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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1105**

Dering Pierson Group, LLC,
Appellant,

vs.

Rockstar Design LLC,
Respondent,

Cash Flow Management, Inc., et al.,
Defendants.

**Filed January 8, 2018
Affirmed in part, reversed in part, and remanded
Reilly, Judge**

Hennepin County District Court
File No. 27-CV-15-11142

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Considered and decided by Rodenberg, Presiding Judge; Worke, Judge; and Reilly,
Judge.

UNPUBLISHED OPINION

REILLY, Judge

Appellant Dering Pierson Group LLC (Dering) challenges the district court's grant
of summary judgment in respondent Rockstar Design LLC's favor on appellant's

vicarious-liability-for-the-unauthorized-practice-of-law and defamation claims arising out of a mechanic's lien filed by Cash Flow Management Inc. (CFM) on Rockstar's behalf naming Dering as the debtor. We affirm summary judgment with respect to Dering's vicarious liability claim. However, because genuine issues of material fact exist regarding Dering's defamation claim and the statements in the mechanic's lien are not protected by conditional privilege, we reverse and remand the district court's order dismissing that claim.

FACTS

In 2014, Dering, a general contractor, contracted to furnish labor and materials for a building project and agreed to defend and indemnify the property owner from any claims asserted by Dering's subcontractors, sub-subcontractors, or suppliers. Dering subcontracted with Minnesota Valley Concrete LLC to furnish labor and material, and Minnesota Valley Concrete subcontracted with its affiliate, Rockstar, to furnish concrete material and labor. Dering removed Rockstar from the project, and, in 2015, Rockstar hired CFM to draft and record a mechanic's lien against the property. CFM's website had an online registration form that allowed its clients to seek mechanic's lien services through a fill-in-the-blank process. Based on the information Rockstar provided through this online form, CFM's president recorded a mechanic's lien on the property on Rockstar's behalf and against Dering. Dering secured a discharge of the mechanic's lien and filed a complaint against Rockstar, CFM, and CFM's president, asserting claims, in relevant part, for the unauthorized practice of law, for vicarious liability, and for defamation. In 2017, the district court granted summary judgment in Rockstar's favor on Dering's vicarious-

liability-for-the-unauthorized-practice-of-law and defamation claims, and this appeal follows.

D E C I S I O N

I. Standard of Review

Summary judgment is properly rendered when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law.” Minn. R. Civ. P. 56.03. We review a district court’s summary judgment decision de novo to “determine whether the district court properly applied the law and whether there are genuine issues of material fact that preclude summary judgment.” *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010). The evidence is viewed in the light most favorable to the party against whom judgment was granted. *Kratzer v. Welsh Cos., LLC*, 771 N.W.2d 14, 18 (Minn. 2009). Judgment will be affirmed “if no genuine issues of material fact exist and if the court below properly applied the law.” *Id.* Even if we “disagree with the district court’s analysis of some issues, summary judgment will be affirmed if it can be sustained on any grounds.” *Allianz Ins. Co. v. PM Servs. of Eden Prairie, Inc.*, 691 N.W.2d 79, 82-83 (Minn. App. 2005).

II. The district court did not err by dismissing Dering’s vicarious liability claim

In Minnesota, “a principal is liable for the act of an agent committed in the course and within the scope of agency. . . .” *Bedow v. Watkins*, 552 N.W.2d 543, 547 (Minn. 1996). “A principal-agent relationship results from the manifestation of consent by one

person to another that the other shall act on the first person's behalf and subject to his control; and the other must consent so to act." *White v. Boucher*, 322 N.W.2d 560, 566 (Minn. 1982). Whether an agency relationship exists is generally a question for the jury, unless the evidence is conclusive. *PMH Props. v. Nichols*, 263 N.W.2d 799, 802-03 (Minn. 1978).

A. Stipulated Consent Judgment Against CFM, in Dering's Favor

In December 2015, the district court granted summary judgment in favor of Dering and against CFM and its president for the unauthorized practice of law and permanently enjoined CFM from providing mechanic's lien services. Following this order, Dering filed an amended complaint asserting additional causes of action and alleging a claim against an indemnity bond issued to CFM. In October 2016, Dering reached a settlement with CFM, its president, and the insurance company, on the claims asserted in the amended complaint. Dering and CFM stipulated to entry of a consent judgment in Dering's favor in the amount of \$250,000. Rockstar was not a party to the settlement discussion. The settlement agreement is not part of the district court or appellate records.

Dering argued that its \$250,000 consent judgment with CFM "controlled Rockstar's liability" on Dering's vicarious-liability-for-the-unauthorized-practice-of-law claim. The district court rejected this argument. On appeal, Dering argues that *Engelstad v. Cargill, Inc.*, 336 N.W.2d 284 (Minn. 1983), precludes Rockstar from contesting liability, following CFM's confessed judgment. But Dering's reliance on this case is misplaced. As the district court correctly noted, *Engelstad* does not address "whether a settlement including a confession of judgment as to one of the parties in all circumstances is binding

or compels entry of the judgment against the other.” Here, Rockstar has not had an opportunity to litigate “the merits of the scope of any agency and the measure of and amount of damages claimed.” It is undisputed that Rockstar was not present for the settlement discussions between Dering and CFM, and did not agree to be bound by any of the settlement terms, including damages. We therefore discern no error in the district court’s determination that the stipulated consent judgment between Dering and CFM did not bind Rockstar.

B. Attorney-in-Fact

Dering argued that Rockstar was vicariously liable for CFM’s unauthorized practice of law because Rockstar retained CFM as its “attorney-in-fact and agent” to execute the mechanic’s lien statement. The district court disagreed and declined to hold Rockstar vicariously liable for CFM’s activities, determining that “undisputed evidence in the record regarding the agency does not include acts supporting the unauthorized practice of law.”

We agree with the district court’s determination that CFM was not Rockstar’s attorney-in-fact and was not authorized to engage in acts constituting the practice of law. The term “power of attorney” means “a validly executed power of attorney.” Minn. Stat. § 523.03 (2016). A “validly executed power of attorney” is:

A person who is a competent adult may, as principal, designate another person or an authorized corporation as the person’s attorney-in-fact by a written power of attorney. The power of attorney is validly executed when it is dated and signed by the principal and, in the case of a signature on behalf of the principal, by another, or by a mark, acknowledged by a notary public. Only powers of attorney validly created pursuant to this section or section 523.02 are validly executed powers of attorney for the purposes of sections 523.01 to 523.24.

Id., § 523.01 (2016).

The plain language of section 523.01 requires a validly executed power of attorney to be “dated and signed by the principal.” There is no such instrument here. Accordingly, the district court did not err by rejecting Dering’s attorney-in-fact argument.

C. Independent Contractor

Our decision affirming the district court’s grant of dispositive relief is further buttressed by Dering’s counsel’s concession that the nature of the agency between Rockstar and CFM was that of a principal and an independent contractor, not master and servant. “The existence of an employment relationship is determined by a number of factors,” the most important of which “is the right of the employer to control the means and manner of performance.” *Nichols v. Metro. Bank*, 435 N.W.2d 637, 639 (Minn. App. 1989) (quotation and citation omitted); *see also Hammes v. Suk*, 291 Minn. 233, 235, 190 N.W.2d 478, 481 (1971) (noting that an independent contractor “contracts to do a piece of work according to his own methods and is subject to his employer’s control only as to the end product or final result of his work”). Rockstar did not have control over CFM’s day-to-day operations, nor did it have the right to control the means and manner of the company’s performance. And while an organization may be vicariously liable for its agent’s torts, *Lange v. Nat’l Biscuit Co.*, 297 Minn. 399, 404, 211 N.W.2d 783, 786 (1973), it is not vicariously liable for negligent acts committed by its independent contractors, *Conover v. N. States Power Co.*, 313 N.W.2d 397, 407 (Minn. 1981).

D. Applicability of Exceptions

Lastly, we reject Dering’s argument that the “negligent direction” and “authorized conduct” exceptions apply. The negligent-direction exception provides that an independent contractor’s employer is liable for “*physical* harm caused by an act or omission committed by the contractor pursuant to orders or directions negligently given by the employer, as though the act or omission were that of the employer himself.” Restatement (Second) of Torts § 410 (1965) (emphasis added). The authorized-conduct exception imposes liability upon a principal “for *physical* harm caused by the negligent physical conduct of a non-servant agent during the performance of the principal’s business, if he neither intended nor authorized the result nor the manner of performance, unless he was under a duty to have the act performed with due care.” Restatement (Second) of Agency § 250 (1958) (emphasis added). Because it is uncontested that Dering did not suffer physical harm, neither exception applies.

For these reasons, we hold that the district court did not err by granting summary judgment in Rockstar’s favor on Dering’s vicarious liability claim.

III. The district court erred by dismissing Dering’s defamation claim against Rockstar, where there are factual issues outstanding and conditional privilege does not apply

The fundamental basis of a defamation claim is that “one is liable for an unprivileged communication or publication of false and defamatory matter [that] injures the reputation of another.” *Matthis v. Kennedy*, 243 Minn. 219, 222-23, 67 N.W.2d 413, 416 (1954). “The elements of defamation require the plaintiff to prove (1) that the statement was false; (2) that it was communicated to someone besides the plaintiff; and

(3) that it tended to harm the plaintiff's reputation and lower him in the estimation of the community." *Kuechle v. Life's Companion P.C.A., Inc.*, 653 N.W.2d 214, 218 (Minn. App. 2002). False statements "concerning one's business, trade, or profession are actionable per se, without proof of actual damages." *Id.*

Dering claims that Rockstar committed per se defamation by presenting false information in the mechanic's lien statement. Specifically, Dering argues that the mechanic's lien statement falsely stated that (1) Rockstar provided concrete and labor for the project; (2) there was an outstanding balance for the labor performed and the materials provided; and (3) the outstanding balance was \$7,939.64. The district court granted dispositive relief in Rockstar's favor on Dering's defamation claim, determining that the mechanic's lien statement was protected by conditional privilege.

We disagree. A conditional privilege may serve as a defense to defamation. *Harlow v. State Dep't of Human Servs.*, 883 N.W.2d 561, 569-70 (Minn. 2016). Conditional privilege applies if a statement "is published under circumstances that make it conditionally privileged and if privilege is not abused," even if the statement is otherwise defamatory. *Lewis v. Equitable Life Assur. Soc. of the U.S.*, 389 N.W.2d 876, 889 (Minn. 1986) (citing Restatement (Second) of Torts § 593 (1977)). For the conditional privilege to apply, the communication "must be made upon a proper occasion, from a proper motive, and must be based upon reasonable or probable cause." *Id.* When made in good faith, "[a]ctual malice must be proved," and the defamed party is precluded from recovery in the absence of such proof. *Id.* However, defamatory statements are "take[n]. . . out of the realm of privilege"

if made in bad faith. *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 257 (Minn. 1980). The existence of a privilege is a question of law. *Lewis*, 389 N.W.2d at 889.

The district court determined that statements made in the mechanic's lien were protected by conditional privilege. The district court did not identify any Minnesota caselaw supporting this ruling. Instead, the district court reasoned that the current case was analogous to *Kelly v. First State Bank of Rothsay*, a case in which the reviewing court ruled that a slander-of-title claim failed where the party acted in good faith and recorded an instrument that the party had a right to file. 145 Minn. 331, 333, 177 N.W. 347, 348 (1920). Relying on *Kelly*, the district court found that the benefit to Rockstar outweighed the harm to Dering because mechanic's lien laws must be "liberally construed" to protect "the labor and toil of claimants even if at the occasional expense of the alleged debtor," and concluded that "a conditional privilege applies to defamation claims involving the filing of mechanic's liens."

Upon review, we determine that the district court improperly applied the law by extending the application of conditional privilege to encompass mechanic's lien statements. Minnesota law does not recognize the application of conditional privilege in this context, and "the task of extending existing law falls to the supreme court or [to] the legislature, but it does not fall to this court." *Tereault v. Palmer*, 413 N.W.2d 283, 286 (Minn. App. 1987), *review denied* (Minn. Dec. 18, 1987). Because we decline to recognize conditional privilege as a defense to a defamation claim arising out of statements made in a mechanic's lien, and because factual issues remain regarding the truthfulness of Rockstar's statements in the mechanic's lien, we reverse and remand to the district court

for further consideration consistent with this opinion. *See, e.g., Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 371 (Minn. 2008) (noting that “summary judgment is a blunt instrument” that is “inappropriate when reasonable persons might draw different conclusions from the evidence presented” (citation omitted)); *Lewis*, 389 N.W.2d at 889 (noting in defamation action that “the truth or falsity of a statement is inherently within the province of the jury”).¹

Affirmed in part, reversed in part, and remanded.

¹ The district court determined that Rockstar was entitled to summary judgment on the defamation claim because Dering failed to produce evidence of Rockstar’s malice. *See Lewis*, 389 N.W.2d at 890 (explaining that if conditional privilege applies, the burden shifts to defamed party to show actual malice). Because we determine that conditional privilege does not apply, we do not reach the question of whether Dering demonstrated that Rockstar acted with actual malice.