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NOT TO BE PUBLISHED OPINION

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RENDERED: SEPTEMBER 22, 2011
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2007-SC-000573-DG
2008-SC-000317-DG

MARY BETH CALOR, M.D. — APPELLANT/CROSS-APPELLEE

V.

ON REVIEW FROM COURT OF APPEALS
CASE NO. 2006-CA-000395-MR
BOYD CIRCUIT COURT NO. 02-CI-01131

ASHLAND HOSPITAL CORPORATION, D/B/A KING'S DAUGHTER MEDICAL CENTER; AND PAUL MCDOWELL — APPELLEES/CROSS-APPELLANTS

MEMORANDUM OPINION OF THE COURT

REVERSING AND REMANDING

Appellant/Cross-Appellee, Mary Beth Calor, filed this action against Appellees/Cross-Appellants, Ashland Hospital Corporation, d/b/a King's Daughters Medical Center and its Chief Financial Officer, Paul McDowell (collectively "KDMC"), in Boyd Circuit Court. The case went to the jury on claims of slander, intentional interference with contractual relations (intentional interference), and punitive damages, with the jury rendering a verdict Calor's favor in the amount of $59,050 for lost wages, $175,000 for emotional and mental distress, and $300,000 in punitive damages.

KDMC appealed, and the Court of Appeals reversed, holding that KDMC was entitled to summary judgment as a matter of law on its defense of qualified common business interest privilege (the qualified privilege or privilege) to the

slander and intentional interference claims, and remanded the matter to the circuit court for dismissal. This Court granted discretionary review, and now reverses the Court of Appeals and remands this matter to the trial court for a new trial with an instruction on the qualified privilege applicable to both claims of slander and intentional interference as such an instruction is necessary in order to address factual issues of malice and other "abuse of privilege" questions required in the determination of whether the qualified privilege does apply in this instance.

I. Background

KDMC is a 440 bed medical hospital located in Ashland, Kentucky. Calor is an anesthesiologist who worked for Staff Care, Inc., a temporary medical staffing agency, and, at Staff Care's direction, KDMC.

Prior to contracting with Staff Care for *locum tenens* anesthesiologists,[1] KDMC contracted for these services with the chair of their anesthesiology department who had an anesthesiology practice group that serviced the hospital. This group resigned, however, and KDMC had to temporarily replace several anesthesiology positions on its staff until permanent replacements could be found. KDMC contracted with Staff Care to provide the anesthesiologists.

Calor began her services with KDMC in October 2001. She continued through June 2002 when KDMC released her, allegedly over concerns about

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[1] A *locum tenens* physician is one "who substitutes for another temporarily." *Taber's Cyclopedic Medical Dictionary* L-38 (10th ed. 1965); *see also* Black's Law Dictionary 959 (8th ed. 2004) (defining term as a "deputy; a substitute; a representative").

her billing records. After her release, Calor continued to work for Staff Care at other locations.

While working at KDMC, Calor and other *locum tenens* anesthesiologists were solicited by KDMC personnel, including the co-chairs of its anesthesiology department, to join its staff as members of a new (to be formed) anesthesiology group.[2]

As a *locum tenens* physician, Calor worked "by the hour" and was required by Staff Care to identify the hours worked on a form supplied by it, known as a Physician Work Record (PWR). Staff Care needed the PWRs to calculate Calor's pay and for billing to be invoiced to KDMC for Calor's services, as well as for the information necessary for Staff Care to obtain and pay for Calor's malpractice insurance, which was directly related to the number of hours worked. Thus, the more hours worked, the higher her pay and malpractice premiums were for Staff Care and the higher Staff Care's billing was to KDMC.

The PWRs were to be counter-signed for verification on behalf of KDMC by either Dr. Siriam Iyer or Dr. Stanford Prescott, fellow KDMC anesthesiologists. However, neither Iyer nor Prescott could be present every hour a *locum tenens* physician worked and neither had the opportunity, or the ability, to undertake an audit of each bi-weekly PWR submitted. Both testified that it was impossible to verify the bi-weekly records before submission to Staff Care; they relied upon the "honor system" when counter-signing them.

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[2] Calor testified this recruitment continued until just before her release.

From October 3, 2001, through her last date of service on June 24, 2002, Calor submitted several PWRs where she claimed to have worked in *actual* patient care for several consecutive twenty-four-hour periods, including *five* consecutive twenty-four-hour days in December, 2002, and *three* consecutive twenty-four hour days in May, 2002. In fact, over a nine month period, Calor claimed to have worked fifty-six twenty-four-hour days. During her nine months at KDMC, Staff Care billed KDMC $801,775.00 for her services.

Staff Care was the first to become concerned with her billing, when, during the second month of her service with KDMC, November 16-30, 2001, Calor submitted a PWR reportedly working: twenty-four hours on November 16; sixteen hours on November 17; twenty-four hours on November 18; fourteen hours on November 19; twenty-four hours on November 20; fifteen and a half hours on November 21; twenty-four hours on November 22; and fourteen and a half hours on November 23. As a result, Staff Care's liaison with KDMC, Miki Von Luckner (Luckner), contacted Calor's husband (and office manager) to verify the PWR accurately reflected time Calor spent in *actual* patient contact. He told her it was accurate.

Staff Care's concern was renewed when it received Calor's PWR for the last half of December 2001. In fact, Luckner testified that during her tenure with Staff Care, she could not recall ever having seen billing for *five consecutive twenty-four-hour days* from any other physician (Calor reported working

around the clock on her PWR for December 23, 24, 25, 26 and 27).[3] Luckner was so concerned this time that, in early January of 2002, she called KDMC to ensure that the PWRs were being verified before submission to Staff Care. KDMC responded that it would require the *locum tenens* physicians to also complete a new "patient log" which would assist in verifying the hours claimed.

In February 2002, KDMC did institute the new "patient log" to record work hours of the *locum tenens* anesthesiologists. However, completion of the form was so tedious and time-consuming that its use by the physicians ceased after just a few days. Calor, herself, turned in only three (February 23, 25 and 27).

At some point thereafter,[4] KDMC directed David Lane, its Director of Budgeting and Business Management, to investigate the accuracy of Calor's

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[3] Other *locum tenens* physicians, however, were also billing long hours. Dr. John Leung's PWRs reflected thirty-six twenty-four-hour workdays and Dr. Colin Bryant's PWRs reflected sixteen twenty-four-hour workdays in a four month period from November 2001 through February 2002.

[4] While there may be some evidentiary confusion as to when KDMC actually began its investigation of Calor, by mid-January 2002, it had received the call from Luckner and had also realized that the cost of the *locum tenens* staffing was exceeding the amount it had budgeted for the anticipated work. By no later than early March 2002, it made a decision to withhold payments to Staff Care for some of the *locum tenens* invoices, including Calor's. Staff Care invoice #085719 to KDMC (dated February 21, 2002 and bearing a KDMC stamp marked "Received" dated February 28, 2002) contained a handwritten note stating, "Rick, process invoices other than Calor. Hold these. Paul." Paul McDowell was the Vice-President of Finance and Chief Financial Officer for KDMC. Neither Staff Care nor Calor were apprised at the time of KDMC's decision.

Upon later inquiry, Staff Care was advised that several invoices had been misplaced and should be re-sent and, later, that the bills had been approved for payment and payment was being processed. By June 19, 2002, however, Staff Care was aware that three of the unpaid invoices were for Calor's time and, upon further inquiry, they were advised by KDMC that these three invoices had been released for payment and that KDMC was going to pay these invoices.

PWRs. Lane had been a Certified Public Accountant since 1985 and, in addition to having worked for Ernst and Young, he worked for KDMC on two occasions (from 1992 through 1999 and again beginning in 2000). Before commencing the investigation, Lane investigated KDMC's anesthesiology work processes and records and interviewed the hospital staff in regard to how the review should be structured to best verify the PWRs. His ultimate review focused on Calor's work period from January through June 2002.

In conducting his investigation, Lane learned that KDMC anesthesiologists typically perform services in three different areas of the hospital: the operating room, the obstetrics floor, and the pre-admission testing area. He then obtained documents and advice from each of these hospital work areas to determine whether, and during what times, the records reflected Calor had provided services on the days she reported overtime and time worked "on call", as well as "post-call" days.

For the anesthesiology services performed in the operating room, Lane relied upon that department's "Molly's Anes report" which identifies the patient name and anesthesia start and stop time for each procedure performed by a particular physician on a certain date. For obstetrics, he relied upon a table produced by that department that identified the daily "time in" and "time out" for each anesthesiologist administering epidurals. The obstetrics log is also based on actual patients' medical records.

To determine whether Calor could have been working in the pre-admission testing area during the "call" and "post-call" time reported on her

PWRs, Lane provided the department the dates in question and the department pulled actual patient records from the morning, afternoon, and evening shifts and created a list of physicians who were signing charts in this area of the hospital during those times. Upon completion, Lane reported that there were six-hundred and seventy (670) hours reported by Calor that he could *not* verify through his investigation of her PWRs from January 16, 2002 through June 21, 2002, amounting to $163,800.00. Lane's report was couched in terms of "amount billed" and "amount overbilled."[5]

On June 21, 2002, near the completion of Lane's investigation and report, McDowell spoke with Luckner and told her that KDMC was going to get rid of Calor because she was fraudulently falsifying her time records.[6] According to Luckner, this was the first time KDMC told Staff Care there was any problem with Calor's billing. McDowell also asked Calor to meet with him at KDMC on June 24, 2002.

On June 24, as requested, Calor appeared for the meeting with McDowell accompanied by her husband. When told that her husband could not attend the meeting, she refused to attend. She was then released.

McDowell then spoke with Staff Care's representative, Brian Lund, and reported KDMC had dismissed Calor because he believed, based upon their

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[5] The Lane report also disclosed an "underbilled" amount of $11,025. Thus, the net difference "overbilled" should have been $152,775.

[6] Luckner wrote in her daily work notes that "He explained they are releasing Dr. Mary Beth Calor as of today due to her falsifying timesheets for hours worked and overtime." McDowell informed her that they had been conducting an "investigation."

review of the records and Lane's analysis, Calor had falsified her PWRs, resulting in over-billing to KDMC. He ultimately advised Staff Care of how KDMC had reached its opinions and provided Staff Care with a copy of Lane's report. KDMC thereafter continued to withhold payment from Staff Care for the amount it believed it had overpaid on the invoices and submitted payment for the amount it believed was otherwise due.[7] Staff Care, however, had already paid Calor for the prior months, but it then withheld payment from Calor for her final June PWRs in the amount of $59,050.

At trial, Calor testified that she had worked every hour she claimed and alleged that KDMC had made defamatory statements about her billing without a thorough investigation, that its real motives were to hire her on its staff to cut *locum tenens* costs or, failing that, to otherwise interfere with her contract with Staff Care, and that McDowell knew when he made the remarks to Staff Care that he could not prove them.

KDMC defended generally, but also asserted the defense of the qualified privilege, a defense it had not pled in its answers. The trial court then refused to instruct on the privilege and the jury subsequently found for Calor on all her claims of slander, intentional interference, and punitive damages.

KDMC then appealed, prevailing at the Court of Appeals on grounds the trial court should have dismissed the claims as a matter of law pursuant to the qualified privilege. We granted discretionary review and now reverse the Court of Appeals and remand this matter back to the trial court for a new trial on the

[7] In litigation, KDMC and Staff Care later settled the amount due between them.

issues of slander, intentional interference, and punitive damages with an appropriate instruction on the disputed factual issue of whether the common business interest privilege was waived by abuse.

II. Analysis

A. Slander and the Qualified Common Business Interest Privilege

Calor's slander claim arose within the context of her employment through Staff Care as a *locum tenens* physician at KDMC through McDowell's statements made to Staff Care to the effect that she had falsified her time records at the hospital. Because such statements tend to "impute crime" or "unfitness to perform duties of office," she correctly argued in this regard that she was entitled to prove her case as slander *per se*. *See Courier Journal Co. v. Noble*, 251 Ky. 527, 65 S.W.2d 703 (1933). As a *per se* action, her slander claim entitled her to a presumption of damages and she could "'recover without allegation or proof of special damages.'" *Stringer v. Wal-Mart Stores, Inc.*, 151 S.W. 3d 781, 794 (Ky. 2004) (*quoting Hill v. Evans*, 258 S.W.2d 917, 918 (Ky. 1953)). Absent the privilege, KDMC would have been required to prove the statements were substantially true (truth is a complete defense even if stated with bad faith or ill will), or that the statements were mere opinion.

As mentioned, however, KDMC also asserted the qualified privilege which would allow it, if it acted in good faith, to make the allegedly defamatory statements to Staff Care in connection with their common interest – i.e., their shared employee, Calor. This defense, however, was not asserted until the

initial pretrial conference and was never pled in its answers. Calor asserts this failure precluded application of the privilege.

However, if the failure to plead in this instance did not constitute a waiver, Calor then asserts that the Court of Appeals erred by holding that KDMC was entitled to judgment on the privilege as a matter of law, arguing rather that the privilege was unavailable as it had been waived by abuse—a material issue of contested fact.

1. Waiver of the Qualified Privilege

Essentially, Calor asserts that KDMC waived the privilege because it is an affirmative defense and was never pled in KDMC's answer or amended answer as required by CR 8.03.

The Kentucky Rules of Civil Procedure do require that "a party shall set forth affirmatively . . . any . . . matter constituting an avoidance or affirmative defense." CR 8.03. Likewise, "[e]very defense, in law or fact, to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto . . . ." CR 12.02. However, CR 15.02 provides exceptions to this requirement. Thus, the interplay of these rules is important.

Under CR 15.02, "[w]hen issues *not* raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." (Emphasis added.) This rule also allows amendments of the pleadings to conform to the proof at trial when the presentation of the merits will be subserved thereby without undue

prejudice to the opposing party.[8] And, under CR 15.02, a motion to amend may be made by "any party *at any time, even after judgment* . . . ." (Emphasis added.)

The record reveals that Calor's complaint was filed on October 30, 2002. The claim of privilege was first set out in KDMC's pretrial memorandum filed on April 24, 2004, just prior to a previous trial date which was then continued for other reasons. However, it was not addressed by Calor or the court until Friday, October 24, 2004, just before the next trial date. The trial was scheduled for the following Monday. At the time, KDMC also had pending a summary judgment motion, arguing its entitlement to summary judgment because it was privileged to do what it did under the qualified privilege as a matter of law. In response, Calor contended the privilege was an affirmative

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[8] In its entirety, CR 15.02 reads:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleading as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

defense that had to be raised in KDMC's pleadings, and, thus, KDMC was foreclosed from making the argument.

In consideration of the motion, the trial judge first appeared to agree the privilege had been waived, but later he indicated that the privilege question might be a factual issue for the jury.[9] Consequently, the court denied KDMC's motion.

Thereafter, at trial, KDMC continued to assert the privilege, both as a question of law and a question of fact, via two directed verdict motions, a motion to amend the pleadings to conform to the evidence, as well as by tendering an instruction for the jury regarding the privilege. However, the trial court denied both motions for a directed verdict motions and refused to include the tendered instruction on the qualified privilege in its instructions to the jury.

The case was then submitted to the jury on the slander and interference claims, along with punitive damages. However, because KDMC was entitled to

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[9] The transcript of the discussion between the trial court and counsel reads:

> THE COURT: Well, in considering your argument, Mr. Edwards, the court still believes that it becomes a question of fact for the jury as to whether any statements that were made were within a privileged communication.
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> . . . .
>
> THE COURT: Here—here is the ruling that the court will make at this point. The court believes that if the defendant can raise through the facts that they did have a legal right for qualified communications, that they would be entitled to raise that as a defense. Alright. You know, if—if the facts are that here is a provision that says that we may or we have the right to do this and we did it pursuant to this provision, then I will allow you to raise that as a defense . . . . So I don't think I can rule that you're entitled to the privilege until the facts are (inaudible).

claim the privilege under CR 15.02 and entitled under these circumstances to amend its answer as is discussed below, the failure to allow the amendment and instruct on the privilege constituted error.

CR 15.02 applies specifically to unpled issues raised by the evidence actually introduced at trial, and therefore—in those situations—does not conflict with CR 8.02 and 12.02, which require notice during the pleading stages of an action. These latter rules provide notice as to the trial issues and thus define the necessary scope of discovery, provide consequent opportunities for settlement, and an opportunity to obtain judgment on the pleadings if applicable, thus promoting judicial economy. CR 15.02, however, requires that if evidence *is offered* at trial on issues unpled, the party opposing must object to the supporting evidence as it is being offered or the issue will be deemed tried by the express or implied consent of the parties. *See Nucor Corp. v. General Elec. Co.*, 812 S.W.2d 136, 145 (Ky. 1991) ("It seems clear that at the trial stage the only way a party may raise the objection of deficient pleading is by objecting to the introduction of evidence on an unpled issue. Otherwise he will be held to have impliedly consented to the trial of such issue.") (quotation marks and citation omitted).

However, once an objection is made, the trial court *may* still allow amendment of the pleadings as a general matter of discretion, but *should* allow the pleadings to be amended if the issue goes to the merits of the case in light of the evidence and there is no prejudice to the opposing party. The obvious

intent of the rule is to address issues arising out of the evidence actually *presented* to ensure that the full merits of the case are addressed. *Id.*

Here, although the issue was raised after discovery was almost completed, it was raised before and during trial. And, had the trial court not been mistaken about the law concerning the privilege, as discussed below, it could have—and should have—allowed the requested amendment to KDMC's pleadings at the pretrial conference. Under these particular circumstances, its refusal to allow the amendment was an abuse of discretion.

Although Calor objected to the application of the privilege at trial, she did not object—and could not object—to the evidence introduced and which supported it, for it was the same evidence necessary to establish the context of the slander and intentional interference. Thus, this evidence—which also addressed the privilege—was necessarily introduced at trial. The court then was mandated by CR 15.02 to allow the amendment as the evidence also related to the issue of the privilege and Calor could not have been prejudiced, since the proof would not have significantly differed anyway.

Thus, given the unvarying evidence and the consequent absence of prejudice, the trial court should have allowed the amendment when requested and, therefore, should have instructed on the issue.

2. The Privilege

Absent a qualified privilege, the essential elements of slander are: "(a) a false and defamatory statement concerning another; (b) an unprivileged

communication to a third party;[10] (c) fault amounting at least to negligence on the part of the publisher;[11] and (d) either actionability of the statement irrespective of harm or the existence of special harm caused by the publication." Restatement (Second) of Torts § 558 (1977). As previously noted, when the communication concerns allegations of criminal behavior or unfitness to perform a job, which are *not* true, the communication is slander *per se*, and proof of special damages is not required. In the event the statements were true, truth is, of course, a complete defense.

Generally, defamation actions involve intentional communications that are false and injurious to another's reputation or good name. And, when brought against a public official or a public figure, the plaintiff must prove that the defamatory statement was made with "actual malice – that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964). For the average citizen who leads a private life, however, published statements that are false and injurious and made with mere negligence are usually sufficient for recovery. Calor was not a public figure or elected official, so her burden on the slander claim—absent application of the qualified privilege, a matter we will address momentarily—would normally have required her to prove only that the statements were false and at least negligently made.

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[10] The instruction given contained no reference to unprivileged communications.

[11] The instruction given required only negligence.

Here, KDMC could argue from its investigation that 670 hours of Calor's claimed work were unsubstantiated by its departments' records.[12] This, however, left KDMC subject to the argument that it could not conclusively prove—against Calor's contradictory evidence—that Calor did not work all the hours she billed. Calor's evidence portrayed KDMC's investigation of her time billing as a sham, asserting essential personnel present during her work time were not interviewed, nor were all the patient medical records made during the time periods involved actually reviewed. Yet, it made statements to Staff Care to the effect that Calor had falsified her time records.

KDMC and Staff Care, however, did have a common business interest in the accurate reporting of Calor's work hours. KDMC didn't want to pay Staff Care for hours she didn't work, and Staff Care didn't want to pay Calor and her malpractice premiums for hours she didn't work. This common interplay between the KDMC and Staff Care supported the assertion of the qualified privilege for the communications.

Merely asserting the existence of a business relationship justifying the privilege, however, does not absolve one of potential liability, as the privilege is qualified and conditions must be met before it can be used as a bar. Admittedly, the question of the existence of such a privilege is a question of

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[12] The real issue was not whether she had actually overbilled exactly 670 hours, but whether she falsified her work time billing, i.e., as stated in the instruction used at trial, "the defendant, Paul McDowell, made a statement to Staff Care to the effect that Dr. Calor falsified her time records . . . .".

law. And, KDMC showed a common interest with Staff Care, which is sufficient to show existence of the privilege.

However, the privilege is qualified—not absolute—and its protection may be lost through actions of a defendant which constitute abuse of the privilege. Thus, "qualified privileges must be exercised *in a reasonable manner and for a proper purpose.* [And,] immunity is forfeited if the defendant steps outside of the scope of the privilege, or abuses the occasion." *Tucker v. Kilgore*, 388 S.W.2d 112, 115 (Ky. 1964) (*quoting* Prosser On Torts, 626 (2d ed. 1955)); *see also* Restatement (Second) of Torts § 599 ("One who publishes defamatory matter concerning another upon an occasion giving rise to a conditional privilege is subject to liability to the other if he abuses the privilege.").

Thus, questions of fact can arise that control applicability of the privilege to a given claim (thus, the use of the adjective "qualified"). These questions of fact are qualifications, or conditions, which must be met to ultimately afford the defense. The practical effect is that once a privilege is in issue, the plaintiff must rebut the claim "by a showing that either there was no privilege under the circumstances or that it had been abused." *Columbia Sussex Corp., Inc. v. Hay*, 627 S.W.2d 270, 276 (Ky. App. 1982).

Abuse of the privilege can occur in a number of situations:

> The privilege may be abused and its protection lost by the publisher's knowledge or reckless disregard as to the falsity of the defamatory matter; by the publication of the defamatory matter for some improper purpose; by excessive publication; or by the publication of defamatory matter not reasonably believed to be necessary to accomplish the purpose for which the occasion is privileged.

Restatement (Second) of Torts § 596 cmt. a (*citing* §§ 600-605A). These latter two qualifications are often referred to collectively by reference to the "reasonable manner" of the communication. *See Kilgore*, 388 S.W.2d at 115 ("The condition attached to all such qualified privileges is that they must be exercised *in a reasonable manner* . . . .").[13]

As the Court noted in *Weinstein v. Rhorer*:

> [S]o any good citizen, in good faith and upon reasonable grounds to believe that what he writes or speaks is true, if free from malice or ill will and actuated solely by his interest in the common [matter], may safely bring to the notice of those who hold any place as officials in the system any information that will enable them to perform with more efficiency their duties, and he will be protected as coming within the scope of qualified privilege, although the communication may be false as well as prima facie libelous. But if the person making the publication is prompted by actual malice or ill will towards the person concerning whom it is written or spoken, then the fact that it was believed to be true, or the fact that it was made in good faith, or the fact that it was made under circumstances that except for this malice would make it privileged, will not be allowed to save the person making the publication from the consequences of his act. When a person from malicious motives makes an attack upon the character of another, he puts himself beyond the protection that qualified privilege affords. . . . Further it is stated: "The plea of qualified privilege, as argued by counsel, does not present a question of law for the court. Of course, upon the pleadings, as well as upon the evidence, the court may rule in these, as well as other actions, that the plaintiff has failed to make out his case, or that the pleadings are not sufficient; but when the petition is sufficient, and there is any evidence of actual malice or malice in fact, the case should go to the jury.

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[13] The "reasonable manner" often at issue in a defamation case is how the statement was communicated—i.e., only to those who share the common interest, not to the public at large—and whether it contained additional defamatory matter that was unnecessary to accomplish the purpose of the privilege. Here, KDMC made the communication only to Staff Care or employees involved in both businesses, so the communication was confined to only those people who were included in the qualified privilege. Similarly, the communication related only to Calor's billing and hours, which falls within the core of the interest shared by KDMC and Staff Care. Thus, as a matter of law, KDMC acted in a "reasonable manner" in the dissemination of the statements.

240 Ky. 679, 42 S.W.2d 892, 895 (1931) (internal citations omitted) (*quoting Tanner v. Stevenson*, 138 Ky. 578, 128 S.W. 878, 882 (1910)).

In other words, one might say "[t]he determination of the existence of a privilege is a matter of law. However, whether or not such has been waived is factual. [And, a] jury should be instructed accordingly." *Columbia Sussex*, 627 S.W.2d at 276; *see also Stringer*, 151 S.W.3d at 798 n.62 (Ky. 2004). But, more importantly, "[a]lthough the law presumes malice where publications are slanderous *per se*, yet where the publication is made under circumstance disclosing qualified privilege, it is relieved of that presumption and the burden is on the Plaintiff to prove actual malice". *Rhorer*, 42 S.W.2d at 895. This higher burden is met only by proof establishing an abuse of the privilege.

Had this case involved slander only, the instruction contained in 2 John S. Palmore and Donald P. Cetrulo, Kentucky Instructions to Juries, Civil §40.10 (5th ed. 2006, release number 3, 2008), would suffice, as it incorporates the requirement of "abuse" into the instruction itself. Notably, this instruction, however, does not reflect all possible ways of abusing the privilege, listing only two of the four categories of abuse previously described. A proper instruction would reflect the relevant category of "abuse" applicable in a given case. And here, such an instruction would have put Calor in the position of having to prove that KDMC did abuse the privilege.[14]

Calor's proof raises factual issues as to whether KDMC was acting for a proper purpose and whether it knew the statements were false, or acted in

[14] KDMC did tender such an instruction on the privilege.

reckless disregard of whether they were false or not, requirements this Court's cases have usually referenced as whether the statements were "in good faith." *National Collegiate Athletic Ass'n By and Through Bellarmine College v. Hornung*, 754 S.W.2d 855, 860 (Ky. 1988) ("The NCAA was entitled to assert 'in good faith' its right of announcer approval."). She offered proof that KDMC failed to adequately investigate its claims because it had no conclusive evidence she had falsified her records, that it had not interviewed all possible witnesses concerning whether she had been in the hospital during those times, had not reviewed all the department records, and the investigation had not been finalized by the time McDowell's made the initial statement. Calor also offered proof that KDMC had an interest in ending her work as a *locum tenens* physician (as evidenced by their simultaneous recruitment of her to become a permanent – and thus less expensive – member of the hospital staff).

However, as alluded to by Dr. Iyer, medical staff and nurses cannot generally remember the multitude of procedures, timing, and personnel they encounter working with various patients over an extended period of time. Thus, the only way KDMC could credibly attempt to establish the procedures performed and Calor's presence per shift was by reference to records created at the time. Such records are generally designed to record who was where, what they did, and how and when they did it.

Thus, it would be unfair to say categorically as a matter of law that KDMC failed to adequately investigate its claim and had no evidence either way about the hours it disputed when, in fact, its internal investigation appears to

have been triggered, or at least influenced by, Staff Care's original concerns and a discrepancy was disclosed by its investigation of its records compiled at the times in question. And, unless the statement is one made in reckless disregard of the available facts, the conditional privilege is based upon one's reasonable belief—not whether the statement was incorrect. "[T]he public interest requires that expressions of suspicions founded upon facts detailed and prudently made in good faith and as confidentially as circumstances will permit . . . do not give rise to an action for slander against the person expressing his suspicions." *Dossett v. New York Min. & Mfg. Co.*, 451 S.W.2d 843, 846 (Ky. 1970).

In *Columbia Sussex*, several of the workers were called together following a theft and directed by their employer to submit to a polygraph examination after having been told that the owners "definitely felt that one of them . . . was involved in the crime." 627 S.W.2d at 273. Each then participated in the polygraph examinations but none of the results established any connection between the workers and the robbery. A suit was then filed by one of the workers alleging numerous causes of action, including slander and punitive damages. Considering the matter, the Court noted that, "the words challenged conveyed the strong assertion that either [one or the other] of the employees working . . . was implicated in the robbery, a criminal offense. Standing alone, those words must be held slanderous *per se*." *Id.* at 274. However, the court reversed the employees' judgment, noting:

> Under the circumstances of the facts presented, a qualified privilege did exist. A robbery had occurred at appellants' place of

> business, which robbery carried certain indicia of having been an inside job. It was not, therefore, unexpected for appellants to have engaged in their own investigation, bounded by the standard of reasonableness.

Id. at 275. The court could do so because there was no reasonable factual issue of an abuse of the privilege.[15]

Here, the evidence would support that both Staff Care and KDMC were concerned. Early on, Staff Care noticed two of Calor's PWRs that raised suspicion. Staff Care then called KDMC, triggering its suspicions, which resulted in the failed attempt to change their record-keeping procedure to resolve the question and, later, the Lane report based on the records from the various departments Calor worked in. Communications thereafter were restricted to KDMC and Staff Care.

However, the trial court's instruction provided no guidance for the jury on the qualified privilege available, absent abuse. In fact, the defamation/slander instruction merely required the finding:

> (1) that the defendant, Paul McDowell, made a statement to Staff Care to the effect that Dr. Calor falsified her time records; and
>
> (2) that said statement would tend to expose a person to public hatred, ridicule, contempt, or disgrace or induce an evil of her in the community; and
>
> (3) that said statement was not substantially true; and

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[15] It is instructive here that the court in *Columbia Sussex* reversed the underlying slander award, as well as the award for punitive damages, which exceeded the compensatory award. Thus, it implicitly recognized that a finding of punitive conduct is not a sufficient substitute for a finding of abuse sufficient to obviate application of a qualified privilege. *Id.* at 276-78.

(4) that the defendant, Paul McDowell, failed to exercise ordinary care to determine whether said statement was substantially true.

Plainly, no instruction was given by which the jury could properly determine the applicability of the privilege, as given "the qualitative differences between negligence and recklessness, the former consisting of a failure to exercise ordinary care, and the latter consisting of a conscious indifference, we doubt that an allegation of simple negligence gives notice that recklessness is charged." *Hoke v. Sullivan*, 914 S.W.2d 335, 339 (Ky. 1995).[16]

This difference is significant as slander in private matters ordinarily requires no proof of recklessness, only mere negligence in the dissemination of the statement, whereas the existence of a relationship supporting the privilege requires recklessness, or some other form of abuse to lose it.

Thus, one could say the existence of the privilege implicitly raises the bar on the "knowledge of falsity" level to that recognized under other circumstances by *New York Times Co.*, 376 U.S. at 280 ("That is, with knowledge that it was false or with reckless disregard of whether it was false or not."), albeit for other reasons and in other ways. *See Rhorer*, 42 S.W.2d at 895 ("[H]e will be protected as coming within the scope of

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[16] KDMC and McDowell's tendered instruction on the privilege stated:

> Are you satisfied from the evidence that the statement was made in good faith, with the reasonable belief that the statement was true and on a subject which [KDMC] had an interest and that [Staff Care] had a corresponding interest?

qualified privilege, although the communication may be false as well as prima facie libelous."); *see also Lever v. Community First Bancshares, Inc.*, 989 P.2d 634, 639 (Wyo. 1999) ("Malice is a necessary element to move the communication out from under the protective doctrine of conditionally privileged communication."); *Turner v. Halliburton Co.*, 722 P.2d 1106, 1113 (Kan. 1986) ("Where a defamatory statement is made in a situation where there is a qualified privilege the injured party has the burden of proving not only that the statements were false, but also that the statements were made with actual malice—with actual evil-mindedness or specific intent to injure.") (internal quotations omitted); Restatement (Second) of Torts § 596 cmt. a (citing §§ 600–605A) ("The privilege may be abused and its protection lost by the publisher's knowledge or reckless disregard as to the falsity of the defamatory matter . . . ."). This is because the privilege, if applicable, protects one's erroneous belief. *See Rhorer*, 42 S.W.2d at 895.

Thus, the failure to give the instruction was error and we cannot find it to be harmless as this failure could have contributed to the finding of a slanderous act under an inappropriate standard, which could then have supported a finding of intentional interference as the act of slander could then be considered by the jury in regards to whether KDMC "improperly interfered" under the intentional interference claim. Lay jurors could easily find that slandering someone is an "improper interference." One need only read the instruction on intentional

interference to see how the finding of slander could also support and lead to a finding of intentional interference.[17] The punitive damage claim, of course, hinged on a finding of slander or intentional interference, or both.

B. Intentional Interference and the Privilege

The claim for intentional interference must be reviewed in the same light[18] as it, too, is subject to the same privilege. *See National Collegiate Athletic Ass'n*, 754 S.W.2d at 858 ("Even if evidence is presented which would

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[17] The court's intentional interference instruction read:

> Dr. Calor alleges that the Defendants, Paul McDowell and Ashland Hospital Corporation d/b/a Kings Daughters Medical Center intentionally interfered with her contract with Staff Care, Inc. You are hereby instructed that one who intentionally and improperly interferes with the performance of a contract between another and a third person by inducing or otherwise causing the third person not to perform the contract, without reasonable justification for doing so, is subject to liability to the other for the loss resulting to the other from the failure of the third person to perform the contract.
>
> In determining whether the Defendants' conduct in intentionally interfering with a contract relation of another is improper or not, or without reasonable justification, you must give consideration to the following factors:
>
> (a) the nature of the actor's conduct;
> (b) the actor's motive;
> (c) the interests of the other with which the actor's conduct interferes;
> (d) the interests sought to be advanced by the actor;
> (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other;
> (f) the proximity or remoteness of the actor's conduct to the interference; and
> (g) the relations between the parties.

[18] The evidence used by Calor to support the slander claim is the same evidence used to establish that KDMC acted without reasonable justification in her intentional interference claim. It is also the same evidence used to support her punitive damages claim.

otherwise make a submissible case, the party whose interference is alleged to have been improper may escape liability by showing that he acted in good faith to assert a legally protected interest of his own."); *see also Lever*, 989 P.2d at 640 ("Lever's claim [for intentional interference] is inextricably intertwined with his position that Anderson's comments were slanderous. . . . [T]hose comments were a privileged communication, and there was no evidence in the record that Anderson acted with any malice in making the statements."); *Jones v. Lake Park Care Center, Inc.*, 569 N.W.2d 369, 376 (Iowa 1997) ("Iowa recognizes the existence of a qualified privilege protecting corporate fiduciaries from personal liability for interference with corporate business relations."); *A & B-Abell Elevator Co. v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council*, 651 N.E.2d 1283, 1294 (Ohio 1995) ("The question here . . . is whether the actual-malice standard required to defeat a qualified privilege in a defamation claim . . . must also be met for tortious interference . . . based on the same protected conduct or statements. We hold it does."); *Nordling v. Northern States Power Co.*, 478 N.W.2d 498, 506 (Minn. 1991) ("Justification or privilege is a defense to an action for tortious interference and justification is lost if bad motive is present."); *Turner*, 722 P.2d at 1117 ("[W]e hold [for purposes of a claim of tortious interference] that such communication is subject to a qualified privilege which requires the plaintiff to prove actual malice by the defendant in making such communication."); *Arlington Heights Nat. Bank v. Arlington Heights Federal Sav. & Loan Ass'n*, 229 N.E.2d 514, 518 (Ill. 1967) ("[I]n a tort action for interference with contract wherein the alleged wrongful conduct is

conditionally privileged, the plaintiff must show actual malice on the part of the defendant in order to sustain such a cause of action."); *Lloyd v. Quorum Health Resources, L.L.C.*, 77 P.3d 993, 1002 (Kan. Ct. App. 2003) ("Occasions privileged under the law of defamation are also occasions in which interference with contractual relations may be considered justified or privileged.").

Given her proof, Calor also claims the Court of Appeals erred in holding that KDMC was entitled to judgment as a matter of law on the intentional interference claim. KDMC, on the other hand, asserts its entitlement to the qualified privilege, at least by instruction. As discussed previously, whether KDMC was entitled to the privilege, in this instance, is a factual question concerning whether the privilege had been abused (and thus lost), not one of law as in *Hornung*, 754 S.W.2d at 858 ("Our law is clear that a party may not recover . . . in the absence of proof that the opposing party "improperly" interfered with his prospective contractual relation."), or *Cullen v. South East Coal Co.*, 685 S.W.2d 187, 190 (Ky. App. 1983) ("In order to arrive at an improper interference conclusion we must consider South East Coal Company's motive, the interest that it is trying to advance or protect, the nature of its conduct, the means used to interfere, and whether or not the interference was based upon malice.").

Since the Court of Appeals' holding with regard to the interference claim was that KDMC was also entitled to the privilege as a of matter law, this

holding, too, was incorrect. Nor was KDMC entitled to a directed verdict on this claim.[19]

The instruction on the intentional interference claim required the jury to find that KDMC intentionally caused Staff Care not to perform its contract with Calor[20] and that KDMC had no reasonable justification to do so. In making its determination, the jury was directed to consider several factors, including the relationship between the parties and whether they "improperly interfered," a somewhat lower standard than one is entitled to under the qualified privilege. And, under the instructions given, the jury could properly consider its finding of slander in gauging whether KDMC's conduct was improper on the interference claim to the point that it was not justified in communicating the slanderous statement to Staff Care. And, although we might reach different conclusions from the evidence, the jury did find that KDMC intentionally and improperly interfered with Calor's contract with Staff Care.

However, given this potential "domino effect"—where communications form the predicate for separate claims of slander and intentional interference—we cannot find that the failure to properly charge the jury on the qualified privilege was harmless, for "[e]ven if evidence is presented which would

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[19] Here, Calor's evidence, when viewed in a light most favorable to her as we must, created a factual question of malice (i.e., abuse and consequent loss of the privilege supported by her evidence that KDMC's communications may have been for an improper purpose or with reckless disregard for its truth or falsity).

[20] Although she continued to work for them at other facilities, Staff Care did not pay her the last $59,050 she claimed due from her work at KDMC.

otherwise make a submissible case [as here], the party whose interference is alleged to have been improper may escape liability by showing that he acted in good faith to assert a legally protected interest of his own." *National Collegiate Athletic Ass'n*, 754 S.W.2d at 858; *see also Lever*, 989 P.2d at 640 ("Lever's claim [for intentional interference] is inextricably intertwined with his position that Anderson's comments were slanderous."). And, given that the privilege is *not* one for the jury to ignore, *except* upon a finding of waiver by abuse, and that, each claim essentially arose from the same facts, the qualified privilege instruction should have been given in such a manner as to apply to *both* the slander and the intentional interference claims. And, in instances such as this, to avoid any "domino effect," it should precede both. Therefore, we also reverse the Court of Appeals on the intentional interference claim.

On retrial, the court should include the following instruction (and interrogatory) prior to the defamation and intentional interference instructions:

> Are you satisfied from the evidence that King's Daughters Medical Center's statements were made in good faith and for a proper purpose, with the reasonable belief that the statement was true and on a subject which King's Daughters Medical Center had an interest and that Staff Care, Inc., had a corresponding interest?
>
> If you answered the question immediately above "YES," do not answer any of the questions contained in the remaining instructions and report to the Bailiff that your deliberations are concluded. If you answered the question above "NO," please proceed to the next instruction.

Having found cause to reverse the opinion of the Court of Appeals, and having found error sufficient to remand for a new trial consistent with this

opinion, we will only address such other issues of the parties as could sway an opinion in their favor or are capable of repetition on retrial.

C. Opinion/Truth

KDMC argues that it is entitled to judgment in its favor because the statements made to Staff Care were either the opinion of McDowell or were true. KDMC claims that these are questions of law which are always reviewable *de novo*. Its arguments to the trial court in this regard, however, were somewhat cursory, and made more in passing as it argued at length regarding the qualified privilege.

KDMC argues that McDowell's statements must be regarded as merely a statement of his opinion of what the investigation would show, as the investigation was not wrapped up until several days after he made the statements. To support this, KDMC references the testimony of Staff Care employee Brian Lund that McDowell said "they believed that she was misrepresenting her overtime hours," and that "they had conducted an investigation and come to the conclusion that she had been overbilling for these." Lund felt it was an opinion.

However, the fact that a statement is prefaced with language such as "I believe" or "I think" does not automatically render it an opinion, as defamatory statements can be embedded in a literally true statement and can still give rise to liability:

> Several kinds of statements may be literally or formally true yet contain an explicitly false and defamatory statement. . . . In all such cases the defamatory statement may do its dirty work even though the non-defamatory portion of the statement is true. If

> truth is to be a defense in such cases, it must be truth as to the defamatory sting.

2 Dan B. Dobbs, *The Law of Torts* § 410, at 1150 (2001). Additionally, the statement as testified to by Lund is on its face subject to interpretation, since much of it was not prefaced with the language of opinion or belief.

Lund's perception that the statements were "opinion" is also not conclusive, since other employees of Staff Care viewed the statements as factual assertions. Luckner testified that McDowell had told her on June 21, 2002 that Calor *was* falsifying her time records, and that she took this as a statement of fact, with McDowell also telling her that KDMC had investigated Calor for months. When Luckner asked why she had not been told this earlier, McDowell told her KDMC had not been able to prove it then. A note made contemporaneously by Luckner noted, "He explained they are releasing Dr. Mary Beth Calor as of today due to her falsifying timesheet in hours worked and overtime." This note clearly indicated she took the statement as fact.

Regardless of how these two witnesses viewed McDowell's statements, their testimony creates, at best, a question of fact as to the nature of McDowell's statements. The jury found that the statements were false, and in light of the actions of KDMC in withholding payments to Staff Care, there was a reasonable basis to believe that the statements were more than mere opinion. Given the conflicting evidence, the trial court could not have properly directed a verdict on the absolute privilege of opinion.

Likewise, this Court cannot make a finding on the defense of truth given the factual disputes. While KDMC offered testimony from other

anesthesiologists at the hospital that it was "very unlikely" that Calor could have worked the hours she claimed, it was simply unable to prove conclusively to the jury that Calor did falsify her records. Thus, we cannot say, based upon the evidence, the jury was clearly erroneous in finding the statements to be false. Thus, we find no error here.

III. Conclusion

For the foregoing reasons, the opinion of the Court of Appeals is reversed, and this matter is remanded to the Boyd Circuit Court for further proceedings consistent with this opinion

Cunningham, Schroder, and Scott, JJ., concur. Venters, J., concurs in result only by separate opinion. Noble, J., concurs in part and dissents in part by separate opinion in which Minton, C.J., joins. Abramson, J., not sitting.

VENTERS, J., CONCURRING IN RESULT ONLY: I concur in result only. I do not agree that a claim of interference with a contractual relationship requires an instruction on the privilege defense and I do not agree that the privilege instruction for the defamation claim must precede the substantive instruction on defamation. I agree only that omitting the privilege instruction from the defamation instruction so affected the verdicts as to require a retrial of the whole case. Except for the conclusion that the trial court erred in failing to provide a privilege instruction with respect to defamation, none of the views expressed in this case gained the support of a majority of the Court and therefore cannot be regarded as binding precedent for future cases.

NOBLE, J., CONCURRING IN PART AND DISSENTING IN PART: I agree with the plurality that the Court of Appeals erred in finding the existence of a common business interest privilege that barred Calor's tort claims. Because the failure to give the qualified privilege instruction was harmless, however, I dissent. Though the jury was not instructed on the privilege, it nevertheless made certain factual findings incompatible with the privilege, which may be waived or lost through abuse. Specifically, the jury's findings necessarily mean that KDMC abused and thereby waived the privilege as to both her slander and intentional interference with a contract claims. Thus, I agree that the Court of Appeals should be reversed, but this case should be remanded for reinstatement of the original judgment, not a retrial.

I. Defamation and the Privilege

Calor's defamation claim arose in the business context of her employment through Staff Care as a physician at KDMC through statements made by its agent to the effect that she had falsified her time records at the hospital. Because such statements tend to "impute crime" or "unfitness to perform duties of office," she correctly argued, and the trial court properly agreed, she was entitled to prove her case as slander *per se*. *See Courier Journal Co. v. Noble*, 251 Ky. 527, 65 S.W.2d 703 (1933). As a *per se* action, her slander claim entitled her to a presumption of damages and she could "'recover without allegation or proof of special damages.'" *Stringer v. Wal-Mart Stores, Inc.*, 151 S.W. 3d 781, 794 (Ky. 2004) (quoting *Hill v. Evans*, 258 S.W.2d 917, 918 (Ky. 1953)). To defend against a slander *per se* action, KDMC was

required to prove that the statements were true (truth is a complete defense even if stated with bad faith or ill will), mere opinion, or that it was entitled to application of a qualified privilege under the facts of the case.

In this case, KDMC could not account for 670 hours of Calor's claimed work, which left it unable to prove or disprove that she had worked them. KDMC (through McDowell) intentionally made statements to Staff Care to the effect that Calor had falsified her time records. It could not prove the truth of the statements made about Calor, and thus did not have a complete defense.

As an alternative to the defenses of truth and opinion, KDMC claimed a qualified privilege stemming from a common business interest with Staff Care which required it to make the allegedly defamatory statements to Staff Care in promotion of that interest, and requested an instruction on the privilege which the trial court did not give. The Court of Appeals held that KDMC was entitled to the defense as a matter of law and should have been given a directed verdict.

Admittedly, KDMC and Staff Care did have a common interest in the accurate reporting of Calor's work hours. KDMC did not want to pay for hours she did not work, and Staff Care did not want to pay malpractice premiums for hours she did not work. This common interest allowed KDMC to assert a qualified privilege to the communication. The privilege is only applicable where the statements made were defamatory; otherwise, there is no need to resort to such a defense. In fact, KDMC specifically argued in its summary judgment motion that the trial court could assume the statements were defamatory in evaluating the privilege.

The Court of Appeals erred, however, in holding that all questions related to the privilege can be decided as a matter of law and that merely asserting the privilege relieved KDMC of any liability. The privilege is qualified, and conditions must be met before it can be used to bar a claim. The question of the existence of a qualified privilege is a question of law, which KDMC proved by showing a common interest with Staff Care. However, the privilege is not absolute, and its protection may be lost through a defendant's actions that constitute abuse of the privilege. Thus, there are questions of fact that control applicability of the privilege to a given defamatory statement (thus the use of the adjective "qualified"). Those questions of fact are qualifications or conditions that must be met to afford a defense.

The practical effect of this is that once a privilege has been placed in issue, the plaintiff must rebut the claim "by a showing that either there was no privilege under the circumstances or that it had been abused." *Columbia Sussex Corp., Inc. v. Hay*, 627 S.W.2d 270, 276 (Ky. App. 1981). "[A]ll such qualified privileges must be exercised *in a reasonable manner and for a proper purpose.* The immunity is forfeited if the defendant steps outside of the scope of the privilege, or abuses the occasion." *Tucker v. Kilgore*, 388 S.W.2d 112, 115 (Ky. 1964) (quoting Prosser On Torts 626 (2d ed. 1955)); *see also* Restatement (Second) of Torts § 599 (1977) ("One who publishes defamatory matter concerning another upon an occasion giving rise to a conditional privilege is subject to liability to the other if he abuses the privilege.").

Abuse of the privilege occurs in a number of situations:

> The privilege may be abused and its protection lost by the publisher's *knowledge or reckless disregard as to the falsity of the defamatory matter*; by the publication of the defamatory matter for some improper purpose; by excessive publication; or by the publication of defamatory matter not reasonably believed to be necessary to accomplish the purpose for which the occasion is privileged.

Restatement (Second) of Torts § 596 cmt. a (1977) (citing §§ 600-605A) (emphasis added).

Whether the privilege is waived or abused, however, is a question properly submitted to a jury. To this extent, I agree with the plurality. KDMC tendered an instruction reflecting that idea, but the trial court did not give it and thus erred.[21]

Such an instruction would have put Calor in the position of having to prove that KDMC abused the privilege, whether by not acting in a reasonable manner when it made the defamatory statements, by acting for an improper purpose, or by acting with reckless disregard or knowledge of the falsity of the statements. Her proof generally consisted of evidence that KDMC did not do a reasonable investigation of her time sheets, that it knew when it made the statement that it could not prove it, that it did not want to pay her for all the hours she worked, that it used this conflict to its advantage by not paying on

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[21] Though KDMC's proposed instruction treated the privilege separately from the elements of slander, the better instruction would be similar to the example in 2 *John S. Palmore and Donald P. Cetrulo, Kentucky Instructions to Juries, Civil* § 40.10 (5th ed. 2006 & release no. 3, 2008), which incorporates the "abuse" into the slander instruction itself. However, Palmore and Cetrulo's instruction does not reflect all of the possible ways of abusing the privilege, listing only two of the four described above, and a proper instruction would reflect the relevant category of "abuse" applicable to a given case.

other contracts it had with Staff Care, and that even after beginning to question her timesheets it continued to try to hire her on staff to reduce the cost of the *locum tenens* contracts.

The "reasonable manner" at issue in a defamation case is how the statement was communicated—i.e., only to those who share the common interest, not to the public at large—and whether it contained additional defamatory matter that was unnecessary to accomplish the purpose of the privilege. Here, KDMC made the communication only to Staff Care or employees involved in both businesses, so KDMC could reasonably argue that the communication was confined to only people who were included in the qualified privilege. Similarly, the communication related only to Calor's billing and hours, which falls within the core of the interest shared by KDMC and Staff Care.

The proof Calor introduced at trial, however, does go to whether KDMC was acting for a proper purpose or in reckless disregard or with knowledge of the falsity of the statements—or, as this Court's cases have usually described it, whether the statement was "in good faith"—any of which would waive the privilege. Calor offered proof that KDMC failed to adequately investigate its claims, since it had no evidence either way about the 670 hours it disputed; had not interviewed witnesses about whether Calor had been in the hospital during those times; and the investigation was not completed when McDowell made the statements. Calor also offered proof that KDMC had an interest in ending her work as a *locum tenens* physician (as evidenced by their

simultaneous negotiations with her to become a permanent—and thus less expensive—member of the hospital staff).

The evidence used to prove the slander is the same evidence Calor used to establish that KDMC acted without reasonable justification in her intentional interference with a contract claim. More importantly, it is also the same proof used to establish at least reckless disregard in her punitive damages claim. KDMC had to defend against this same evidence on all the claims heard by the jury. KDMC was thus presented ample opportunity to persuade the jury to its version of events.

The jury did not hear this case in a vacuum, taking one count at a time. It heard all of the evidence before ever being instructed by the court. It found that KDMC had committed slander and intentional interference with Calor's contract. It also found that KDMC had acted with malice, oppression, or fraud, or with reckless disregard, and thus awarded punitive damages. Acting with malice, oppression, or fraud, or reckless disregard is incompatible with the common-interest privilege, as described above. Thus by making an explicit finding of malice, etc., the jury could not have found that the privilege would apply without having inconsistent verdicts.

Consequently, though an instruction should have been given on the qualified privilege, it was harmless here that it was not. The jury found for Calor under instructions that required the jury to find that KDMC acted not only with a lack of ordinary care (defamation), but without reasonable justification (intentional interference) and with malice or reckless disregard

(punitive damages), all on the same underlying facts. This fact pattern is one that requires a jury to judge credibility, since Calor claimed KDMC acted in bad faith, and KDMC claimed justification. This factual determination is not a question for an appellate court, and the jury verdict should not be disturbed absent legal grounds which are prejudicial. Because a jury has already made findings showing what would amount to abuse of the privilege, which would thereby preclude KDMC from claiming it, there was no prejudice. Any failure to give the instruction, then, was harmless.

II. Intentional Interference with a Contract

Calor also claims the Court of Appeals erred in holding that KDMC was entitled to judgment as a matter of law on the intentional interference with a contract claim because its entitlement to the qualified privilege against the slander claim undermined the claim that its behavior was improper. Again, I agree with the plurality on this limited point. As discussed above, whether the privilege gave KDMC immunity was ultimately a fact question, not a question of law. Since the Court of Appeals' holding with regard to the interference depended on its erroneous holding that KDMC was entitled to the privilege as a matter of law, that holding too was incorrect.

The plurality concludes that the common-interest privilege was also applicable to this tort claim and that failure to instruct on it was prejudicial error. Unlike the plurality, I think the failure to instruct the jury on the privilege as a possible bar to the interference claim was harmless.

Again, the failure to give the instruction was rendered harmless by the jury's finding under the punitive damages instruction. As the plurality admits, at least in the cases it cites about the applicability of the privilege, proof of malice defeats the privilege. *Ante*, slip op. at 25-26 (citing, among others, *Lever v. Community First Bancshares, Inc.*, 989 P.2d 634, 639 (Wyo. 1999) (holding that malice "move[s] the communication out from under the protective doctrine of conditionally privileged communication"); *A & B-Abell Elevator Co. v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council*, 651 N.E.2d 1283, 1292 (Ohio 1995) (holding the privilege is "defeated" by a showing of malice)). And according to the Restatement, which the plurality also cites as authority for the privilege, "reckless disregard" also waives the privilege. *See* Restatement (Second) of Torts § 596 cmt. a. (1977).

III. Punitive Damages

The key to this case is the jury's finding under the punitive damages instruction. In imposing punitive damages under the instruction given, the jury was required to find malice, fraud, or oppression, or reckless disregard on the part of KDMC. Simple logic dictates that if the jury found that the facts of this case constituted such bad intent, there can be no question that its finding on a qualified privilege would be that there was bad faith, a somewhat lesser standard. The jury did in fact find malice or reckless disregard here, and that is comprehensive. There can be no reasonable argument that it would have held differently, thereby creating an inconsistent verdict.

The plurality, of course, claims that the jury's finding on the tort claims necessarily tainted its finding on the punitive damages claim, which makes the failure to give complete instructions (i.e., describing the privilege) on them prejudicial. But this domino-effect approach assumes that the jury acted unreasonably—or, worse still, *speculates* that the jury may have acted unreasonably. Otherwise, there is no reason to discard the factual findings under this instruction. Unless we are willing to say that the jury's punitive damages findings were flawed, as being unsupported by the evidence or the product of inflamed passions, we cannot ignore them.

But the evidence was in fact placed before the jury, and the jury chose the version of facts that it found most credible. To that extent, the jury had the opportunity to consider facts that would have supported applications of the qualified business privilege, but did not make that finding. Merely letting the jury hear that they could apply a privilege cannot reasonably be thought to have significant weight on its findings of fact. The facts are what they are, and the jury considered them. The jury found that KDMC made the communication knowing it could not support it, and that fact constituted the necessary bad faith element of the qualified privilege. I cannot say that the factual findings of the jury are clearly erroneous. We must assume that any finding the jury would have made under proper privilege instructions would have been consistent with the finding that this jury actually made. The only such compatible finding would be that KDMC abused its common-interest privilege.

Thus, the only reasonable conclusion is that the failure to give proper privilege instructions in this case was not prejudicial and thus was harmless.

IV. Conclusion

I cannot agree with the plurality that there was harm to KDMC because the qualified privilege instruction was not presented to this jury. The jury made adequate findings to negate the privilege if such an instruction had been given. To hold that the jury would—or *could*—have found otherwise if it had only been told that a privilege could apply is nothing more than disagreeing with the jury's findings of fact, which an appellate court cannot do unless such findings were clearly erroneous. There being sufficient evidence to support the jury's findings of fact, this Court must give the proper deference. Failing to instruct on the qualified privilege was harmless. I would reverse and remand for imposition of the original judgment.

Minton, C.J., joins.

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MARY BETH CALOR, M.D. — APPELLANT/CROSS-APPELLEE

V.

ON REVIEW FROM COURT OF APPEALS
CASE NO. 2006-CA-000395-MR
BOYD CIRCUIT COURT NO. 02-CI-01131

ASHLAND HOSPITAL CORPORATION, D/B/A KING'S DAUGHTER MEDICAL CENTER; AND PAUL MCDOWELL — APPELLEES/CROSS-APPELLANTS

ORDER GRANTING PETITION FOR REHEARING AND WITHDRAWING AND REISSUING OPINION

The petition for rehearing filed by the Appellant is hereby granted.

The Opinion of the Court by Justice Noble, rendered August 26, 2010, is hereby withdrawn and the attached Memorandum Opinion of the Court is reissued in lieu thereof.

Abramson, J., not sitting.

ENTERED: September 22, 2011.

CHIEF JUSTICE