STATE OF MINNESOTA
IN COURT OF APPEALS
A09-396

Douglas John Gunnink,
Appellant,

vs.

State of Minnesota, et al.,
Respondents.

Filed January 5, 2010
Affirmed in part, reversed in part, and remanded
Hudson, Judge

Sibley County District Court
File No. 72-CV-08-252

Douglas John Gunnink (pro se appellant)

Lori Swanson, Attorney General, Kimberly Middendorf, Assistant Attorney General, 900 Bremer Tower, 445 Minnesota Street, St. Paul, Minnesota 55101-2127

Considered and decided by Hudson, Presiding Judge; Stauber, Jr., Judge; and Crippen, Judge.*

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

HUDSON, Judge

Appellant challenges the district court's dismissal of his claims that: (1) the statute authorizing a warrantless inspection of his seed-handling facility violated his

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

constitutional right to be free from unreasonable searches and seizures; (2) a state employee defamed him by telling his customers that he sold "bad seed"; and (3) state officials negligently supervised that employee. We conclude that the district court did not err by dismissing appellant's constitutional and negligent-supervision claims. But because the district court erred by determining that immunity protected the state from liability based on the employee's allegedly defamatory remarks, we reverse the dismissal of appellant's defamation claim and remand for further consideration of that claim.

FACTS

Appellant Douglas John Gunnink operates a seed-growing and -handling facility on his farm in rural Gaylord. In May 2008, the supervisor of the Seed and Noxious Weed Unit of the Plant Protection Division of the Minnesota Department of Agriculture notified appellant of an impending site visit to inspect appellant's seed and records to determine compliance with the Minnesota Seed Law, Minn. Stat. §§ 21.80-.92 (2006), and with federal seed laws. Appellant replied that he did not wish to volunteer for an inspection and that he wanted to see the statutory authority for a state inspection. The supervisor notified appellant that the state was authorized to inspect firms offering seed for sale in Minnesota under Minn. Stat. § 18J.04, subds. 1, 2 (2006), and provided copies of the Minnesota Seed Law and relevant rules. The supervisor stated that routine inspections encouraged voluntary compliance with the seed law and noted that, in 2007, appellant had unlawfully shipped white-clover seed that had a test date exceeding the lawful 12-month test period. The supervisor stated that an inspection would have likely detected this problem before shipment, and the statute required an inspection. Appellant replied

that he did not believe that the statute applied to him and demanded a hearing. The director of the Plant Protection Division made a final request for an inspection and told appellant that if he did not cooperate, the state would initiate enforcement proceedings.

Appellant responded by challenging the state's authority to conduct the inspection. He then filed a complaint in district court against the State of Minnesota and its governor; the Minnesota Department of Agriculture and its commissioner; the director of the Plant Protection Division; the supervisor of the Seed and Noxious Weed Unit; and a consultant to that unit. Appellant requested judgment declaring provisions of various Minnesota statutes to be facially unconstitutional to the extent that they authorized the department of agriculture to conduct warrantless searches on his property. Appellant also asserted a defamation claim, alleging that a department employee named "Jeff" had contacted appellant's customers, confirmed that they had purchased seed from appellant, and falsely told them that appellant sold "bad seed." Finally, appellant alleged that the department and its named employees negligently supervised "Jeff" with regard to his contacts with appellant's customers and the alleged defamatory statements.

The state moved to dismiss all three of appellant's claims as a matter of law. After a hearing at which appellant represented himself, the district court issued an order dismissing all of appellant's claims. The district court concluded that because appellant's seed facility was a closely regulated business, a warrantless inspection of the facility was constitutional under the test enunciated in *New York v. Burger*, 482 U.S. 691, 107 S. Ct. 2636 (1987). The court stated that, assuming that the allegations supporting appellant's defamation claim were true, it was unclear whether the alleged defamatory statements

would be protected by absolute privilege or qualified privilege. But the district court concluded that the state was immune from suit under the Minnesota Tort Claims Act because the alleged statements related to the performance of a discretionary duty. *See* Minn. Stat. § 3.736, subd. 3(b) (2008). Finally, the court determined that appellant's negligent-supervision claim failed as a matter of law because claims for negligent supervision are based on policy-level activity, which is discretionary, and the state was entitled to statutory immunity based on those acts. This appeal follows.

D E C I S I O N

This court reviews a district court's dismissal for failure to state a claim on which relief can be granted under Minn. R. Civ. P. 12.02(e) by determining whether the complaint sets forth a legally sufficient claim for relief. *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 229 (Minn. 2008). A claim is legally sufficient if relief may be granted on any evidence that might be produced consistent with the pleader's theory. *N. States Power Co. v. Minn. Metro. Council*, 684 N.W.2d 485, 490 (Minn. 2004). The district court's review is limited to the complaint, but encompasses "particular documents and oral statements referenced in the complaint." *Martens v. Minn. Mining & Mfg. Co.*, 616 N.W.2d 732, 739 n.7 (Minn. 2000). Whether a claim is legally sufficient presents a question of law, which this court reviews de novo. *Hebert*, 744 N.W.2d at 229.

I

Appellant argues that Minn. Stat. § 18J.04, which relates to the inspection of seed-manufacturing, -storage, -handling, -disposal, -use, and -distribution facilities, is facially unconstitutional because it abridges his right to be free from unreasonable searches and

seizures under the Fourth Amendment to the United States Constitution and article I, section 10 of the Minnesota Constitution. The constitutionality of a statute is a legal question, which this court reviews de novo. *Soohoo v. Johnson*, 731 N.W.2d 815, 821 (Minn. 2007). This court will exercise its power to declare a statute unconstitutional "only when absolutely necessary in the particular case and then with great caution." *Id.* (quotation omitted).

The Minnesota Seed Law regulates the labeling, testing, recording, and inspection of seeds sold or transported in or into Minnesota. *See* Minn. Stat. §§ 21.80-.92 (2008). The Minnesota legislature has specified that the commissioner of the Minnesota Department of Agriculture "must be granted immediate access at reasonable times to sites where a person manufactures, distributes, uses, handles, disposes of, stores, or transports seeds." Minn. Stat. § 18J.04, subd. 1. The commissioner may enter sites to inspect inventory and equipment, take samples, inspect records, or otherwise investigate compliance with the provisions of the Minnesota Seed Law. *Id.*, subd. 2.

Appellant argues that the statutory provisions allowing inspection of seed facilities to determine compliance with the Minnesota Seed Law are unconstitutional because the state lacks authority to search his facility without a warrant. Ordinarily, a search requires a warrant, supported by probable cause. *State v. Bartylla*, 755 N.W.2d 8, 15 (Minn. 2008). But the United States Supreme Court has carved out certain exceptions to the warrant requirement, including an exception for inspections of "closely regulated" industries. *Burger*, 482 U.S. at 702, 107 S. Ct. at 2643–44; *Bartylla*, 755 N.W.2d at 15. Under *Burger*, the government may conduct a warrantless inspection of a "closely

regulated" business if: (1) a substantial government interest supports the regulatory scheme relating to the inspection; (2) the inspection is necessary to further that regulatory scheme; and (3) the regulatory statute provides a constitutionally adequate substitute for a warrant. *Burger*, 482 U.S. at 702–03, 107 S. Ct. at 2644. The third requirement is met if the statute "perform[s] the two basic functions of a warrant:" advising the business owner that the inspection is conducted pursuant to law, with a properly defined scope, and limiting the inspecting officer's discretion. *Id*. at 703, 107 S. Ct. at 2644. Thus, the statute allowing for inspection must be limited in time, place, and scope, and it must be "sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes." *Id*. (quotation omitted). Whether a business is closely regulated is determined by examining the regulatory scheme governing the business. *See id.* at 703–04, 107 S. Ct. at 2644–45 (concluding that operation of an automobile junkyard was closely regulated by examining governing regulatory scheme).

The district court concluded that because appellant's seed production business was closely regulated, it was subject to the *Burger* analysis. And the district court concluded that because the additional *Burger* requirements were satisfied, Minn. Stat. § 18J.04, which allows a warrantless inspection of appellant's facility, is constitutional. Appellant argues, however, that seed production is not a "closely regulated" business because independent farming is not closely regulated in Minnesota.

But a business offering seed for sale in Minnesota must satisfy specific labeling, recordkeeping, testing, sales, and permit requirements. *See* Minn. Stat. §§ 21.82-.92.

The existence of this comprehensive statutory scheme relating to seed production and sales reflects that the seed industry in Minnesota is closely regulated. And, contrary to appellant's argument that the production of seed has not historically been regulated, Minnesota law has long contained specific restrictions relating to commercial seed planting and sales. *See, e.g.*, *State v. Lux*, 235 Minn. 181, 191, 50 N.W.2d 290, 296 (1951) (upholding conviction for violation of earlier statute prohibiting sale of seed with excessive weed-seed content).

Appellant argues that *State v. Larsen*, 650 N.W.2d 144 (Minn. 2002), which held that an ice-fishing house may not be searched without a warrant, applies here. But in *Larsen*, the supreme court determined that "recreational ice fishing" was not a closely regulated business. *Id*. at 152–53. Appellant's commercial seed facility is not used for recreational activity and, unlike ice fishing, it is subject to a controlled regulatory scheme. Therefore, appellant's argument lacks merit.

Appellant also maintains that, even if the district court correctly determined that his business is closely regulated, the additional *Burger* requirements are not satisfied. He argues that there is no substantial government interest related to the seed-production industry. But the seed-production industry is similar to those industries in which courts have previously found a substantial government interest. *See, e.g.*, *W. States Cattle Co. v. Edwards*, 895 F.2d 438, 441 (8th Cir. 1990) (acknowledging substantial government interest in health and safety of food supply); *Lesser v. Espy*, 34 F.3d 1301, 1309 (7th Cir. 1991) (upholding warrantless inspection of licensed dealers of laboratory animals). In addition, the warrantless inspections authorized by Minn. Stat. § 18J.04 further the stated

regulatory scheme by assuring that seed is free from disease and is properly stored and maintained. As respondent points out, this process should properly occur before seed is distributed or sold to customers.

Finally, the third *Burger* requirement is fulfilled because the statute relating to inspection provides a constitutionally adequate substitute for a warrant. It limits the time of inspections to "reasonable times" and the location of inspections to sites where seed is stored, manufactured, distributed, used, handled, disposed of, or transported. Minn. Stat. § 18J.04, subd. 1. It also limits the purposes for which the inspector can enter the premises to those related to compliance and implementation of the seed law. *Id.*, subd. 2. Therefore, the district court did not err by concluding that the seed-inspection regulatory scheme falls within the exception to warrantless searches under the *Burger* analysis, and the district court properly dismissed appellant's constitutional challenge to the statutory seed-facility inspection provisions.

II

Appellant challenges the district court's dismissal of his defamation claim. A plaintiff alleging defamation must prove that the defendant made a defamatory statement about the plaintiff, which was false, that the defendant communicated the statement to a third party without privilege, and that the statement harmed the plaintiff's reputation in the community. *Weinberger v. Maplewood Review*, 668 N.W.2d 667, 673 (Minn. 2003).

Sufficiency of pleading

Respondents claim that appellant's complaint insufficiently alleged actionable defamatory statements. Minnesota law requires that defamatory statements be

specifically set out in the complaint. *See, e.g.*, *Pope v. ESA Servs., Inc*, 406 F.3d 1001, 1011 (8th Cir. 2005) (stating that plaintiff must, at a minimum, "allege who made the allegedly libelous statements, to whom they were made, and where" (quotation omitted)). The district court concluded that the allegations in the defamation count of appellant's complaint, if taken as true, are sufficient to withstand a motion to dismiss. We agree. The complaint identifies a state employee who allegedly made specific statements that appellant sold "bad seed" to appellant's customers, which harmed appellant's business reputation. Although the complaint does not identify certain customers or allege a time when the statements were made, that information may not have been available to appellant when the complaint was filed.

Respondents also argue that the allegation that appellant sold "bad seed" is opinion, rather than fact, and is therefore not actionable. In order to support an action for defamation, a statement must "present or imply the existence of fact that can be proven true or false." *Marchant Inv. & Mgmt. Co. v. St. Anthony W. Neighborhood Org.*, 694 N.W.2d 92, 95 (Minn. App. 2005) (quotation omitted). The district court stated that in considering the motion to dismiss, it must view the allegations in the complaint in the light most favorable to appellant and declined to dismiss the defamation claim on this ground. The allegation that appellant sold "bad seed" implies the existence of a fact: that appellant has been selling defective or expired seed. The statement may be actionable if it is proved false, and its truth or falsity is a factual issue, which is appropriate for further discovery. Similarly, whether the alleged statement harmed appellant's business

reputation presents a factual matter for further determination. The district court did not err by concluding that appellant stated a cognizable claim for defamation.

Immunity

But the district court dismissed appellant's defamation claim on the ground that respondents were immune from liability based on the application of the Minnesota Tort Claims Act, Minn. Stat. § 3.736, subd. 3(b) (2008). Whether a public official and governmental entity are protected by official immunity and statutory immunity presents a legal question, which this court reviews de novo. *Johnson v. State*, 553 N.W.2d 40, 45 (Minn. 1996).

The Minnesota Tort Claims Act provides that "the state and its employees are not liable for . . . a loss caused by the performance or failure to perform a discretionary duty, whether or not the discretion is abused." Minn. Stat. § 3.736, subds. 3, 3(b). In dismissing appellant's claim, the district court reasoned that because the alleged defamatory statement was made at the discretion of a state employee, the statement was discretionary and entitled to protection under the Tort Claims Act. But "[a]lthough the discretionary function exception in the Tort Claims Act protects from liability 'the state and its employees,' a public official sued individually for his or her own torts still may be subject to liability unless entitled to protection under the common law doctrine of official immunity." *Rico v. State*, 472 N.W.2d 100, 106 n.4 (Minn. 1991).

In general, official immunity protects a public official who is charged by law with duties requiring the exercise of discretion unless that official acted willfully or maliciously. *Johnson v. Morris*, 453 N.W.2d 31, 42 (Minn. 1990). And if a public

official is determined to be immune from suit, the official's government employer usually enjoys vicarious official immunity from a suit arising from that official's conduct. *Schroeder v. St. Louis County*, 708 N.W.2d 497, 508 (Minn. 2006).[1] Here, although the employee, "Jeff," was not a specifically named defendant, because appellant seeks to hold the state vicariously liable for the statement of its employee, this court examines whether official immunity applies to the employee's statement. If official immunity is determined to apply, the state would generally be shielded from suit under the doctrine of vicarious official immunity. *See id*.

But the Minnesota Supreme Court has already concluded that "official immunity does not apply to a defamation action against public officials." *Bauer v. State*, 511 N.W.2d 447, 448 (Minn. 1994); *see also Gleason v. Metro. Council Transit Operations*, 582 N.W.2d 216, 220 (Minn. 1998) (stating that "[o]fficial immunity does not protect an official against a defamation claim"). In *Bauer*, the supreme court held that state regional-treatment-center employees did not qualify for official immunity from a defamation claim asserted by a former employee. 511 N.W.2d at 450. The district court stated that although a decision to discharge an employee may involve official immunity because it involves discretion, "official immunity does not fit defamation. In defamation, the essential focus is not so much on alternative courses of conduct and the reasonableness of the actor's conduct, as it is in most torts, but on the nature of the

[1] Statutory immunity protects legislative or executive activities when those activities take place at the planning, rather than the operational, level. *Johnson v. State*, 553 N.W.2d 40, 46 (Minn. 1996). Because the alleged defamatory statement was not such an activity, statutory immunity does not apply to protect the state from appellant's defamation claim.

published statement." *Id*. at 449. Truth is a defense to a defamation action, and whether a statement is true does not involve discretionary conduct. *Id*. The supreme court stated that whether a defendant knew or should have known the truth or falsity of a defamatory statement might involve an exercise of discretion, but that issue relates to the separate determinations of qualified privilege and malice. *Id*. Because official immunity does not apply to a defamation claim, and because the state does not therefore enjoy vicarious official immunity from that claim, we hold that the district court erred by concluding that immunity protected respondents from appellant's defamation claim.

We now address whether the district court's dismissal of that claim may be sustained on an alternate ground. Specifically, we analyze whether respondents were protected by an absolute or a qualified privilege relating to that claim. *See, e.g.*, *Bol v. Cole*, 561 N.W.2d 143, 148–49 (Minn. 1997) (considering issue of whether either absolute or qualified privilege applied to shield psychologist and mental-health center from defamation claim).

Absolute privilege

Although the terms "absolute privilege and immunity are often used interchangeably, . . . they are different legal concepts. . . . [A]bsolute privilege . . . has the effect of making the publisher of a defamatory statement immune from suit." *Id.* at 147. Whether a statement is privileged presents a legal issue for the court. *Lewis v. Equitable Life Assurance Soc'y*, 389 N.W.2d 876, 889 (Minn. 1977).

The Minnesota Supreme Court has held that a high-level official in state government has an absolute privilege to communicate defamatory statements in the

performance of that official's duties. *Johnson v. Dirkswager*, 315 N.W.2d 215, 223 (Minn. 1982). This type of absolute privilege is applied sparingly and generally relates only to "top-level, cabinet-equivalent executives." *See id.* at 221, 223 (holding that commissioner of Public Welfare has an absolute privilege to defame in the course of official duties). The supreme court has also extended the doctrine of absolute privilege to lower-level officials in certain specific circumstances, holding that a police officer had an absolute privilege relating to defamatory statements in a written police report because of a critical governmental interest involved. *Carradine v. State*, 511 N.W.2d 733, 735–37 (Minn. 1994). "For absolute privilege to apply, the public interest served must be one of paramount importance, such that it is entitled to protection even at the expense of failing to compensate harm to the defamed person's reputation." *Bol*, 561 N.W.2d at 149.

The district court concluded that, although it was a "close call," the doctrine of absolute privilege did not apply to the alleged defamatory statement. We agree. Appellant does not allege that "Jeff" is a high-level governmental official. And on the face of the complaint, it is not apparent that he was required to make the allegedly defamatory statement as part of his official duties or that a critical public interest was involved. Therefore, the defense of absolute privilege is unavailable to insulate respondents from liability for defamation.

Qualified privilege

Respondents assert that if absolute privilege does not apply, the employee's statement was protected by a qualified privilege. For a qualified privilege to apply, a statement "must be made upon a proper occasion, from a proper motive, and must be

based upon reasonable or probable cause." *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 256–57 (Minn. 1980) (quotation omitted). The statement must be made in good faith. *Ferrell v. Cross*, 557 N.W.2d 560, 565 (Minn. 1997). A qualified privilege can be defeated by a showing that the privilege was abused because the defamatory statement was made with malice. *Bol*, 561 N.W.2d at 150.

In this case, the allegations on the face of the complaint are insufficient for this court to determine whether the alleged statements are protected by a qualified privilege. Further, the district court did not err by concluding that, although a qualified privilege potentially applies, questions of ill will and malice are factual questions, which are not appropriately considered in a motion to dismiss.

For all of the reasons stated above, we reverse the district court's dismissal of the defamation count of appellant's complaint, and we remand for consideration of factual issues relating to that claim. *See, e.g.*, *Bird v. State, Dep't of Pub. Safety*, 375 N.W.2d 36, 41–42 (Minn. App. 1985) (remanding for factual determination of whether alleged defamatory statements were made in good faith and without malice).

III

Appellant argues that the district court erred by dismissing his negligent-supervision claim on the ground of statutory immunity. The final count of appellant's complaint alleges that the state improperly supervised its employee, "Jeff," by failing to prevent him from making defamatory statements about appellant. This court has recognized that "claims for negligent supervision . . . are based on policy level activity." *Gleason v. Metro Council Transit Operations*, 563 N.W.2d 309, 320 (Minn. App. 1997),

aff'd in party by Gleason, 582 N.W.2d at 221. Specifically, we have held that the Minnesota Tort Claims Act provides immunity for the discretionary decisions involved in supervising and disciplining a state employee who allegedly made harassing and defamatory statements. *Oslin v. State*, 543 N.W.2d 408, 416 (Minn. App. 1996), *review denied* (Minn. Apr. 1, 1996). This court concluded that these discretionary decisions "were necessarily entwined in a layer of policy-making that exceeded the mere application of rules to facts." *Id.* The same reasoning supports the district court's conclusion that the state is entitled to immunity for its supervision of the state employee in this case. Therefore, the district court did not err by concluding that the application of statutory immunity protected respondents from appellant's claim of negligent supervision, and we affirm the dismissal of that claim.

Affirmed in part, reversed in part, and remanded.