

SUPREME COURT OF YUKON

Citation: *Ramirez v. Gale*, 2017 YKSC 29

Date: 20170529
S.C. No. 16-A0073
Registry: Whitehorse

BETWEEN

EVANGELINE RAMIREZ

PLAINTIFF

AND

DIANNE GALE, INDIVIDUALLY AND AS ADMINISTRATOR OF
WHITEHORSE UNITED CHURCH; AND WHITEHORSE UNITED CHURCH

DEFENDANTS

Before Madam Justice A. B. Moen

Appearances:

Evangeline Ramirez
Debra Fendrick

Appearing on her own behalf
Appearing on behalf of the Defendants

REASONS FOR JUDGMENT

INTRODUCTION

[1] The Defendants bring an application for summary trial determination pursuant to Rule 19 of the *Rules of Court*.

[2] Ms. Ramirez had worked for Whitehorse United Church (the “Church”) as a janitor from 2010 to 2016.

[3] Ms. Gale had been retained by the Church in January 2016 as the Church’s administrator.

[4] On June 9, 2016, Ms. Gale sent an email to Ms. Ramirez (the “email”), which Ms. Ramirez claims is defamatory. The Church defends on the basis that the email was

covered under qualified privilege, and that, in any event, that qualified privilege cannot be defeated by malice.

[5] The issues to be decided are:

1. Is this a suitable case for summary trial determination?
2. Was the email sent by Ms. Gale on June 9, 2016 defamatory?
3. If so, was it protected by qualified privilege?
4. Was the qualified privilege lost because it was malicious?
5. Were the statements true?

[6] During oral argument, the Church emphasized the issue of qualified privilege and made representations to the Court that truth was not an issue in this case. Therefore, I have not considered whether the email was true.

DISCUSSION

Issue 1 Is this a suitable case for summary trial determination?

[7] Summary trial provides a proportionate, expeditious and less expensive resolution than a conventional trial in many cases including ones for defamation: *Vindic Hindu Cultural Society v. Joshi*, 2010 BCSC 1070, paras. 12 – 17 (Tab 6 – Defendants’ Authorities).

[8] To determine whether this is a suitable case for a summary trial I must determine two things:

- a. Are there sufficient facts before the Court from which to make the necessary findings of fact?
- b. Is it unjust to decide the case on a Summary Trial application?

[9] I note here that the Plaintiff has provided me with authority to substantiate that the Church can be found liable where one of its employees is found liable of an offence/tort: *John Doe v. Bennett*, 2004 SCC 17; *Bazley v. Curry*, [1999] 2 S.C.R. 534.

[10] This is a well-established principle and the Defendants have not suggested that the Church in this case would not be liable if I were to find Ms. Gale liable. Therefore, I do not find it necessary to discuss this point further except to acknowledge that it is an argument made by the Plaintiff and that I accept her argument that the Church is liable if I find that Ms. Gale is liable.

a. *Are there sufficient facts before the Court from which to make the necessary findings of fact?*

[11] The facts in this case are found in a number of affidavits submitted by the Plaintiff, Ms. Gale, and members of the Property Management Committee (the “Committee”). The facts are not complicated with respect to whether there was a defamation and, if so, whether there is a defence of qualified privilege.

[12] The affidavits submitted by both the Defendants and the Plaintiff address the complaint by Ms. Ramirez about the impugned email; the relationship of Ms. Gale to the committees of the Church and to other committees of the Church as well as Church documents that establish her relationship with them.

[13] I have a copy of the impugned email, which is found at Appendix ‘A’ to this judgment. The Defendants have filed a defence on the basis of qualified privilege and provided in the affidavits copies of the pertinent Church governing documents and contracts. There is enough evidence for me to determine if the words in that email are

defamatory, and if so, whether there is a relationship between Ms. Gale and the Committee that can, at law, be determined to be qualified privilege.

[14] As to malicious conduct, I can look at the facts alleged to determine whether there was malicious conduct on the part of Ms. Gale. Ms. Ramirez did not argue this point and could not point out where there was evidence of such malicious conduct. That evidence does not exist and would not be available at a trial.

[15] I find that there are sufficient facts for me to proceed with my analysis of the merits of this claim.

b. Is it unjust to decide the case on a Summary Trial application?

[16] Given that there is no contradictory evidence in the affidavits on central facts, and that there is sufficient evidence for me to determine if there was a defamation and, if so, whether the defamation took place in circumstances of qualified privilege, it is just for me to proceed with the decision on this summary trial application.

[17] I agree with the Defendants when they say that a one-day summary trial of alleged defamation in the form of a single email rather than five days of trial will provide a just result to the matters at issue in this lawsuit.

[18] On the basis of the affidavit evidence and the legal arguments before me, it is clear that the issues are fairly straightforward: first, whether the email was defamatory, and second, whether the email was made in the circumstances of qualified privilege.

[19] Therefore, it is just for me to proceed with the decision in this summary trial hearing.

Issue 2 Was the email sent by Ms. Gale on June 9, 2016 defamatory?

[20] I find that the words used by Ms. Gale were defamatory. Further, I find that those words were about the Plaintiff, Ms. Ramirez, and that they were published.

[21] There are three elements to the tort of defamation: (1) that the words complained of are defamatory; (2) that the words complained of refer to the plaintiff; and (3) that the words complained of were published to a third person: *Hay v. Platinum Equities Inc.*, 2012 ABQB 204, at para. 42, citing *Chohan v. Cadsky*, 2007 ABQB 498, at para. 240.

[22] In the case before me, the Defendants have not denied that the words are defamatory. Ms. Ramirez says they are. Further, the Defendants do not deny that the words are intended to refer to the Plaintiff, Ms. Ramirez. Finally, the Defendants do not deny that the words were published. Therefore, I do not have to spend much time on a discussion of this point.

[23] The Defendants argue that it has a defence of qualified privilege, which I shall address shortly.

[24] I append at Appendix A, the email correspondence dated June 9, 2016, that contains the defamatory words and that published those words. In that letter, Ms. Gale points out to Ms. Ramirez that Ms. Gale believes that Ms. Ramirez has not returned all of the supplies that she (Ms. Ramirez) had purchased on behalf of the Church and had stored at her house. Specifically, the supplies alleged to have been retained by Ms. Ramirez were a case of toilet paper and a case of garbage bags. Then Ms. Gale says:

I would like the toilet paper and garbage bags returned by tomorrow when I arrive at work. If they are not here, then I will have no choice but to call the police and report the theft.

[25] That email correspondence was sent not just to Ms. Ramirez but also to the members of the Committee to which Ms. Gale reported. The tenor of the whole email correspondence was that Ms. Ramirez had stolen supplies that were properly the supplies of the Church. In essence, this is an accusation of theft, which is defamatory. Further, by sending the email to the whole of the Committee, that accusation was published.

[26] Prior to the June 9 email correspondence, there were two other pieces of email correspondence by Ms. Gale to the Committee concerning the missing supplies. The first one, dated June 3, 2016, she entitles “I hope I am mistaken”. She sets out in detail the supplies that she could not find. Again, on June 8, 2016, she sends an email to the Committee in which she describes a conversation she had with Ms. Ramirez. She told Ms. Ramirez that she could not find supplies and said “I told her that the committee was worried about the missing supplies and they are considering calling the police.” She also explained to Ms. Ramirez that the reason they would call the police is that Ms. Ramirez had purchased the supplies two months earlier and that they should be in the Church closets. She said that the Committee assumed that those supplies were stolen. It is clear from other evidence that the Committee had not said any such thing to Ms. Gale. Her explanation for those remarks was that she wanted to get Ms. Ramirez’ attention.

[27] Words are defamatory if an ordinary, average, right-thinking and reasonable person would think less of the plaintiff by reading those words. Further, the truth of the words does not matter at this point. Although truth is a defence, the law presumes that

the words are false, that is, that the plaintiff is entitled to a good reputation: Tort Law 4th Edition, Lewis N. Klar, 2008, Thomson Carswell at pp 752, 753.

[28] In this case, the words used in the email essentially accused Ms. Ramirez of a theft. This is criminal activity. There is no doubt that the words were about Ms. Ramirez. Those words are capable of being interpreted by the reasonable person as defamatory.

[29] Of course, for words to be defamatory they must be published. In this case, there was publication because it was communicated by Ms. Gale in an email to a church committee.

[30] “The law of defamation is essentially aimed at the prohibition of the publication of injurious false statements.” The law of defamation provides, however, for the defences of fair comment and of qualified privilege in appropriate cases. Just because someone publishes a hurtful comment does not mean that they will be liable for it if they do so in circumstances of qualified privilege or fair comment. Those who publish statements should assume a reasonable level of responsibility: *Hill v. Church of Scientology of Toronto*, [1995] 2 SCR 1130, at para. 137.

[31] In the case before me, the main issue is not whether the words are defamatory, nor whether they were published, but rather whether there has been a defence of qualified privilege made out.

Issue 3 If so, was it protected by qualified privilege?

[32] I find that the Defendants have made out the defence of qualified privilege on a balance of probabilities.

[33] In the case before me, the Defendants are claiming qualified privilege. *Hill* comments on the effect of qualified privilege:

144 The legal effect of the defence of qualified privilege is to rebut the inference, which normally arises from the publication of defamatory words, that they were spoken with malice. Where the occasion is shown to be privileged, the *bona fides* of the defendant is presumed and the defendant is free to publish, with impunity, remarks which may be defamatory and untrue about the plaintiff. However, the privilege is not absolute and can be defeated if the dominant motive for publishing the statement is actual or express malice. See *Horrocks v. Lowe*, [1975] A.C. 135 (H.L.), at p. 149.
[*Hill v. Church of Scientology of Toronto*, *supra*, at para. 144.]

[34] The information communicated must be reasonably appropriate in the context of the circumstances existing on the occasion when that information was given: *Hill v. Church of Scientology of Toronto*, *supra*, at para. 147.

[35] I note here that the Plaintiff has cited a number of cases concerning publication by the media. I make it clear that this is not a case of the media publishing anything. This is a case of an individual, Ms. Gale, reporting to the Committee of the Church to which she was obliged to report.

[36] The evidence establishes that Ms. Gale who wrote the impugned email was employed by the Church as the Church's administrator, a position she obtained in January 2016. In that position, she was responsible for providing administrative support to Church committees, one of which is the Property Management Committee. This responsibility is set out in the Position Description (see Exhibit A to the affidavit of Ms. Gale, dated March 27, 2017). Ms. Gale sits on that Committee *ex officio*. In particular, Ms. Gale was tasked with liaising with that Committee on an as-needed basis to co-ordinate repairs and maintenance of the building.

[37] The Constitution of the Church provides at s. 4.11 for the duties of the Property Management Committee. The Constitution provides that this Committee is responsible for managing the church's physical resources and it provides that the Church Administrator is an *ex officio* member of that Committee. Specifically it is tasked with overseeing janitorial duties in the Church properties (Exhibit A, affidavit of Lee Pigage dated March 27, 2017).

[38] Ms. Ramirez provided janitorial services to the Church and had done so since 2010. Her duties were set out in a document, which was Exhibit B to the affidavit of Lee Pigage. In that document, which was signed by Ms. Ramirez on April 30, 2010, it was set out that communication was to be through the church administrator either by notes, emails or phone messages. Any major issues were to be discussed with the chairperson of the Committee.

[39] In her role as administrator, Ms. Gale had been receiving complaints about the cleanliness of the Church. In addition, Ms. Gale, who, as administrator of the Church, provided support to other committees, had been tasked by the Financial Committee to determine why janitorial supplies were so expensive. She then reviewed the expenses and determined that it was reasonable to buy in bulk, explaining why the invoice was so high. One day subsequent to making this determination, she took it upon herself to clean her office, as she was not satisfied with the quality of the cleaning done by the janitorial service. When she sought out Windex, which was listed on the invoice, she could not find any. Consequently, she took a closer look at the supplies in the Church and found that they did not accord with the invoice she had reviewed. Because of this, she communicated by email on June 9, 2016, to the members of the Committee. It is

that email in particular that Ms. Ramirez claims was defamatory. Ms. Gale had also, as set out earlier in these reasons, communicated earlier by email on the same subject with the members of the Committee. There are three emails that can be considered together.

[40] The question is whether the email June 9 sent in the circumstances I have just outlined was sent in circumstances of qualified privilege.

[41] Qualified privilege relates to the occasion upon which the communication is made and not to the communication itself: *Vedic Hindu Cultural Society v. Joshi*, 2014 BCSC 1070, at para. 54.

[42] Qualified privilege is available as a defence against a claim of defamation when the defendant has an interest or a duty – legal, social or moral – to communicate the defamatory material to the person to whom it is made and the recipient of the communication has a corresponding interest or duty to receive the communication: *DDI Diamonds Direct Inc. v. Raney*, 2006 BCSC 952, at paras. 28-29; *Wood v. Van Bibber*, 2013 YKCA 15, at para. 31; *Vedic Hindu Cultural Society v. Joshi*, *supra*, at para. 54.

The standard for establishing an interest or duty is an objective one; the Court asks whether “persons of ordinary intelligence and moral principle, or the great majority of right-minded persons, would have considered it a duty to communicate the information to those to whom it was published”: [citation omitted]
[*Popat v. MacLennan*, 2014 BCSC 1601, at para. 28.]

[43] Because the June 9, 2016 email dealt with the matter of missing, but paid for, janitorial supplies, Ms. Gale’s report to the Committee was not made as an officious volunteer but rather as part of her responsibilities as the Administrator of the Church. I find that persons of ordinary intelligence would have considered it a duty for Ms. Gale to

report to the Committee when she became suspicious that there were supplies missing, and that the Committee had a duty to receive the information and to act upon it.

[44] There have been examples in the case law where qualified privilege applied to statements made by an employee to supervisors: *Popat v. MacLennan, supra*, at paras. 27 to 28.

[45] I find that Ms. Gale was obliged to communicate with the Committee as outlined in her responsibilities and reporting requirements. I also find that the Committee was responsible for overseeing janitorial issues and for receiving information from the Administrator concerning janitorial issues. Therefore, the subject matter of the emails pertains to Ms. Gale's responsibilities and to the responsibilities of the Committee. In other words, there was a reciprocity between Ms. Gale and the Committee with respect to any concerns with the Church's janitorial services.

[46] Communications of this nature between Ms. Gale and the Committee are done as a matter of qualified privilege and were done on this occasion as a matter of qualified privilege.

[47] With respect to publication of the defamatory remarks, the Defendants say that because the communication was kept between Ms. Gale and the Committee, that was an internal communication and, even if the communication was mistaken as to the theft, it was protected by qualified privilege.

[48] There is no doubt that the email was only sent to members of the Committee who had responsibility for these matters and was not disclosed by Ms. Gale nor by the Committee to anyone else. Even if I find that the email was published, which I do, I find that the publication of the defamatory remarks in this case were in the context of

qualified privilege and are therefore protected communications. I note that these comments were published to people other than Committee members only when Ms. Ramirez published them herself by complaining, for example to the Minister of the Church and when she commenced this lawsuit.

Issue 4 Was the qualified privilege lost because it was malicious?

[49] Even in circumstances of qualified privilege, the defence of qualified privilege can be lost if the defamatory statements are made with malicious intent.

[50] I find that there is no malicious intent proved.

[51] The words in the June 9, 2016 email do not suggest malice. Although they suggest that Ms. Ramirez may have stolen the toilet paper and the garbage bags, and theft is a strong word in this context, the language in the email and the surrounding emails does not achieve the level of very strong language or are “so violent, outrageous or disproportionate to the facts” that malice is suggested: *Vedic Hindu Cultural Society v. Joshi, supra*, at para. 62; *DDI Diamonds Direct Inc. v Raney, supra*, at para. 51. In the circumstances, the only descriptor that Ms. Gale could have used was theft. The fact that she also threatened to report the theft to the police did increase the import of what she was saying, but that did not achieve the level of malice.

[52] Further, the evidence in the affidavits suggested that Ms. Gale believed that Ms. Ramirez had taken toilet paper rolls and garbage bags that did not belong to her. This was an honestly held belief. Ms. Ramirez was unable to point to any evidence that Ms. Gale made her allegation in the June 9, 2016 email with any malice. She was simply doing her job.

Issue 5 Were the statements true?

[53] Given that I have found that the Defendants have shown that there is a defence of qualified privilege and that this defence is not defeated by malice, I do not have to determine if the statements made in the June 9, 2016 email are true. Ms. Ramirez spent a great deal of her time in court and in her brief trying to convince the Court that the allegation of theft was untrue. I decline to make any findings in regard to truth.

[54] One of the defences to an action in defamation is truth. For the purposes of the summary trial, the Defendants did not argue that the statements were true. There was some evidence in the affidavits which suggested that there were differing views as to whether there were missing toilet paper rolls and garbage bags. For the purposes of the summary trial, I am presuming that the statements made by Ms. Gale were false.

[55] Ms. Ramirez in her materials and in her oral argument before the Court focused on the issue of truth notwithstanding that I told her it was not an issue in the summary trial. Therefore, I will not address the law with respect to truth nor will I address the facts of this case. It is not necessary.

CONCLUSION

[56] The Applicants, Defendants, are successful in having the Statement of Claim summarily dismissed.

[57] The Defendants have demonstrated that they have a defence of qualified privilege and that this defence is not defeated by malice.

[58] Given that they are the successful party, if the Defendants wish to make an application for costs, they must arrange prior to May 30, 2017, with the Trial Coordinator for a date for a hearing.

MOEN J.

APPENDIX A

25

Lorna Hutchinson

From: Whitehorse United Church <wuc@klondiker.com>
Sent: June 09 16 12:52 PM
To: vangie49@hotmail.com
Cc: 'Brenda Prokopchuk'; 'Dawn Dimond'; Doug MacLean; 'Fred Smith'; 'Hank Moorlag'; 'Harris Cox'; 'John Maissan'; 'Lee Pigage'
Subject: re:supplies missing from Whitehorse United Church

Dear Vangie,

Thank you for returning most of our supplies, but I believe you are still in possession of some of Whitehorse United Church property.

I had a talk with Yukon Service Supply Co to clarify size and contents of both the 3 cases toilet paper purchased by you, and the 3 boxes of garbage bags.

The following assumes that we had zero garbage bags and zero toilet paper on hand at the time of purchase, which is highly unlikely.

Let's start with the toilet paper. Three cases with 80 rolls each equals 240 rolls. I counted one full case --80-- plus 65 individual rolls all around the church and in all of the bathrooms, and in all of the closets. So then, 240 rolls (3 cases) minus 145 rolls (on site) equals on site equals 95 missing rolls. Estimating that we use one to two rolls per week, say 15 rolls in the last 2 months, that leaves 80 unaccounted for. I believe you are still in the possession of one case (80 count) of toilet paper belonging to Whitehorse United Church.

Now the garbage bags. You ordered 3 cases which equal 600 large bags. You have opened all of the boxes to make it difficult to determine how much is here, but I counted each individual bag. From the 600 you ordered, we have 230 on site which means we have 370 bags missing. I counted all of the large garbage cans and found 4. If the bags are changed 5 times a week times in 4 garbage cans then we use 20 bags a week. It has been almost 8 weeks since you purchased the three cases. Eight weeks times 20 bags a week equals 160 bags used. From the 370 that we have on hand minus the 160 bags used, means that 210 bags are missing. I believe you are still in the possession of one case (200 count) of large garbage bags that belong to Whitehorse United Church.

I would like you to return one case(80 rolls) of toilet paper and one case(200 count) of garbage bags to Whitehorse United Church. Please leave them in my office so that I can do a complete count of the items you have returned. I have taken a complete count of everything that we have on site, in all of the closets and loose in all of the bathrooms. Please do not attempt to replace the missing items from the supplies in our closets. I will know if anything is missing right down to an individual garbage bag. I have taken a complete inventory as of this morning.

I would like the toilet paper and garbage bags returned by tomorrow when I arrive at work. If they are not here, then I will have no choice but to call the police and report the theft.

Regards,

Dianne Gale

Administrator,
Whitehorse United Church
667-2989

This is Exhibit "A" referred to in the
 affidavit of Dianne Gale
 sworn before me at Whitehorse
 this 27 day of March 2017

 A Notary Public in and for the Yukon Territory