STATE OF MICHIGAN

COURT OF APPEALS

LARRY FARLEY and BARBARA FARLEY,

Plaintiffs-Appellees/Cross-Appellants,

v

LOUIS REICHLIN,

Defendant-Appellant/Cross-Appellee,

and

ERIC JACOBSON,

Defendant.

UNPUBLISHED
April 3, 1998

No. 195162
Cheboygan Circuit Court
LC No. 94-003834-NZ

Before: Markman, P.J., and Murphy and Neff, JJ.

PER CURIAM.

Defendant Louis Reichlin appeals as of right and plaintiffs, Larry and Barbara Farley, cross-appeal from a net judgment of $24,048 on Larry Farley's slander claim. We affirm the judgment but remand for further findings regarding the proper set-off of damages.

Plaintiffs resided on a 165-acre parcel of land that was also used for two business operations. One operation was a calendar assembly and distribution business that was operated out of a building constructed on the parcel for this purpose. The other operation involved two pits from which a contractor excavated sand. One pit was also refilled by the contractor by dumping items such as stumps and concrete. Plaintiffs filed the instant action against two individuals, Louis Reichlin and Eric Jacobson, who allegedly interfered with these business operations, based on theories of slander and defamation, intentional infliction of emotional distress, intentional interference with business expectancy, and civil conspiracy. An additional count of civil trespass was alleged only against Reichlin. Before the jury trial commenced, plaintiffs settled with Jacobson. Further, all claims against Reichlin (hereinafter "defendant") were dismissed before or during trial, with the exception of Larry Farley's (hereinafter "plaintiff") slander and intentional infliction of emotional distress claims.

At trial, plaintiff presented evidence of several allegedly false statements made by defendant, a property owner residing near plaintiff, to other property owners and government officials. First, in December 1992, defendant told the county zoning administrator that plaintiff's pit activity had only been in operation for approximately seven years. This statement was significant because the county enacted a zoning ordinance in 1970 that would regulate this activity unless it was subject to a grandfather provision for prior, continuous activities preceding the enactment of the zoning ordinance. The administrator testified that he relied on defendant's statement to send a notice of a zoning ordinance violation to plaintiff, but rescinded the notice when he discovered that the pits were in operation before 1970. Defendant appealed the rescission decision to the county zoning board of appeals, but plaintiff ultimately prevailed.

Second, plaintiff presented evidence that some of defendant's allegedly false statements concerning the pit operations caused the DNR to investigate the items being dumped into the pit. During the DNR investigation, some of defendant's statements were proven true when items such as stumps, brush, concrete and asphalt were observed in the pit. The DNR determined that these inert items could be dumped in the pit, but that the contractor using the pit was required to obtain a "designation of inertness" for them under the DNR rules then in effect. Other statements made by defendant could not be verified by the DNR (*i.e.*, that pipes were dumped). Plaintiff's slander claim was based in part on these unverified statements.

Third, plaintiff presented evidence of alleged slander stemming from another 1993 DNR investigation, initiated by Jacobson, regarding whether chemicals used in plaintiff's calendar business were causing pollution or contamination. The DNR took ground samples in April 1993 as part of this investigation, but the test results revealed only nonhazardous trace amounts of chemicals. These test results were first released by the DNR during June 1993, but the test results were available for some time before their release.[1] At trial in the case at bar, plaintiff relied on statements made by defendant during the time that the DNR test results were being released as support for his theory that defendant made false statements about the existence of a pollution or contamination hazard. Plaintiff also claimed that defendant attempted to use this information to reopen the previously decided issue of whether his calendar business could continue on the property as a home occupation.

The jury, by special verdict, awarded damages of $18,000 to plaintiff for the slander claim. No damages were awarded for the count of intentional infliction of emotional distress because the jury did not find that defendant actually and proximately caused plaintiff severe or extreme emotional distress. The trial court added statutory interest, taxable costs pursuant to MCR 2.625, and attorney fees pursuant to MCR 2.405 in the amount of $24,048. Therefore, the original judgment was $42,048. However, the court subsequently ordered a set-off, or reduction of the jury award, because plaintiff had already received a settlement award from Jacobson covering many of the same claims. The trial court determined that the amount of the reduction was to be equal to the total damages awarded by the jury ($18,000), leaving a net judgment for plaintiff of $24,048.

On appeal, defendant first contends that the trial court improperly denied his motion for a directed verdict on the issue of qualified privilege. The motion was directed both at the allegations of slander involving defendant's statements to the DNR regarding the contents of the pit, and at

defendant's statements to the county zoning administrator regarding the number of years that the pits had been operating. Defendant argued that, even assuming that inaccurate statements were made, there was no actionable slander since the statements were protected by a qualified privilege. In denying the motion, the trial court concluded that the qualified privilege applied, but that the issue should go to the jury because there was evidence falling both inside and outside the scope of the privilege.

When reviewing a motion for directed verdict, this Court looks at the evidence and legitimate inferences drawn from the evidence in the light most favorable to the nonmoving party. *Mason v Royal Dequindre, Inc*, 455 Mich 391, 397; 566 NW2d 199 (1997). Directed verdicts are appropriate only when no factual question exists upon which reasonable minds may differ. *Brisboy v Fibreboard Corp*, 429 Mich 540, 549; 418 NW2d 650 (1988). The initial determination of whether a privilege exists is one of law for the court. *Swenson-Davis v Martel*, 135 Mich App 632, 636; 354 NW2d 288 (1984).

The court must examine the external circumstances surrounding the publication to determine if they give rise to a privileged communication. *Lawrence v Fox*, 357 Mich 134, 139-140; 97 NW2d 719 (1959). However, if facts are in dispute, either the court will decide, based on facts found by the jury, whether the statement is privileged, or will instruct the jury as to what facts they must find in order to hold the statement privileged. *Id.* at 141. The elements of a qualified privilege are (1) good faith, (2) a legitimate interest to be upheld, (3) a statement limited in its scope to this legitimate interest, (4) a proper occasion for communicating the statement, and (5) communication of the statement in a proper manner and to proper parties only. *Prysak v R L Polk Co*, 193 Mich App 1, 15; 483 NW2d 629 (1992). Defendant bears the burden of proof to establish the existence of a privileged occasion for the statement, *Lawrence, supra* at 141, but a plaintiff may then overcome the qualified privilege by showing that the statement was made with actual malice, i.e., with knowledge of its falsity or reckless disregard of the truth. *Prysak, supra* at 15.

On appeal, defendant presents a somewhat confusing argument that fails to adequately address the specific grounds of the motion for direct verdict, inappropriately relies on evidence introduced by the defense after the motion for directed verdict was denied, and inadequately distinguishes the question of whether he established a privileged occasion for the statements from the plaintiff's burden to establish actual malice. We also note that defendant's argument incorrectly suggests that good faith and actual malice are separate and distinct issues. As was noted in *Lawrence, supra* at 141-42, a statement made with actual malice establishes a lack of good faith.

While we, thus, find serious deficiencies in defendant's argument, we will briefly address defendant's claim. First, we believe that it would have been better for the trial court to address each party's burden of proof separately in deciding if a directed verdict was proper based on the proofs introduced up to the time that the trial court decided the motion. Second, while we believe that it may have been appropriate for the trial court to decide, as a matter of law, whether the proofs were sufficient to find that the surrounding circumstances showed the existence of a privileged occasion, any possible error warrants no relief because defendant's liability was based on actual malice. Hence, the dispositive issue is whether plaintiff established a factual question of actual malice. Viewing plaintiff's proofs and the legitimate inferences that may be drawn therefrom in the light most favorable to plaintiff,

we hold that reasonable minds could differ on whether defendant made the alleged defamatory statements with actual malice.[2] Accordingly, defendant was not entitled to a directed verdict based on a qualified privilege.

Defendant also argues in his first issue on appeal that the trial court improperly denied his motion for judgment notwithstanding the verdict (JNOV) on the issue of qualified privilege and that the issue of qualified privilege should not have been submitted to the jury. Defendant failed to preserve these arguments because they were not set forth in the statement of the issue presented. *Meagher v McNeely & Lincoln, Inc*, 212 Mich App 154, 156; 536 NW2d 851 (1995). The standard of review for a JNOV requires a review of the evidence and all legitimate inferences in the light most favorable to the nonmoving party. *Phinney v Perlmutter*, 222 Mich App 513, 524; 564 NW2d 532 (1997).

Where special verdict forms were used, error may be localized so that the sound portions of the verdict are saved. *Sudul v Hamtramck*, 221 Mich App 455, 458-459; 562 NW2d 478 (1997). In the case at bar, both special verdict forms used for slander required a finding of actual malice, that is, that plaintiff proved that "defendant had knowledge that the statement(s) was false or that the defendant acted with reckless disregard as to whether the statement(s) was false." *Prysak, supra* at 15. Since the jury found actual malice on both forms and a plaintiff overcomes a qualified privilege by showing actual malice, *Id.* at 15, the separate question presented to the jury in one form regarding whether defendant had a qualified privilege was not a controlling issue in the case. Thus, even if defendant had properly preserved this question, manifest injustice would not result if we declined to consider it. *Bieszck v Avis Rent-A-Car System, Inc*, 224 Mich App 295, 302; 568 NW2d 401 (1997), lv pending.

Defendant next contends that the trial court erred in ruling that plaintiff's claim was not barred by the prior release made during the Jacobson settlement. The scope of a release is governed by the intent of the parties as it is expressed in the release. *Wyrembelski v St Clair Shores*, 218 Mich App 125, 127; 553 NW2d 651 (1996). If the terms of the release are unambiguous, the legal effect of the language is a question of law. *Id.* at 127. Here, the release executed by both plaintiffs discharges "Tuscarora Township, its officers, boards and commissions, its agents, employees . . . ." By way of illustration, the release also states that it is "intended to release . . . any and all liability . . . which arises or may arise in connection with any legislative or administrative determination concerning the parcels . . . owned by the Farleys." The release, in unambiguous language, plainly does not apply to defendant, a former township officer who has continued to sit on annual property tax review boards, because he was sued in his individual capacity, rather than in the capacity of any past or present position that he served in the township. Further evidence that the release did not apply to defendant is found in the provision of the release that "authorizes a dismissal with prejudice and without cost of the litigation currently pending in the Cheboygan Circuit Court, Case NO. 94-3834-NZ, only as to Eric A. Jacobson." Therefore, the trial court did not err in holding that the release did not apply to defendant.

Although defendant argued at the trial court motion hearing that the release takes away the statutory right to contribution under MCL 600.2911(4): MSA 27A.2911(4), we decline to consider his claim on appeal that this statutory right was usurped by plaintiff in part because this issue is given, at best, cursory treatment in his brief. *Community Nat'l Bank v Michigan Basic Property Ins Ass'n*,

159 Mich App 510, 520-521; 407 NW2d 31 (1987). We also note that this statutory provision expressly pertains to "libel." Under MCL 600.2911(8); MSA 27A.2911(8), libel is defined as including "defamation by a radio or television broadcast." However, defendant cites no authority for the proposition that the libel provision of MCL 600.2911(4); MSA 27A.2911(4) applies to plaintiff's slander claim or that this statutory provision has any relevancy to the issue of how the release should be construed. Hence, we decline to consider this issue.

Defendant next contends that the trial court erred in denying a directed verdict and JNOV on the issue of damages for the slander claim because the only evidence of damages was plaintiff's own testimony. When a plaintiff proves actual malice, the plaintiff is entitled to recover economic damages, as well as actual damages to, among other things, reputation or feelings. *Glazer v Lamkin*, 201 Mich App 432, 437; 506 NW2d 570 (1993); MCL 600.2911; MSA 27A.2911. However, as a theory of causation, damages must be based on reasonable inferences, and not conjecture. *Poledna v Bendix Aviation Corp*, 360 Mich 129, 138; 103 NW2d 789 (1960). While damages must be proven with reasonable certainty, the certainty requirement is relaxed where the fact of damages has been established and the only question to be decided is the amount of damages. *Hoffmann v Auto Club Ins*, 211 Mich App 55, 108; 535 NW2d 529 (1995); *Bonnelli v Volkswagon*, 166 Mich App 483, 511; 421 NW2d 213 (1988).

In the case at bar, defendant sought a partial directed verdict on damages with regard to the attorney fees for the slander claim, while his motion for JNOV claimed that plaintiff failed to prove any cognizable damages for slander. Viewed in the light most favorable to plaintiff, we hold that plaintiff's testimony established an evidentiary basis for the jury to determine damages, with reasonable certainty, arising from defendant's claimed slander. Although plaintiff did not introduce documentary evidence on the attorney fees, his testimony was sufficient for the jury to evaluate the reasons for and amount of attorney fees. *Cf. Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 196-198; 555 NW2d 733 (1996). Hence, the trial court did not err in denying defendant's motion for a partial directed verdict on attorney fees and the subsequent motion for JNOV on all components of damages. *Phinney*, *supra* at 524-25.

Defendant next contends that the trial court should have granted his motions for a mistrial and new trial or, in the alternative, ordered remittitur. We review a trial court's grant or denial of a new trial for an abuse of discretion. *Phillips v Mazda Motor Mfg (USA) Corp*, 204 Mich App 401, 411; 516 NW2d 502 (1994). The proper remedy to correct a defective verdict is to either reinstruct the jury or order a new trial. *Beasley v Washington*, 169 Mich App 650, 658; 427 NW2d 177 (1988). Since the trial court was able to determine the jury's intent on damages by submitting to it a supplemental special verdict form, we find that the trial court did not abuse its discretion in denying a new trial. Further, we find no basis for defendant's argument that remittitur would be appropriate.

Finally, we consider plaintiff's claim that the trial court erred in ordering a set-off of $18,000 against the jury award to account for the settlement with Jacobson. This question of law regarding the application of MCL 600.2925d(b); MSA 27A.2925(4)(b) to the release executed between plaintiffs and Jacobson for their settlement is considered de novo on appeal. See *In re Lafayette Towers*, 200 Mich App 269, 273; 503 NW2d 740 (1993).

At the time that the release was executed, MCL 600.2925d; MSA 27A.2925(4) stated:

> When a release or a covenant not to sue or not to enforce judgment is given in good faith to 1 of 2 or more persons *liable in tort for the same injury* or the same wrongful death:
>
> (a) It does not discharge any of the other tort-feasors from liability for the injury or wrongful death unless its terms so provide.
>
> *(b) It reduces the claim against the other tort-feasors to the extent of any amount stipulated by the release or the covenant or to the extent of the amount of the consideration paid for it, whichever amount is the greater.*
>
> (c) It discharges the tort-feasor to whom it is given from all liability for contribution to any other tort-feasor. [Emphasis added.] [3]

The focus of this provision is on the nature of the injury and not the identity of the plaintiff. See *O'Dowd v General Motors Corporation Corp*, 419 Mich 597, 606; 358 NW2d 553 (1984). In the case at bar, the nature of the injury included economic and non-economic damages claimed by both plaintiffs. Further, the plaintiffs' complaint contained allegations of a concerted action between defendant and Jacobson and, as the trial court observed, the evidence at trial on some statements made by defendant could be deemed "joint in the sense that it is the actions of two parties who have decided to pursue that particular ending with regard to plaintiff."

Under these circumstances, the trial court correctly found that defendant was entitled to a set-off because both the amount stipulated in Jacobson's release ($30,000) and the jury's finding that defendant was liable for $18,000 can be viewed as encompassing liability for the same injury. However, the trial court incorrectly ordered a set-off of $18,000 without conducting an evidentiary hearing to determine how much of the settlement money should be allocated to alleged injuries other than those covered by Larry Farley's slander claim against defendant, *e.g.*, non-economic damages claimed by plaintiff Barbara Farley, since the $30,000 amount specified in the settlement release was not allocated between injuries; and to determine the correct allocation of the jury award, if any, between "joint" statements and statements due solely to defendant. For this reason, we find it necessary to remand this case to the trial court for further proceedings to determine the amount of the settlement and jury verdict that constitute liability in tort for the same injury as required by MCL 600.2925d(b); MSA 27A.2925(4)(b).

Affirmed as to the judgment but remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Stephen J. Markman
/s/ William B. Murphy
/s/ Janet T. Neff

[1] As a result of the DNR investigation, plaintiff later pleaded no contest to a criminal charge of discharging without a permit, albeit involving no harm to the environment.

[2] The elements of a claim for defamation are: (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged publication to a third party, (3) fault amounting to at least negligence on the part of the publisher, (3) either actionability of the statements irrespective of special harm, or the existence of special harm caused by the publication. *Gonyea v Motor Parts Federal Credit Union*, 192 Mich App 74, 77; 480 NW2d 297 (1991). Because this appeal is limited to the availability of the qualified privilege, we have assumed for purposes of our review that plaintiff has met his burden of proving false and defamatory statements.

[3] As amended by 1995 PA 161, effective March 28, 1996, MCL 600.2925d; MSA 27A.2925(4) removed the clause for reducing a claim against the other tortfeasor. This statute now provides:

> If a release or a covenant not to sue or not to enforce judgment is given in good faith to 1 or 2 or more persons for the same injury or the same wrongful death, both of the following apply:
>
> (a) The release or covenant does not discharge 1 or more of the other persons from liability for the injury or wrongful death unless its terms so provide.
>
> (b) The release or covenant discharges the person to whom it is given from all liability for contribution to any other person for the injury or wrongful death.