IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 23-1794

POLK COUNTY NO. LACL155126

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LINDA BETZ,
Plaintiff-Appellant

v.

REBECCA MATHISEN, ERIC MULLER, KELLY RASMUSSEN, AND MICHAEL WILSON
Defendants-Appellees.

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APPEAL FROM THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY
THE HONORABLE PATRICK SMITH

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REPLY BRIEF OF APPELLANT

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PROOF OF SERVICE & CERTIFICATE OF FILING

On May 30, 2024, I served this proof brief on all other parties by EDMS to their respective counsel.

I further certify that I did file this proof brief with the Clerk of the Iowa Supreme Court by EDMS on May 30, 2024.

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I. Introduction

The Defendants spend little space in their brief on whether the discovery rule should apply to defamation cases, instead focusing on why Betz should be disallowed from pursuing her case now. The main thrust of their argument is that Betz should be barred from litigating claims that she either did litigate or that she should have litigated in her prior case. (Appellees' Br., at 31). This case, however, is nothing like a "second bite at the apple," but is rather, a distinct defamation lawsuit alleging the Defendants made false statements about Betz in her capacity as Chief Information Security Officer of the Federal Home Loan Bank of Des Moines ("FHLBDM").

Defendants attempt to lend legitimacy to the defamatory statements by referring to them as part of a "whistleblower" complaint and an ensuing "investigation." The alleged "whistleblower," Mathisen, was in fact not disclosing anything illegal but was instead making false statements about Betz to protect her own job. (App. v. I p. 9, Pet., at ¶ 18-26). Mathisen's complaint against Betz deflected from a crucial mistake Mathisen made—failure to perform certain SOX controls—which Mathisen knew to be a critical failure, so critical in fact that she feared she would lose her job. (App. v. I p. 9, Pet., at ¶ 18-26). Rasmussen, Muller, and Wilson accepted Mathisen's false

statements at face value, and in fact encouraged them. Based on the deficiency of their investigation of Mathisen's complaint, the only possible conclusion is that they intended to avoid the truth, not find it. (App. v. I p. 10, Pet., at ¶ 30-32). Their investigation and communications with the board of directors doubled down on Mathisen's original defamation. The investigation and post complaint communications amplified and perpetuated Mathisen's initial falsehood. (App. v. I p. 13, Pet., at ¶ 37).

In contrast with this case, the prior action (federal Case No. 4:21-cv-00022 (S.D. Iowa)) ("the federal case")) was about sexist comments made by an independent contractor who supervised Plaintiff's employment at the "FHLBDM". That independent contractor, Zeeshan Kazmi, is not a party to this action and no longer works for the FHLBDM. The federal case concerned Betz's complaint to human resources regarding sexist actions and comments to her including that "men's self-worth is tied to work, and if they don't deliver, this leads to integrity issues. Women have outside responsibilities, so this doesn't affect them." (App. v. II p. 13, First. Am. Pet., the federal case, at ¶ 21).

Betz challenged her discharge from FHLBDM in the federal case as based on sex discrimination from Kazmi and based on retaliation for complaining about him. Betz also claimed within the federal case that she

was defamed by the form 8-K that FHLBDM filed with the Securities and Exchange Commission following her termination which did not identify her termination as "without cause." (App. v. II p. 24, First. Am. Pet., the federal case, at ¶ 98). Any facts surrounding Kazmi and the 8-K have nothing at all to do with the petition in this litigation.

II. The Discovery Rule Should Be Applied

Defendants ignore the fact that the defamatory statements at the heart of this case, while made more than two years before the petition was filed, were completely unknown to Betz until after discovery in the prior suit disclosed the statements. The Defendants do not state a position on whether the Court should adopt the discovery rule in defamation cases, but state simply that the Iowa Supreme Court has not applied the rule to defamation claims. (Appellees' Br. at 28-29). This case is a textbook example of why the discovery rule should be extended to defamation claims.

The reason that is so is because Betz could not have known about the defamatory statements made about her at the time they were made or in the weeks and months that followed. (App. v. I p. 11, Pet. at ¶ 40). The facts alleged in the petition, which must be accepted as true, make this fact indisputable. *McGill v. Fish*, 790 N.W.2d 113, 115 (Iowa 2010). Those facts include:

- Mathisen, Betz's subordinate and direct report, was responsible for

a critical failure of internal SOX controls. (App. v. I p. 8, Pet. at ¶ 14).

- Betz followed her supervisor's direction regarding internal disclosure of the critical failure. (App. v. I p. 9, Pet. at ¶ 17).
- Mathisen thought she was going to be fired for her critical failure. (App. v. I p. 9, Pet. at ¶ 18).
- Mathisen made a confidential internal complaint against Betz in an effort to shift blame away from her and toward Betz. (App. v. I p. 9, Pet. at ¶ 18).
- The internal complaint contained falsehoods about Betz including that she had reported the SOX controls as effective (she had not) and that she was retaliating against Mathisen (she was not). (App. v. I p. 9, Pet. at ¶ 18-19).
- An investigation followed. (App. v. I p. 10, Pet. at ¶ 30).
- Betz was not interviewed during the investigation or informed of the fact of the investigation at any time before her discharge. (App. v. I p. 10, Pet. at ¶ 32).
- The bank CEO relied upon the complaint and the investigation in recommending Betz's termination to the Board while he repeated falsehoods about Betz to the Board. (App. v. I p. 11, Pet. at ¶ 37).

- Betz was never told of any of the above facts and had no basis to learn about them until discovery alerted her to these facts. (App. v. I p. 11, Pet. at ¶ 40).
- The first Betz could have learned of the facts that are the basis of this case according to the defendants is late April 2021. (Ruling, 10).

Where a person has no right or reason to know about an internal complaint such as the one made by Mathisen, to impute to the victim of the alleged defamation knowledge of the basis for a lawsuit deprives the victim of her right to both pursue legal remedies, but also to clear her name. This Court has recognized the reason for applying the discovery rule in other cases, namely that it is unfair to bar an otherwise actionable claim simply because a plaintiff was unaware of facts critical to the claim. *Mormann v. Iowa Workforce Development*, 913 N.W.2d 554, 566 (Iowa 2018).

III. Betz Cannot Know Facts Kept Hidden

Defendants lean heavily on the district court's ruling arguing that Betz was on "inquiry notice" of the defamation when she filed her first lawsuit on November 11, 2020. (Appellees' Br. at 29). In its submission to the district court, the bank admitted that the documents that first disclosed the defamatory statements to Betz were in productions to Betz's lawyers on April 23, 2021, and

April 30, 2021. (Ruling, 10). The district court held that "Even without access to the specific statements the Defendants uttered or wrote, Plaintiff was aware that FHLB employees 'made additional slanderous and libelous statements regarding Plaintiff's ability to perform her job or the surrounding circumstances of her termination.'" (Ruling, 10-11). The court also stated that had Betz not been aware of other potentially defamatory statements, she would not have made an allegation of defamation at all. (Ruling, 11).

There are several problems with the district court's conclusion that Betz's initial pleading suggests she was on inquiry notice of potential defamation claims. The defamation pleading in the first lawsuit (that was dismissed by the court on motion to dismiss) was very specifically related to the implications of a Form 8-K filed with the SEC. (App. v. II p. 24, First. Am. Pet., the federal case, at ¶ 98). The allegation in the petition that upon information and belief there were other statements "regarding Plaintiff's ability to perform her job or surrounding the circumstances of her termination…" says nothing of what *this* case is about. This case is not a wrongful termination case, nor is it a discrimination case. What Betz alleged in the prior case had to do with what was stated about her to federal regulators and agencies, and specifically related to her termination. She could not have known that the person she coached and mentored would make false statements about her in an attempt

to cover for her own failures.

The other reason inquiry notice makes no sense on these facts is because having a fair opportunity to know a fact as a basis for starting a statute of limitations must mean something. According to the Iowa Supreme Court, inquiry notice means being on "notice of all facts that would have been disclosed by a reasonably diligent investigation." *Hallett Construction Co. v. Meister*, 713 N.W.2d 225, 231 (Iowa 2006citing *K&W Electric, Inc. v. State,* 712 N.W.2d 107, 116 (Iowa 2006). Betz could not do anything to dislodge the fact of or the contents of internal complaints and communications without the benefit of formal discovery. There was simply no way for Betz to make a reasonable inquiry, and therefore no way for her to be on inquiry notice.

The district court relied on *Mormann v. Iowa Workforce Development*, 913 N.W.2d 554, 566 (Iowa 2018), observing that the Court refused to allow equitable tolling based on the discovery rule where the plaintiff was on notice of information sufficient to trigger the statute of limitations because he was, among other things, notified of the employment decision. (Ruling, 9-10). The facts in *Mormann* and this case are quite different. Not only was Betz completely ignorant of the complaint, but she was also oblivious to the investigation. (App. v. I p. 11, Pet. at ¶ 40). Had she been informed of the investigation, even then she would not have known the reason for it unless she

had been told. Betz was given none of that information and the ruling in *Mormann* is inapplicable.

Holding Betz to inquiry notice based on the facts of this case creates a false statute of limitations. Either she gets two years from learning of the defamation, or she does not. But holding her to a theoretical construct like inquiry notice is little more than fiction. This Court should not countenance a construct that dismisses a case based on the theory the plaintiff is aware of something about which she could not have been aware either in reality or in a parallel reality. Where there is no indication the victim did know, could know, or should have known of facts upon which to base a lawsuit, she should not be held to inquiry notice.

IV. Res Judicata Does Not Apply and Betz's Claims Should Survive

Defendants argue for preclusion of Betz's claims in this lawsuit based on the doctrine of res judicata. To prove the defense of res judicata, Defendants must show that: "(1) the parties in the first and second action are the same parties or parties in privity, (2) there was a final judgment on the merits in the first action, and (3) the claim in the second suit could have been fully and fairly adjudicated in the prior case (i.e., both suits involve the same cause of action)." *Pavone v. Kirke*, 807 N.W.2d 828, 836 (Iowa 2011). "The absence of any one of these elements is fatal to a defense of claim preclusion." *Id.*

Betz concedes that there was a final judgment on the merits in the federal case, and that action terminated in a judgment in favor of the defendants. Plaintiff also admits that Defendant Michael Wilson, who was CEO of the Bank during Plaintiff's employment there, was a party to the prior federal action at the very outset of that action) though he was dismissed in the federal court's ruling on a 12(b)(6) motion to dismiss prior to any discovery occurring between the parties). Betz disputes that the remaining defendants were parties or were in privity with the parties in the federal action, and, most important, disputes that the present case involves the same cause of action as the federal case.

Based on these standards, Defendants are limited to the face of the pleading initiating this case and any pleadings which this court recognizes through judicial notice.

a. With the exception of Mike Wilson, the prior judgment did not involve the same parties or their privies.

The parties of the two actions relevant to this dispute are as follows:

Prior Action	**This Action**
Linda Betz, Plaintiff v.	Linda Betz, Plaintiff v.

Federal Home Loan Bank Des Moines, Zeeshan Kazmi, Sunil Mohandas, and Mike Wilson	Rebecca Mathisen, Eric Muller, Kelly Rasmuson, and Michael Wilson

While Mike Wilson was a defendant in both actions, the remaining defendants were not parties to the first action. Defendants contend that Mathisen, Muller, and Rasmussen are in privity with the defendants named in the prior action because "claim preclusion principles have 'special applicability in suits against a principal or agent.'" (Def. Br., at 33) (citing *Peppmeier v. Murphy*, 708 N.W.2d 57, 63 (Iowa 2005)). Defendants argue that because Mathisen, Muller, and Rasmussen, as defendants in this action, are employees of the FHLBDM, a defendant in the prior action, they are in privity with a prior party, and therefore claim preclusion applies. This argument oversimplifies and misinterprets the law regarding privity and claim preclusion.

The employer/employee relationship, alone, does not constitute privity. "Not all government employees and officials are in privity with the government, however, just as not every employee is in privity with his or her employer. A city or village can act only through its mayor, manager, and council. Moreover, even persons in such clearly policy-making positions may not be in privity with the government." *Headley v. Bacon*, 828 F.2d 1272, 1276 (8th Cir. 1987); *see*

also Kimmel v. Iowa Realty Co., 339 N.W.2d 374 (Iowa 1983) (cited in *Headley* and as examining privity under the same Restatement sections). *Headley* held that:

> Section 51 of the Restatement, respecting vicarious liability, speaks more directly to the privity and res judicata issues. *That section notes that a judgment against an injured party which bars him from reasserting his or her claim against that defendant generally also extinguishes any claim he or she has against another person in a vicarious liability relationship with the first defendant*, but that a judgment in favor of the injured person is conclusive only as to the amount of damages when, as here, different rules govern the measure of damages in the two actions.

Headley, 828 F.2d at 1278 (emphasis added in italics). Thus, privity applies if Mathisen, Muller, and Rasmussen were in a vicarious relationship with FHLBDM.

Vicarious liability of an employer for the claim of defamation arises only when the employee acts within the scope of his or her employment. *See Stueckrath v. Bankers Trust Co.*, No. 6-931/06-0803, at 9 (Iowa Ct. App. Jan. 31, 2007) (analyzing whether an employee's statement was imputable to the Bank and holding it was not because it was not made within the scope of employment). "[F]or an act to be within the scope of employment the conduct complained of 'must be of the same general nature as that authorized or incidental to the conduct authorized' or 'necessary to accomplish the purpose of the employment and is intended for such purpose.'" (citing *Godar v. Edwards*,

588 N.W.2d 701, 705-06 (Iowa 1999)). Quoting the Restatement (Second) of Agency, the Iowa Supreme Court has listed the following factors "to be considered in determining whether conduct of an employee may be characterized as occurring within the scope of the employee's employment:

(a) Whether or not the act is one commonly done by such servants;

(b) The time, place and purpose of the act;

(c) The previous relations between the master and the servant;

(d) The extent to which the business of the master is apportioned between different servants;

(e) Whether nor not the act is outside the enterprise of the master, or, if within the enterprise, has not been entrusted to any servant;

(f) Whether or not the master has reason to expect that such an act will be done;

(g) The similarity in quality of the act done to the act authorized;

(h) Whether or not the instrumentality by which the harm is done has been furnished by the master to the servant;

(i) The extent of departure from the normal method of accomplishing an authorized result; and

(j) Whether or not the act is seriously criminal.

Godar, 588 N.W.2d at 706.

Further, "[c]omment a, concerning subsection (2), explains that the ultimate question in determining whether an employee's conduct falls within the scope of employment is 'whether or not it is just that the loss resulting from the servant's acts should be considered as one of the normal risks to be borne by the business in which the servant is employed.'" *Id.* (quoting Restatement (Second) of Agency § 229 cmt. A.). *Godar* also acknowledged that scope of employment is "ordinarily a jury question." *Id.*

Betz has alleged that Mathisen made a false complaint because she feared being fired herself, that Wilson encouraged and supported her complaint and made additional false statements about Betz, and that Rasmussen and Muller performed an investigation so deficient that the only end-goal was to support Wilson and Mathisen—not to discover the truth. (App. v. I pp. 9-11, Pet. ¶¶ 16-37). Reviewing the petition in the light most favorable to Betz, and accepting all well-pleaded facts as true, these abuses of the complaint and investigation process were not undertaken with the purpose or intent of furthering the interests of the FHLBDM and thus, at this stage, and without additional proof upon which Defendants can rely, the defamation alleged fell outside the scope of their employment.

Based on this analysis, Defendants have not met their burden of establishing the privity of Mathisen, Muller, and Rasmussen to the FHLBDM

named in the federal case. As Defendants must prove each of the three elements of res judicata to succeed in a res judicata defense, Defendants' motion to dismiss should be denied as to these defendants on this basis alone.

b. The two cases do not involve the same cause of action.

To determine whether the two cases assert the same cause of action, or whether the claims in this case could have been fully and fairly adjudicated in the prior case, this court must consider: "(1) the protected right; (2) the alleged wrong; and (3) the relevant evidence." *Pavone*, 807 N.W.2d at 837. However, the Supreme Court "carefully distinguish[es] between two cases involving the same cause of action—where claim preclusion bars initiation of the second suit—and two cases involving related causes of action—where claim preclusion does not bar initiation of the second suit. *Id.* According to the Restatement of Judgments, as quoted by *Pavone*,

> [A] single cause of action 'connotes a natural grouping or common nucleus of operative facts. Among the factors relevant to a determination whether the facts are so woven together as to constitute a single claim are their relatedness in time, space, origin, or motivation, and whether, taken together, they form a convenient unit for trial purposes. Though no single factor is determinative, the relevance of trial convenience makes it appropriate to ask how far the witnesses or proofs in the second action would tend to overlap the witnesses or proofs relevant to the first. If there is a substantial overlap, the second action should ordinarily be held precluded. But the opposite does not hold true; even when there is not a substantial overlap, the second action may be precluded if it stems from the same transaction or series.'

Id. (quoting Restatement (Second) of Judgments § 24 cmt. B, at 199 (1982)).

This case falls within the latter category—related but separate causes of action. In the federal case, Betz's asserted her protected right was to remain employed and not be terminated through sex discrimination of Kazmi or retaliation for complaining about Kazmi. Further, and to the extent Betz alleged defamation in the federal case, she was alleging a right not to be defamed in the FHLBDM's 8-K filed with the SEC. This action concerns Betz's right to recover for damage caused to her reputation by false statements circulated by Mathisen, Muller, Rasmussen, and Wilson. Evidence relevant to the federal case surrounded Betz's working relationship with Kazmi, his comments made to her in the office, her complaint to human resources regarding Kazmi, other complaints and investigations that were made about Kazmi, Kazmi's end of employment with the Bank, Kazmi's contractual arrangement with the Bank, Wilson's hiring of Kazmi and interactions with him about Betz, Wilson's knowledge of Betz's complaint about Kazmi to human resources, and the timing and asserted reasons for the decision to terminate Betz's employment. (App. v. II pp. 24-26, First. Am. Pet., the federal case, at ¶¶ 98-108).

In contrast, evidence relevant to this case includes the statements made by Mathisen in her complaint, whether they were true, her intent in making her complaint. Relevant evidence also includes the statements made by Muller, Rasmussen, and Wilson, whether they were true, the context in which they were

made, to whom they were made, the intent with which they were made, and evidence demonstrating the ensuing reputational harm to Betz. While there may indeed be some overlap between the evidence in these two matters, they do not "form a convenient unit for trial purposes." Kazmi and his attitudes can be left completely out of this matter. Betz's complaint to human resources is irrelevant to this matter. The 8-K is irrelevant to this matter. The focus of Mathisen's complaint and an ensuing investigation is central, rather than collateral, to this matter, and the allegedly discriminatory or retaliatory motivations of the FHLBDM in terminating Betz is not at issue in this matter. FHLBDM's other alleged, legitimate, non-discriminatory reasons for terminating Betz, its decision to terminate two male executives and its contention their terminations were related to Betz's termination are also not at issue in this matter whereas they consumed much of the argument and briefing in the federal case. (App. v. I pp. 123-145; Plaintiff's Br supporting resistance to motion to dismiss; v. II pp. 124-145; Defendants' Br. the federal case).

Instead, the intent of Mathisen, Muller, Rasmussen and Wilson in making statements about Betz is at the forefront. Perhaps paramount to the difference between the two actions, however, is the truth of the statements, which was not directly at issue in the sex discrimination or retaliation claims within the federal case, but is of paramount importance to the Defendants to this action. Namely,

should the Defendants in this action hope to avoid liability for defamation, they must either rely upon a privilege, or they must prove that the statements they made about Betz were true. As in the case of *Kearney v. Pittmann*:

> The acts complained of in the two lawsuits are different, the recoveries demanded are different, and although some of the evidence that supports the first action also supports the second, each action requires evidence that is not relevant to the other and does not support the other. The current lawsuit therefore should not be precluded.

Kearney v. Pittmann, No. 8-615/07-2032, at 8 (Iowa Ct. App. Oct. 29, 2008).

Based on the petitions of each lawsuit, and accepting Betz's allegations as true, Betz alleges a separate cause of action in this lawsuit from the cause of action alleged in the federal case. Defendants' motion to dismiss should have been denied.

CONCLUSION

For all the reasons stated above, Linda Betz respectfully urges the Court to overrule the district court and remand the case for further proceedings.

REQUEST FOR ORAL ARGUMENT

The Appellant hereby requests to be heard in oral argument in connection with this appeal.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because:

[X] This brief contains 3,794 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1)

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[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word 365 (for Mac) in Times New Roman, font 14 point.

Dated: May 30, 2024

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CERTIFICATE OF SERVICE AND FILING

I hereby certify that on May 30, 2024, I electronically filed the foregoing with the Clerk of the Court for the Iowa Supreme Court by using the EDMS system. I certify that all participants in the case are registered EDMS users and that service will be accomplished by the EDMS system.

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