**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A17-1482**

Sumi Mukherjee,
Appellant,

vs.

Lisa Vipperman,
Respondent.

**Filed July 2, 2018**
**Affirmed**
**Jesson, Judge**

Crow Wing County District Court
File No. 18-CV-16-4187

Sonia Miller-Van Oort, Robin M. Wolpert, Sapientia Law Group, PLLC, Minneapolis, Minnesota (for appellant)

Kevin F. Gray, Matthew W. Moehrle, Katherine O. Fossey, Rajkowski Hansmeier, Ltd., St. Cloud, Minnesota (for respondent)

Considered and decided by Peterson, Presiding Judge; Kirk, Judge; and Jesson, Judge.

**U N P U B L I S H E D  O P I N I O N**

**JESSON**, Judge

In 2015, respondent Lisa Vipperman was working at a hotel in Deerwood when appellant Sumi Mukherjee and a large group of juveniles under his supervision started roughhousing in the hotel's pool. Vipperman asked the group to calm down and went back

to her duties. Mukherjee, upset with how Vipperman spoke to him, complained to the hotel's management, but nothing came of this complaint.

A few months later, Vipperman saw that Mukherjee would be returning to the hotel with a minor child. In light of the previous incident, Vipperman was concerned about the welfare of children in the area. She took her concerns to police.

Police looked into Vipperman's claims but did not find anything to merit further investigation. But Mukherjee discovered what Vipperman told police. He filed a defamation suit, claiming Vipperman's statements to police damaged his reputation. The district court dismissed the complaint after summary judgment proceedings, and Mukherjee appeals. We affirm.

## FACTS

Appellant Sumi Mukherjee is a Twin Cities resident who speaks to parents, children, and schools about preventing bullying and child sexual abuse. A few years before the events in this case, Mukherjee was in a relationship with a woman from Deerwood. This relationship meant that Mukherjee became familiar with some of the children in the Deerwood and Crosby area. It was this friendly relationship with the area children that eventually led to the events described here.

This case begins back in November 2015 while Mukherjee was staying at the Country Inn in Deerwood. Sometime during the evening, a group of juveniles arrived at the hotel to see him.[1] Mukherjee and the juveniles went to the hotel's pool where they

[1] The juveniles were between the ages of 13 and 17. The record suggests that some juveniles were staying with Mukherjee at the hotel, but it is unclear how many were

started "roughhousing." Vipperman was on duty at the hotel that night and she became concerned about the behavior in the pool. She confronted the juveniles, urging them to calm down. She also asked Mukherjee to take responsibility for the situation.

What happened next is disputed. Vipperman claims the juveniles agreed to calm down. Mukherjee says he responded to Vipperman's scolding by chastising her—to the applause of the juveniles. Regardless, Vipperman left the pool and went back to work. She did not hear from Mukherjee or the juveniles for the rest of the night. Vipperman claims that she later heard from a coworker that the juveniles stayed with Mukherjee until sometime between 3:00 and 4:00 in the morning.

Mukherjee, upset with the way Vipperman confronted him, sent a complaint to her employer. The employer received his complaint, but nothing came of it. According to Vipperman, she and her employer laughed over the complaint because the situation was "ridiculous."

The incident was left in the past until March 2016 when Vipperman learned that Mukherjee would be returning to the hotel in a few days' time. She also learned that Mukherjee's reservation was for himself and one child. Afraid that "the same behaviors would take place again" and that Mukherjee would allow juveniles to stay past curfew, Vipperman took her concerns to local police.

---

overnighting with him. According to Mukherjee, they stayed with him because one of the juveniles recently learned that her grandmother in the area had developed cancer, and Mukherjee agreed to bring a group of friends and acquaintances up to support her.

Vipperman spoke with an officer at the Deerwood Police Department. A report from that encounter mentions that police took information from Vipperman about "suspicious activity at the Country Inn in Deerwood concerning juveniles." The report indicates that Vipperman told police the following information:

- Mukherjee stayed at the hotel in November 2015;
- There were six to eight juveniles with him until about 3:00 to 4:00 a.m.;
- Vipperman was concerned that the juveniles were with a male from out of town;
- Vipperman was concerned that Mukherjee had an upcoming reservation to stay at the hotel and that the reservation included two minor guests, but was recently changed to only one minor guest;
- Vipperman knew one of the minors who stayed with Mukherjee in November 2015, and she was concerned about the minor staying with him again;
- Mukherjee had spoken at a nearby school about bullying;
- Mukherjee was sexually abused as a child.

Vipperman did not know anything about Mukherjee's childhood—or much about his life at all—when she made her report. Deerwood Police looked into the matter but the investigation was short-lived. Within two weeks, police closed their investigation. No action was taken against Mukherjee.

After the investigation ended, Mukherjee learned that Vipperman reported his activities to police. Concerned that her police report damaged his reputation in the community, he filed a defamation claim against Vipperman, alleging that her statements to police implied that he was sexually abusing children in the area. After discovery

concluded, Vipperman filed a motion for summary judgment, which the district court granted. Mukherjee appeals.

## D E C I S I O N

The essence of Mukherjee's claim is that Vipperman's statements to police were defamatory and the district court incorrectly dismissed his case on summary judgment. Because the district court ruled in Vipperman's favor, we review the evidence de novo and in a favorable light for Mukherjee to determine if there are any genuine issues of material fact and if the district court correctly applied the law. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002).

The district court's summary judgment decision made two conclusions. First, Vipperman's police report was protected by a qualified privilege immunizing her against Mukherjee's defamation claim. Second, Mukherjee failed to put forth enough evidence showing that Vipperman made the report with malice, which could overcome the privilege. The district court did not decide the threshold issue of whether Vipperman's report was actually defamatory.

Our opinion will first address whether Vipperman's police report was reasonably capable of being defamatory, which we conclude it was. Second, we examine whether the report is protected by a qualified privilege because it was made to police in a good-faith effort to report a possible crime. We ultimately conclude the report was privileged. Third, we analyze whether Mukherjee overcomes this privilege by showing that Vipperman made the report with malice.

## I. Vipperman's police report was reasonably capable of being defamatory.

While not explicitly addressed by the district court, the initial question in this case is whether Vipperman's report to police was reasonably capable of being defamatory. Determining if a statement is reasonably capable of being defamatory is a question of law that this court reviews de novo. *Schlieman v. Gannett Minn. Broad., Inc.*, 637 N.W.2d 297, 307 (Minn. App. 2001), *review denied* (Minn. Mar. 19, 2002). There are four elements to a defamation claim: (1) a false statement, (2) communicated to someone other than the plaintiff, (3) that tends to harm the plaintiff's reputation and lowers the plaintiff in the estimation of the community, and (4) the recipient of this false statement reasonably understands that it refers to a specific individual. *State v. Crawley*, 819 N.W.2d 94, 104 (Minn. 2012). The parties do not dispute that Deerwood police cleared Mukherjee of wrongdoing and Vipperman did not know anything about Mukherjee's past when she allegedly stated he was sexually abused as a child—meaning that Vipperman's report was false. They also do not dispute that Vipperman communicated her report to police and the police understood it referred to Mukherjee. This leaves only one element of the defamation analysis in dispute: whether Vipperman's police report harmed Mukherjee's reputation.

Not all defamation claims require proof that the plaintiff's reputation was harmed. There is a category of defamatory statements—known as defamation per se—that presume harm occurs from the very nature of the statement itself. *Longbehn v. Schoenrock*, 727 N.W.2d 153, 158-59 (Minn. App. 2007). There are four of these defamation-per-se categories. They are false statements that a plaintiff committed a crime; has a "loathsome disease;" engaged in "unchastity;" or refer to improper or incompetent conduct concerning

the plaintiff's business, trade, or profession. *Id.* The parties dispute whether Vipperman's police report falls under the per se category of accusing Mukherjee of a crime.

Determining if Vipperman's report was capable of being defamatory per se requires us to reasonably interpret what her report was communicating. The report contains multiple statements that, read in isolation, could be considered benign, such as stating that Mukherjee previously stayed at the hotel where Vipperman worked. Other statements could be considered more invasive, such as stating that Mukherjee was sexually abused as a child. Determining if Vipperman's report is defamatory depends on how ordinary people would interpret its language in light of the surrounding circumstances. *Gadach v. Benton Cty. Co-op. Ass'n*, 236 Minn. 507, 510, 53 N.W.2d 230, 232 (1952). We have emphasized that context is critical to distilling the meaning of a defamatory statement, because a false statement might be defamatory when read in isolation but not when placed in its surrounding context. *Schlieman*, 637 N.W.2d at 304.

Viewed in a favorable light for Mukherjee, the circumstances surrounding the report include Vipperman's encounter with Mukherjee in 2015 when multiple juveniles stayed with him at the hotel until early in the morning, Vipperman's statement that Mukherjee was an out-of-town male, the fact that Mukherjee would be returning to the hotel with a minor, and Vipperman's statement that Mukherjee was sexually abused as a child. The reference to childhood sexual abuse is important since one of the officers investigating Mukherjee testified that child sexual abusers were sometimes victimized themselves as children. Knitting this context together leads us to a reasonable interpretation that the implied message within Vipperman's report was an allegation that Mukherjee was sexually

abusing children in the area. This interpretation raises a genuine issue of material fact on the question of whether Vipperman accused Mukherjee of committing a crime, and this allegation is reasonably capable of being defamatory per se. The question now becomes whether Vipperman's report was protected by a qualified privilege.

## II. Vipperman's report is protected by a qualified privilege.

Even if a statement is capable of being defamatory, a defendant may argue that the statement is protected by a privilege in order to avoid liability. There are two types of privilege for a defamation claim: absolute privilege and qualified privilege. *Zutz v. Nelson*, 788 N.W.2d 58, 61 (Minn. 2010).[2] Whether a privilege applies is a question of law that we review de novo. *Kuelbs v. Williams*, 609 N.W.2d 10, 16 (Minn. App. 2000), *review denied* (Minn. June 27, 2000).

The rationale for protecting even defamatory statements with a qualified privilege is a recognition that, in some circumstances, the benefits of protecting certain statements outweigh the risks that these statements could be defamatory. *Bol v. Cole*, 561 N.W.2d 143, 149 (Minn. 1997). For example, and relevant to this case, there may be a qualified privilege when an individual makes a good-faith report to police about possible criminal activity. *Smits v. Wal-Mart Stores, Inc.*, 525 N.W.2d 554, 557 (Minn. App. 1994), *review denied* (Minn. Feb. 14, 1995). The reason for this privilege is to encourage people to report

[2] Absolute privilege for defamatory statements "is not lightly granted" and is only recognized in a limited number of circumstances, such as for members of the state senate and house of representatives during official duties, government officials acting in judicial or quasi-judicial capacities, and top-level cabinet-type officials. *Zutz*, 788 N.W.2d at 62. Vipperman does not fall under any of these areas, so we decline to analyze her report under the absolute-privilege framework.

possible crimes without the fear of defamation hanging over the would-be reporter's head. *Id.*

Even if a qualified privilege applies, it is not absolute. The privilege only applies if the communication was made in good faith and was made "upon a proper occasion, from a proper motive," and "based upon reasonable or probable cause." *Bol*, 561 N.W.2d at 149 (quotation omitted). Breaking this down, there are four components to determining if a qualified privilege applies to defamatory communications made to police, they are: (1) good faith, (2) made on proper occasion, (3) made with proper motive, and (4) based on reasonable or probable cause. *Id.* We examine each of these components within the facts of Mukherjee's case.

***Good faith***

Vipperman argues that her report was made from a good-faith concern for protecting children. She lists the following facts that supported her concern:

- Last time Mukherjee stayed at the hotel, the children he was with told Vipperman that they were not accompanied by their parents and they were not related to Mukherjee;
- Mukherjee allowed the children to use the hotel pool in an unsafe manner;
- The children stayed with Mukherjee at the hotel until the early-morning hours;
- The children were allowed to leave the hotel without supervision sometime between 3:00 and 4:00 in the morning.

Mukherjee claims there is no good faith here because Vipperman did not know anything about him or the circumstances when she made her report. However, the context of the report is that Mukherjee stayed with multiple juveniles in the past, failed to

adequately supervise them, allegedly allowed them to stay with him past curfew, and would be staying with one minor child in a few days' time. Given this context, Vipperman's report was a good-faith effort to report possible criminal activity and meets the first factor of the qualified privilege analysis.

***Proper occasion***

Vipperman argues that the report's occasion was proper because it was prompted by learning that Mukherjee would be returning to the hotel and that a minor child would be staying in his room. Mukherjee claims the timeline undermines Vipperman's explanation because if she was genuinely concerned about any child's welfare, the proper occasion to contact police was immediately after the November 2015 incident at the hotel, not months later.

Vipperman testified in her deposition that she did not go to police in 2015 because she "didn't think it pertinent at the time." She explained that she "never thought about" going to police because she assumed the situation "was a one-time thing," and she would never see Mukherjee again. When she learned of Mukherjee's plan to return, she realized this was not the case. Her explanation satisfies the proper-occasion factor of the privilege analysis.

***Proper motive***

Vipperman claims her motive for making the report was to protect the welfare of the area children and to understand her responsibilities as an employee of the hotel when Mukherjee returned with a minor child. These are proper motives for reporting to police. Although Mukherjee argues that Vipperman harbored an ulterior, malicious motive as well,

his argument is better addressed when examining the subsequent issue of whether actual malice was the catalyst for Vipperman's report. We will examine this argument further in our discussion, but for now, we observe that protecting child welfare and satisfying the duties as an employee of the hotel to be on the lookout for suspicious or criminal activity are proper motives.

***Reasonable and probable cause***

Vipperman claims her police report was made with both reasonable and probable cause because when she saw Mukherjee's upcoming reservation with an accompanying minor child, she had reasonable and probable cause to bring her concerns to police. We have said that even a defamatory statement may be based on reasonable cause if the person had "valid reasons for believing [the] statement." *Rudebeck v. Paulson*, 612 N.W.2d 450, 454 (Minn. App. 2000), *review denied* (Minn. Sept. 13, 2000). But Minnesota's appellate courts have never specifically defined the meanings of "reasonable" or "probable" cause in the context of defamation claims. Courts have encountered these terms in other civil contexts, and in those cases, courts have adopted the same meaning from criminal law. *See, e.g., Wall v. Fairview Hosp. & Healthcare Servs.*, 584 N.W.2d 395, 406 (Minn. 1998) (adopting the criminal-law definition of "reasonable cause" to a civil statute that mandated reporting requirements of vulnerable adults based on "reasonable cause"). Reasonable cause has the same meaning as "probable cause" in criminal law, and probable cause is defined as having enough of a reasonable basis of suspicion—supported by the surrounding circumstances—that would lead a cautious person to believe the accused was guilty. *State v. Childs*, 269 N.W.2d 25, 27 (Minn. 1978).

The facts that ultimately compelled Vipperman to approach police included the 2015 incident where Mukherjee failed to supervise juveniles at the hotel, hearing from a coworker that those same juveniles stayed in Mukherjee's hotel room past curfew, and Mukherjee's upcoming reservation with one minor child. In our modern world where human trafficking often involves the use of hotels, we rely on hotel employees to be especially attentive to suspicious behaviors. Employees who alert law enforcement when red flags emerge are one line of defense in combatting this issue. Although the police in this case did not find any wrongdoing on Mukherjee's part, the underlying circumstances created a reasonable basis of suspicion of criminal activity. For these reasons, we conclude that Vipperman had probable cause to take these concerns to police.

After examining the record, we conclude that although Vipperman's report was reasonably capable of being defamatory, it was made in good faith, on a proper occasion, with a proper motive, and based on reasonable and probable cause. For these reasons, we determine that the report was protected by a qualified privilege.

**III. Mukherjee does not show that the report was made with actual malice.**

Because we conclude that Vipperman's report is protected by a qualified privilege, it now becomes Mukherjee's burden to prove that the privilege was abused because Vipperman made the report with malice. *Kuelbs*, 609 N.W.2d at 16. Actual malice means that the report was made with ill will and with an improper motive, or that it was made "causelessly" and "wantonly" to injure the plaintiff. *Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910, 920 (Minn. 2009). It is not enough to show that the report was false, but actual malice may be shown with relevant extrinsic or intrinsic evidence. *Id.* Extrinsic

evidence can include proof of a personal ill feeling while intrinsic evidence can include exaggerated language, the character of the language, the mode and extent of publication, and any other relevant matters. *Id.*

Mukherjee argues that actual malice is present in this case because the record shows that Vipperman only went to police in retaliation for the 2015 incident where Mukherjee allegedly confronted and embarrassed Vipperman in front of a group of juveniles. Determining if there is actual malice is usually a fact question better left for a jury to decide, but "in some circumstances, it may be subject to summary judgment." *Rudebeck*, 612 N.W.2d at 454. The district court determined that this was such a case and granted Vipperman summary judgment on the issue of malice. Because Mukherjee argues this was an error, we review the court's granting of summary judgment to determine if there are any genuine issues of material fact and whether the court correctly applied the law. *Id.* at 453. We view the evidence in a favorable light toward Mukherjee because summary judgment was granted against him. *Bol*, 561 N.W.2d at 146.

When considering the issue of actual malice, *Bol* is instructive. There, defendant-psychologist sent a letter to the mother of a child-abuse victim identifying plaintiff as the abuser. *Id.* at 145. Plaintiff sued for defamation, but the supreme court determined that the defendant was protected by qualified privilege. *Id.* at 150. Plaintiff then argued that the letter was sent with malice, but the supreme court disagreed, stating that the defendant did not use "inflammatory language," only sent the letter to appropriate recipients, and no other evidence tended to show that the defendant acted with any ill will. *Id.* at 150-51. Even viewing the record in the light most favorable to the plaintiff, the supreme court

concluded that the evidence was insufficient to create a genuine issue of material fact in order to survive summary judgment. *Id.* at 151.

Like in *Bol*, the police report in this case does not contain any evidence that Vipperman used inflammatory or exaggerated language. There is no evidence that Vipperman made her statements to anyone besides the police. And regarding the 2015 incident, there is nothing in the record suggesting that Vipperman harbored ill will for Mukherjee. If anything, the fact that Vipperman was not reprimanded by her employer based on Mukherjee's complaint suggests that the incident did not have significant ramifications for her. Even when we view the evidence in a favorable light toward Mukherjee, the only evidence that Vipperman may have acted with some amount of malice is the fact that her statement about Mukherjee's childhood was false. But it is not enough to simply show a statement was false—the law requires Mukherjee to show that Vipperman made her report from a place of "ill will" with the motivation of injuring him. *Id.* at 150-51. This record does not create a genuine issue of material fact that Vipperman acted with the kind of ill will needed to show actual malice. We conclude that Mukherjee did not make a prima facie showing of malice and the district court correctly granted summary judgment for Vipperman.

In summary, Vipperman admits that she did not know much about Mukherjee before this case—including information about his childhood. So the statement that Mukherjee was sexually abused as a child was not only false, it was used to buttress an implication that he was abusing children as well. Vipperman's report was reasonably capable of being defamatory. But the context surrounding the police report shows that it was made in good-

faith, on a proper occasion, with proper motive, and based on reasonable belief that a crime may have occurred and might repeat. This protected the report with a qualified privilege—a privilege that Mukherjee could not overcome because he could not prove it was made with actual malice. Vipperman's report is protected, and we affirm the findings and conclusions of the district court.

**Affirmed.**