STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1154

David McKee, M. D.,
Appellant,

vs.

Dennis K. Laurion,
Respondent.

Filed January 23, 2012
Affirmed in part, reversed in part, and remanded
Bjorkman, Judge

St. Louis County District Court
File No. 69DU-CV-10-1706

Marshall H. Tanick, Teresa J. Ayling, Mansfield, Tanick & Cohen, P.A., Minneapolis, Minnesota (for appellant)

John D. Kelly, Nathan N. LaCoursiere, Hanft Fride, P.A., Duluth, Minnesota (for respondent)

Considered and decided by Bjorkman, Presiding Judge; Schellhas, Judge; and Crippen, Judge.*

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

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

BJORKMAN, Judge

Appellant challenges summary judgment dismissing his defamation and interference-with-business claims, arguing that the district court erred by (1) determining that the allegedly defamatory statements constituted opinions, true statements, and statements too vague to carry defamatory meaning, and (2) dismissing his interference-with-business claim without addressing it on the merits. We hold that material fact issues preclude summary dismissal of some of appellant's defamation claims but that appellant's interference-with-business claim fails as a matter of law. Accordingly, we affirm in part, reverse in part, and remand for trial.

FACTS

Appellant David McKee, M.D., practices neurology at St. Luke's Hospital in Duluth, where he examined respondent Dennis Laurion's father in April 2010. Later the same week, respondent posted negative reviews of appellant on several rate-your-doctor websites, stating the following:

> My father spent 2 days in ICU after a hemorrhagic stroke. He saw a speech therapist and physical therapist for evaluation. About 10 minutes after my father transferred from ICU to a ward room, Dr. David C. McKee walked into a family visit with my dad. He seemed upset that my father had been moved. Never having met my father or his family, Dr. McKee said, "When you weren't in ICU, I had to spend time finding out if you transferred or died." When we gaped at him, he said, "Well, 44% of hemorrhagic strokes die within 30 days. I guess this is the better option." My father mentioned that he'd been seen by a physical therapist and speech therapist for evaluation. Dr. McKee said, "Therapists? You don't need therapy." He pulled my father to a sitting

> position and asked him to get out of bed and walk. When my father said his gown was just hanging from his neck without a back, Dr. McKee said, "That doesn't matter." My wife said, "It matters to us; let us go into the hall." Five minutes later, Dr. McKee strode out of the room. He did not talk to my mother or me. When I mentioned Dr. McKee's name to a friend who is a nurse, she said, "Dr. McKee is a real tool!"

Respondent also sent letters to St. Luke's Hospital and numerous medical associations and organizations that contained substantially similar statements. The letters also stated that appellant scowled when he left the patient's room, seemed to blame the patient for the loss of appellant's time, treated the patient as a "task and charting assignment," and failed to treat the patient with dignity.

Appellant's complaint alleges that the following statements defame him and interfere with his business: (1) appellant seemed upset that the patient had been transferred from the ICU to a ward room; (2) appellant told the patient that he had to "spend time finding out if you were transferred or died"; (3) appellant said, "44% of hemorrhagic strokes die within 30 days. I guess this is the better option"; (4) appellant said, "You don't need therapy"; (5) appellant said, "[It] doesn't matter" that the patient's gown did not cover his backside; (6) appellant left the patient's room without talking to the patient's family; (7) appellant seemed to blame the patient for the loss of appellant's time; (8) appellant scowled after he exited the patient's room; (9) appellant treated the

patient as a "task and charting assignment"; (10) appellant did not treat the patient with dignity; and (11) a nurse told respondent[1] that appellant was "a real tool."[2]

Respondent moved for summary judgment. The district court determined that the challenged communications, taken as a whole, state a non-actionable opinion and, individually, constitute opinions, true statements, and statements too vague to harm appellant's reputation. Accordingly, the district court granted summary judgment on all claims but did not specifically address appellant's interference-with-business claim.

D E C I S I O N

"On an appeal from a grant of summary judgment, we review de novo whether there are any genuine issues of material fact and whether the district court erred in applying the law. In doing so, we view the evidence in the light most favorable to the party against whom summary judgment was granted[.]" *Sampair v. Vill. of Birchwood*, 784 N.W.2d 65, 68 (Minn. 2010) (citation omitted).

I. The district court erred by dismissing all of appellant's defamation claims.

A party seeking to establish a defamation claim must prove that the defendant (1) communicated to a third party (2) a factual assertion (3) that is false and (4) tends to harm plaintiff's reputation in the community. *See Bahr v. Boise Cascade Corp.*, 766

[1] The complaint charges respondent with saying "[appellant] is a real tool." But respondent actually wrote that a nurse called appellant "a real tool," and appellant clarifies on appeal that he challenges that statement.

[2] Appellant argues that respondent also defamed him by saying that appellant pulled the patient out of bed by his arms, thus endangering the patient. But we will not consider this statement because appellant gave no indication that he challenged it until after discovery began. *See Moreno v. Crookston Times Printing Co.*, 610 N.W.2d 321, 326 (Minn. 2000) (holding that the complaint must state each allegedly defamatory statement).

N.W.2d 910, 919-20 (Minn. 2009) (explaining the communication, falsity, and harm elements); *McGrath v. TCF Bank Sav.*, 502 N.W.2d 801, 808 (Minn. App. 1993) (explaining the factual assertion element), *modified on other grounds*, 509 N.W.2d 365 (Minn. 1993). Respondent agrees that he communicated each of the challenged statements to third parties but denies the remaining elements.

A. Six of the challenged statements are factual assertions.

To support a defamation claim, the allegedly defamatory statement must be a factual assertion capable of being proven true or false. *McGrath*, 502 N.W.2d at 808. "Expressions of opinion, rhetoric, and figurative language are generally not actionable if, in context, the audience would understand the statement is not a representation of fact." *Jadwin v. Minneapolis Star & Tribune Co.*, 390 N.W.2d 437, 441 (Minn. App. 1986). To determine whether a statement is a factual assertion or merely a subjective opinion, courts consider the statement's specificity, verifiability, and context. *Huyen v. Driscoll*, 479 N.W.2d 76, 79 (Minn. App. 1991), *review denied* (Minn. Feb. 10, 1992). But courts consider whether a challenged statement is itself a factual assertion in light of its context, not whether all the challenged statements, combined and on balance, constitute a factual assertion. *See, e.g., Schlieman v. Gannett Minn. Broad., Inc.*, 637 N.W.2d 297, 308 (Minn. App. 2001), *review denied* (Minn. Mar. 19, 2002). Whether a statement is a factual assertion is a question of law. *McGrath*, 502 N.W.2d at 808.

Appellant argues that all 11 of the challenged statements are factual assertions. We agree, in part, and address them by category.

1. Factual assertions: Appellant said he had to "spend time finding out if you were transferred or died"; appellant said, "44% of hemorrhagic strokes die within 30 days. I guess this is the better option"; appellant said, "You don't need therapy"; appellant said, "[It] doesn't matter" that the patient's gown did not cover his backside; and appellant left the patient's room without talking to the patient's family.

Appellant argues that these statements are factual assertions. We agree. The quotation marks in the first four statements indicate that the statements objectively and specifically recite appellant's words, not respondent's subjective perception of the conversation. Whether appellant made the quoted statements and was silent after leaving the patient's room is verifiable. Thus, these are factual assertions.

2. Factual assertion: A nurse told respondent that appellant was "a real tool."

Respondent asserts that this is a statement of opinion. We disagree. The question is not whether the assertion that "[appellant] is a real tool" is verifiable. Rather, the question is whether the statement "[a nurse] said [Appellant] is 'a real tool'" is verifiable. *See Schlieman*, 637 N.W.2d at 308 (holding that the statement "two people say they witnessed the shooting and that Hartwig was not being aggressive" was a factual assertion because "[w]hether the two people . . . made these statements is susceptible of proof"). As in *Schlieman*, whether a nurse told respondent that appellant is "a real tool" is susceptible of proof. The statement is therefore a factual assertion.

3. Not factual assertions: Appellant seemed upset that the patient had been transferred from the ICU to a ward room; appellant seemed to blame the patient for the loss of appellant's time; appellant scowled after he exited the patient's room; appellant treated the patient as a "task and charting assignment"; and appellant did not treat the patient with dignity.

Appellant concedes that none of these statements, standing alone, is a factual assertion. But he asserts that their context transforms them into factual assertions. We disagree. Each of these statements describes respondent's opinion concerning appellant's demeanor. Words like "upset," "blame," "scowl," and "dignity" are not specific and precise, nor do they express objective facts. *See McGrath*, 503 N.W.2d at 808 (holding that a statement describing a person as a "troublemaker" does not express a fact). And the mere fact that respondent's statements are surrounded by factual assertions does not render them factual assertions as well. *See Schlieman*, 637 N.W.2d at 308 (finding that the second half of a challenged sentence was not a factual assertion even though the first half of the sentence was).

Appellant's argument heavily relies on the fact that during his deposition, respondent described these statements as a "factual recitation" of his encounter with appellant. But whether a statement is a factual assertion is a question of law for the court to determine. Moreover, appellant mischaracterizes respondent's deposition testimony. Respondent was reluctant to call his statements a "factual recitation" and this reference, when viewed in the context of his overall testimony, conveyed his belief that his statements were true, not that they conveyed objective facts. Appellant's argument is

therefore unavailing, and the district court correctly concluded that these statements are not factual assertions.

B. Appellant produced evidence that the six challenged statements are false.

To establish the falsity element of a defamation claim, the plaintiff must prove that the statement is not substantially accurate, not merely that it contains "inaccuracies of expression or detail." *Jadwin*, 390 N.W.2d at 441. "A statement is substantially accurate if its gist or sting is true, that is, if it produces the same effect on the mind of the recipient which the precise truth would have produced." *Id.* (quotation omitted). Whether a statement is substantially accurate depends on its context. *Hunter v. Hartman*, 545 N.W.2d 699, 707 (Minn. App. 1996), *review denied* (Minn. June 19, 1996). Nevertheless, the question is whether the *statement* is true in light of its context, not whether the *context as a whole* is true. *See, e.g.*, *Schlieman*, 637 N.W.2d at 308; *Hunter*, 545 N.W.2d at 707-10; *Jadwin*, 390 N.W.2d at 441-43. "Generally, the truth or falsity of a statement is inherently within the province of the jury. If, however, the underlying facts are not in dispute, the question of whether the statements are substantially accurate is one of law for the district court to determine." *Oaks Gallery & Country Store-Winona, Inc. v. Lee Enters., Inc.*, 613 N.W.2d 800, 803 (Minn. App. 2000) (citation and quotation omitted), *review denied* (Minn. Sept. 13, 2000). We address each of the six challenged factual assertions in turn.

1. Appellant said he had to "spend time finding out if you were transferred or died."

Appellant challenges the district court's determination that the parties do not dispute the truth of this statement. We agree with appellant. According to respondent, appellant said, "When I couldn't find you in ICU, I had to find out if you were transferred or died." By contrast, appellant testified that he—

> made a jocular comment. . . to the effect of I had looked for him up in the intensive care unit and was glad to find that, when he wasn't there, that he had been moved to a regular hospital bed, because you only go one of two ways when you leave the intensive care unit; you either have improved to the point where you're someplace like this or you leave because you've died.

Although appellant's version of the conversation is similar to the challenged statement, its "sting" is very different. The challenged statement suggests that appellant blamed the patient for wasting his time and joked about the patient's possible death. Appellant's version, by contrast, expresses happiness that the patient's health improved. If the jury believes appellant, then the challenged statement is not substantially accurate. Thus, whether this statement is false is a disputed question of fact.

2. Appellant said, "44% of hemorrhagic strokes die within 30 days. I guess this is the better option."

Appellant contends that this statement carries a different "sting" than the words he actually used during the encounter, therefore creating a material dispute of fact regarding its truth. We agree. Appellant testified that, while he stated that some patients die from hemorrhagic strokes, he never mentioned a percentage or statistic. Respondent's version depicts appellant as insensitively quoting a high mortality rate; appellant's version shows

appellant simply acknowledging the obvious truth that some stroke patients die. The sting of the two statements is substantially different, creating a material dispute regarding the truth of the challenged statement.

3. Appellant said, "You don't need therapy."

Appellant argues that there is a genuine dispute of fact regarding the truth of this statement. We agree. Respondent maintains that appellant made the statement, whereas appellant denies saying anything about therapy.

4. Appellant said, "[It] doesn't matter" that the patient's gown did not cover his backside.

Appellant disputes the truth of this statement, and we agree that a genuine dispute of fact remains for the jury to determine. Respondent testified that, when told that the patient's gown was tied at the neck but not at the back, appellant said, "That doesn't matter." Appellant asserts that he said "I thought it would be fine" or "It looks like it's okay" to indicate that the gown was sufficiently tied. The two statements, while similar, would likely have different effects on the listener. A doctor saying that a patient's concern "doesn't matter" is markedly different than a doctor reassuring a patient by saying that it "would be fine." Again, if appellant's account is believed, then the challenged statement is not substantially accurate. A jury must therefore determine whether this statement is true.

5. Appellant left the patient's room without talking to the patient's family.

Appellant contends that this statement is untrue because it is misleading. We agree. A literally true statement is considered false if its omission of key facts creates a

false implication. *See Metge v. Cent. Neighborhood Improvement Ass'n*, 649 N.W.2d 488, 498 (Minn. App. 2002), *review dismissed* (Minn. Oct. 15, 2002). Appellant maintains that he did not see the family when he left the patient's room and therefore did not say anything to them. He concedes the literal truth of the challenged statement but refutes its obvious implication: that appellant had the opportunity to talk to the patient's family but chose not to. The omission of critical information about whether respondent and other members of respondent's family were present when appellant left the patient's room creates an implication that appellant very much disputes. This presents an issue for the jury.

6. A nurse told respondent that appellant was "a real tool."

Appellant argues that there are genuine issues of material fact regarding the truth of this statement. We agree. Respondent alleges that a nurse who recently left St. Mary's Hospital told him that appellant was "a real tool." Appellant asserts that respondent fabricated the encounter with the nurse, pointing out that respondent could not identify the nurse, another doctor at St. Mary's was unable to identify anyone matching respondent's physical description of the nurse, and appellant has had very little contact with nurses at St. Mary's in the past decade. We conclude that appellant produced competent evidence sufficient to create a genuine fact issue for the jury to decide.

C. The challenged factual assertions tend to harm appellant's reputation.

The plaintiff in a defamation case must establish that a challenged statement has a tendency to harm his reputation and lower him in the eyes of the community. *Bahr*, 766 N.W.2d at 919-20. Context is important in determining whether a particular statement

carries a defamatory meaning. *Schlieman*, 637 N.W.2d at 304. Whether, as an initial matter, a statement is capable of harming the plaintiff's reputation is a question of law for the court to determine. *Id.* at 307.

1. Appellant said he had to "spend time finding out if you were transferred or died"; appellant said, "44% of hemorrhagic strokes die within 30 days. I guess this is the better option"; and appellant said, "[It] doesn't matter" that the patient's gown did not cover his backside.

Appellant asserts that these statements suggest that he is rude, insensitive, and morbid. We agree. These statements portray appellant as insensitive to the feelings, fears, and modesty concerns of the patient and his family. Accordingly, the challenged statements are capable of harming appellant's reputation.

2. Appellant said, "You don't need therapy."

Appellant argues that this statement is capable of harming his reputation because, while it could be a valid medical evaluation, the context in which it was made reveals that the statement was insensitive and inaccurate. We agree. The statement's context indicates that appellant had spent only ten minutes with the patient when he hastily concluded that therapy was unnecessary. Furthermore, other surrounding statements demonstrated that the patient's stroke was so serious that he spent two days in the ICU and other doctors had already determined that he needed speech and physical therapy—revealing the carelessness of appellant's alleged medical evaluation. This statement could therefore give appellant a reputation for being arrogant and careless.

3. Appellant left the patient's room without talking to the patient's family.

Appellant contends that this statement is capable of harming his reputation. We agree. While the statement, by itself, could be innocuous, its context renders it harmful to appellant's reputation. Placed between respondent's assertions that appellant said he "had to spend time finding out if you were transferred or died" and that appellant seemed to blame the patient for the loss of his time, this statement suggests that appellant is too busy or uncaring to talk to patients' families in a time of crisis. This implication could lower the community's esteem for appellant.

4. A nurse told respondent that appellant was "a real tool."

Appellant argues that this statement "calls into question his medical capabilities." We agree. Although the exact meaning of the word "tool" is unknown, both parties agree that the word carries a negative connotation. The disapproval of another medical professional is capable of harming appellant's reputation as a doctor.

In sum, we conclude that appellant's defamation claim shall proceed with respect to the following statements: (1) appellant told the patient that he had to "spend time finding out if you were transferred or died"; (2) appellant said, "44% of hemorrhagic strokes die within 30 days. I guess this is the better option"; (3) appellant said, "You don't need therapy"; (4) appellant said, "it doesn't matter" that the patient's gown did not cover his backside; (5) appellant left the patient's room without talking to the patient's family; and (6) a nurse told respondent that appellant was "a real tool."

II. The district court properly dismissed appellant's interference-with-business claim.

Appellant contends that the district court erred by dismissing his interference-with-business claim either because it is separately actionable or because it is derivative of his defamation claims, which should not be summarily dismissed. We disagree with both arguments. Minnesota does not recognize a cause of action for interference with business or economic expectancy. *Harbor Broad., Inc. v. Boundary Waters Broadcasters, Inc.*, 636 N.W.2d 560, 569 n.4 (Minn. App. 2001). And although Minnesota permits recovery for tortious interference with contractual relations, appellant has failed to allege three of its necessary elements: the existence of a contract or prospective contract, respondent's knowledge thereof, and respondent's intentional procurement of its breach. *See Kjesbo v. Ricks*, 517 N.W.2d 585, 588 (Minn. 1994) (defining interference with contract); *United Wild Rice, Inc. v. Nelson*, 313 N.W.2d 628, 632-33 (Minn. 1982) (defining interference with prospective contract). Consequently, appellant's interference-with-business claim fails as a matter of law.

Affirmed in part, reversed in part, and remanded.