STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1047

David Ericson, et al.,
Respondents,

vs.

Kathleen Hallaway,
Appellant.

Filed August 26, 2008
Affirmed in part, reversed in part,
and remanded
Hudson, Judge

Hennepin County District Court
File No. 27-CV-05-017500

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Considered and decided by Hudson, Presiding Judge; Schellhas, Judge; and Connolly, Judge.

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

HUDSON, Judge

This is an appeal from judgment entered against appellant following a jury trial on claims of defamation and intentional infliction of emotional distress. Appellant argues

that the district court erred by (1) granting judgment as a matter of law on liability with respect to the defamation claim when there were factual issues as to the authorship and truth of the anonymous-e-mail communications; (2) allowing respondents to amend their complaint at trial to allege the existence of additional defamatory e-mails; and (3) allowing the jury to find liability and award damages based on respondent's claim for intentional infliction of emotional distress, without requiring proof of the elements of that claim. By notice of review, respondents assert that the district court abused its discretion by reducing the amount of damages awarded by the jury. Although the district court did not abuse its discretion by allowing the complaint to be amended, the district court erred by issuing judgment as a matter of law on the issue of defamation, and we reverse that determination and remand for a new trial.

FACTS

The Minnesota Youth Soccer Association (MYSA) is a non-profit organization that governs youth soccer in Minnesota. MYSA has approximately 80,000 players and 13,000 coaches. MYSA is governed by US Youth Soccer, which is based in Texas.

Eric Hawkins coached the Elk River United (ERU) soccer club, which was a member of MYSA. But after some disciplinary issues, MYSA suspended Hawkins from coaching in 2002; he nevertheless continued to coach for ERU, apparently in violation of his suspension.

At the time, Lani Hollenbeck was an MYSA board member, and she began receiving phone calls from soccer parents asking why Hawkins was still coaching after being suspended and why MYSA was not doing anything about it. In September 2003,

Lani Hollenbeck's husband, Michael Hollenbeck, visited an ERU practice in an effort to photograph Hawkins to document that he was coaching after his suspension. The practice Hollenbeck attended was the ERU team for girls under age eleven. Appellant Kathleen Hallaway's daughter was a member of the team. Hollenbeck later explained that he did not actually take any pictures at the practice.

On September 6, 2003, appellant sent Hollenbeck an e-mail stating that it was inappropriate for him to take pictures of the children's soccer practice and that "I can only assume that your intentions of being around these children are such of a personal gratification of some sort. Other parents know about you now." On September 10, 2003, appellant filed a complaint against Hollenbeck with the Elk River police department. Appellant, on behalf of her daughter, later sought and was granted a harassment restraining order against Hollenbeck.

In October 2003, appellant filed a complaint with MYSA demanding an investigation of Hollenbeck's conduct. Appellant stated that Hollenbeck "was observed lurking around the playground area" with a camera, "taking pictures of our girls," and that he had created an "intimidating, hostile or offensive environment." On October 30, 2003, appellant also sent an e-mail to over 40 people on MYSA's e-mail list stating, among other things, that Hollenbeck "was seen watching these girls" and suggesting that Hollenbeck was involved in "deviant actions." The e-mail also suggested that MYSA president Ellie Singer was protecting Hollenbeck and that her behavior was unethical. That same day, Singer informed appellant that her complaint against Hollenbeck had been received and that the investigation of appellant's complaint would be handled by

respondent David Ericson, the vice-president of administration for MYSA and the MYSA Risk Management Coordinator. On May 3, 2004, an MYSA hearing panel determined that Hollenbeck had not violated any MYSA rules.

In August 2004, MYSA officials notified the Elk River United Soccer Association that it had been "disaffiliated" from MYSA because it had allowed Hawkins to continue to participate in ERU activities after his suspension. As a result of ERU's "disaffiliation," appellant and Hawkins sued Ericson in conciliation court, alleging fraud and extortion. Ericson eventually prevailed in these actions.

On March 14, 2005, appellant sent an e-mail to Annette Durst, another ERU soccer parent. The e-mail was a draft of a "demand letter" that appellant apparently intended to send to members of the MYSA Youth Council. The text of the e-mail stated that judgment was entered against Ericson for fraud and extortion and that Ericson "attempted to blackmail the mother of a molestation victim[1] who had obtained a restraining order against Mike Hollenbeck. . . . Mr. Ericson told the mother that if she would 'get rid of the restraining order, it would go a long way in getting the club reinstated.'" The e-mail demanded Ericson's resignation. At the bottom of the e-mail is a paragraph written by appellant, apparently as part of an earlier e-mail to Durst, which reads

> Hi girls,
> I composed an email to the Youth Council let[t]ing them know what had happened in court. Would any of you be willing to come on board in sending the email with me? Most

[1] The record reflects that appellant's older daughter was sexually assaulted by her high-school swim coach, who was eventually convicted.

> of the Youth council have no clue as to the activities of members of the executive committee. Let me know if you are willing as I want to send the email tomorrow.

Durst responded to appellant that she wanted to see the text of the letter before it was sent, after which appellant sent Durst the draft of the demand letter.

Beginning on March 15, 2005, through October 2, 2005, a series of anonymous e-mails from someone calling him- or herself "Blah Blah" were sent from the mochasoccer@hotmail.com e-mail address to various people. A total of 16 e-mails were sent by Blah Blah to various members of MYSA, US Youth Soccer, and others. ERU parents Gerald Jones, Stephen Bianchi, Gwen Meyers, and Durst all denied sending the anonymous e-mails. The text of the first anonymous mochasoccer e-mail was very similar to the text of appellant's March 14, 2005 e-mail to Durst.

On November 22, 2005, respondents Ericson, Ellie Singer, and MYSA filed a defamation complaint against appellant, Hawkins, Bianchi, Durst, Meyers, Jones, and Parents Achieving Soccer Safety (PASS). On July 12, 2006, respondents filed an amended complaint alleging defamation, wrongful interference with a contractual relationship, intentional infliction of emotional distress, and negligent infliction of emotional distress against all of the defendants, as well as negligence against Hawkins. The amended complaint also sought punitive damages against all of the defendants and Hawkins.

The amended complaint's factual allegations include:

> 8. On or about March 14, 2005, Defendant Hawkins registered mochasoccer@hotmail.com with

> the Microsoft Corporation, and stated his first name as "Blah" and his surname as "Blah."
>
> 9. On March 15, 2005, Defendants sent an e-mail to members of the MYSA Youth Council from mochasoccer@hotmail.com. This e-mail was signed by Defendants Hallaway and Durst.
>
> . . . .
>
> 11. Thereafter, "Blah Blah" (mochasoccer@ hotmail.com) sent e-mails concerning Plaintiffs to numerous recipients on the following dates: April 29, 2005; May 3, 2005; May 13, 2005; May 17, 2005; May 24, 2005; May 25, 2005; May 26, 2005; June 13, 2005; June 21, 2005; July 13, 2005; July 15, 2005; August 4, 2005; August 11, 2005; September 29, 2005; and October 2, 2005. These e-mails were signed by a group calling itself P.A.S.S., or Parents Achieving Soccer Safety.
>
> 12. Upon information and belief, the above-described "Blah Blah" e-mails were sent by Defendants.
>
> 13. The "Blah Blah" e-mails contain numerous defamatory statements about Plaintiffs Ericson, Singer, and MYSA.

All of the defendants, with the exception of appellant, reached settlement agreements with respondents.

In November 2006, respondents filed a motion in limine and a motion for a directed verdict.[2] Respondents argued that because appellant admitted to sending the March 14, 2005, e-mail, because that e-mail was published, and because the e-mail was

[2] Effective January 1, 2006, Minn. R. Civ. P. 50 has been amended to adopt the "judgment as a matter of law" nomenclature in place of "judgment notwithstanding the verdict" and "motion for directed verdict."

defamatory per se, "there is no fact dispute, [and] as a matter of law, [appellant] is liable for defamation *per se*. As the comments are defamatory *per se*, damages are presumed. The only issue for the jury is the amount of damages."

On November 20, 2006, the parties appeared before the district court to address respondents' motions. The district court ruled that appellant could present evidence and argue to the jury the issue of the truth or falsity of the statements made in the e-mails. But the district court also stated that it "might yet rule that the jury doesn't get to [consider that issue] once I've heard all the testimony." The jury trial began the next day. The district court noted on the record that the parties had agreed on the jury instructions relating to defamation and falsity.

The first witness for respondents was Candace Daley, the executive director of MYSA. Daley described the impact that the e-mails had on MYSA. MYSA had a sponsorship agreement with Culvers, which was terminated early in part because of rumors regarding MYSA officials caused by the e-mails. The value of the lost sponsorship agreement was $30,000. At the time of the e-mails, MYSA was also working with Schwan's to develop a sponsorship agreement. MYSA planned to have an "appreciation event" with Schwan's, but after learning of the lawsuit, the president of one MYSA club announced his intent to boycott the event and e-mailed the presidents of the other MYSA clubs asking them to boycott the event as well. Additionally, the Eden Prairie Soccer Association, which has 3,000 players, disaffiliated itself from MYSA in part because of the rumors caused by the e-mails. The disaffiliation of the Eden Prairie club cost MYSA approximately $17,000 per year.

Evidence at trial also revealed that several of the mochasoccer e-mails were sent from various Dunn Brothers coffee shops around the Twin Cities. Hawkins made purchases at those same coffee shops within minutes of the e-mails being sent. But Daley admitted that there is no evidence that appellant was present at the coffee shops with Hawkins at the time the e-mails were sent. Daley noted that after the lawsuit against appellant and the other defendants was filed, MYSA did not receive any more e-mails from the mochasoccer address.

Ericson also testified. According to Ericson, who is also an attorney, some of the e-mails were sent directly to Ericson's employer. Ericson's employer investigated the matter and ultimately concluded that there were no breaches of company policy. Ericson eventually left that company and testified that the e-mails were a factor in his decision to change jobs. Ericson denied ever having blackmailed or attempting to blackmail appellant. He also testified that the e-mails had adverse physical effects on him, including difficulty controlling his diabetes, sleeplessness, and stomach upsets. On cross-examination, Ericson admitted that he did not have any evidence that appellant was at the coffee shops at the times the anonymous mochasoccer e-mails were sent.

Singer testified that she was concerned when the MYSA clubs began receiving the e-mails: "[T]hese are the clubs that I represented as president. And sometimes the only thing they knew about me was my name. So here they receive an e-mail that says that I'm giving thumbs up to crimes and to some awful things, and absolutely that concerned me." Singer testified that she believed her reputation had been harmed by the e-mails, noting that "[her] name has been put up there with these horrible allegations of lying and

harassment and pedophilia. . . ." Singer stated that she does not think her life will return to the way it was before the e-mails were sent: "I'm cautious, like I said, about putting myself out there and accepting any real job of authority or responsibility because I don't want my name ever associated again with these kinds of words or these kinds of allegations that are so totally false."

On cross-examination, Singer admitted that she had not seen any evidence that appellant was at the coffee shops at the time the anonymous mochasoccer e-mails were sent. In addition, appellant's counsel questioned Singer about e-mails that she had received from appellant in 2003 and 2004, which were not referenced in respondent's complaint or amended complaint. Appellant's counsel then submitted into evidence several of these e-mails appellant had previously authored, including e-mails sent on October 30, 2003, December 18, 2003, and January 6, 2004.

The October 30, 2003 e-mail, which was sent to all of the people on MYSA's e-mail list, was entitled "Why is Ellie Singer putting our children at risk?" The e-mail stated that Hollenbeck "had something to hide" and that his behaviors "may indicate a more serious issue of deviant intentions." The e-mail then explained that appellant had filed a complaint against Hollenbeck with MYSA but that Singer was "putting our children at risk" because she did not assign an investigator to look into Hollenbeck's alleged rule violations. The e-mail stated that Singer was protecting the "at best strange, and at worst deviant behavior" of Hollenbeck and that Singer engaged in "unethical behavior [which] has become disgraceful to MYSA."

The December 18, 2003, e-mail written by appellant was sent to various members of MYSA and US Youth Soccer. The e-mail stated that Singer and Ericson had refused to do anything about Hollenbeck's "stalking/harassing behavior" and that Singer and Ericson were protecting Hollenbeck. Appellant wrote in the e-mail: "I need to understand why a Youth Council would still allow such an MYSA member to have contact with children. He was harassing to a whole U11 girls soccer team. Please assure me it is only these two who are protecting Michael Hollenbeck."

The January 6, 2004, e-mail from appellant was sent to 19 people, including members of MYSA. The e-mail details Hollenbeck's actions and states that "[w]hile I have hesitated at declaring Mr. Hollenbeck's actions are of a sexual nature, others have drawn their own conclusions. I know many people, including some . . . parents, at least one school board member, and police officers who have questioned whether his actions are sexual in nature. The school board member has declared Mr. Hollenbeck a predator[.]" Appellant states in the e-mail that Hollenbeck admitted stalking the girls soccer team and that "I question the integrity of a club whose President knowingly allows a club administrator to engage in stalking and does nothing to stop it." Appellant also stated that MYSA "blames the victims, and . . . tries to cover up the deviant actions of their administrator. . . . MYSA . . . should be ashamed."

During cross-examination of Singer, appellant's counsel suggested that the 2003 and 2004 e-mails were significant because appellant had signed her name, in contrast to the 2005 anonymous mochasoccer e-mails, demonstrating that she was not afraid to identify herself regarding the Hollenbeck/MYSA matter.

After Singer testified, appellant renewed her motion for judgment as a matter of law, arguing that "the plaintiffs have failed to establish any link between my client and the anonymous mochasoccer e-mails, besides the fact that her signature appears on the first one." The district court pointed out that during Singer's cross-examination, appellant submitted into evidence several 2003 and 2004 e-mails, admittedly written by appellant, that accused Hollenbeck of "deviant behavior" and Singer of sanctioning the behavior. Appellant's counsel responded that appellant's 2003 and 2004 e-mails were not part of the lawsuit. The following exchange took place:

> COURT: Well, number one, it appears to be part of a whole set of connected facts over a long period of time.
> [APPELLANT'S COUNSEL]: That's correct.
> COURT: Number two, I suppose, if we need to, I don't know that it's necessary, but the plaintiff can amend his complaint to conform to the evidence in that regard, and if that's what you're doing then I suppose I'll grant it. It seems pretty clear to me that we don't know the details, but, you know, a lot of blah blah's e-mails refer to things that [appellant] was doing, and [appellant] was doing them and somehow that was being communicated to whoever blah blah was, probably Eric Hawkins, right?
> [APPELLANT'S COUNSEL]: Correct.
> . . . .
> COURT: [Appellant's counsel] is right that your amended complaint only references directly the moccasoccer [sic] accounts. Talk about the point that he's raised[.]
> . . . .
> [RESPONDENTS' COUNSEL]: We appreciate the opportunity to amend our complaint, once again, to conform to the evidence which has been brought to light by the defendants. These are their exhibits. And as Your Honor correctly noted, the Rules of Civil Procedure expressly allow that. So we would like to include all of these e-mails as part of our complaint.
> . . . .

COURT: Why shouldn't they be permitted to amend their complaint to reflect the evidence that's been presented by both parties?
[APPELLANT'S COUNSEL]: Well, we haven't presented any evidence yet, judge.
COURT: Well, your exhibits are already in record.
[APPELLANT'S COUNSEL]: That's true.
[RESPONDENTS' COUNSEL]: And stipulated to.
COURT: Talk me out of it, if you can. This is your chance.
[APPELLANT'S COUNSEL]: Well judge, I think they [got] one chance to amend their complaint already. How many times are you gonna give them? I mean, they amended their complaint after discovery had been produced and almost seven months after the issuance of the first complaint. In addition, the plaintiff has had these e-mails for well over—and I have to look at the dates of the individual e-mails—well over three years. I would argue the statute of limitations would apply.
. . . .
COURT: It would have been tidier had those been referred to in the amended complaint. On the other hand, the defendant wrote those things and they say that [Singer] engaged in sexual—or in approving or permitting sexually deviant behavior. It seems to me that at a minimum as a part of the alleged conspiracy between the members of the nonexistent PASS, they were permitted to try to prove that with all of the stuff that's come in.
. . . .
[APPELLANT'S COUNSEL]: You're not granting the motion to amend the complaint, are you, because I would argue[ ] the statute of limitations up the wazoo on that one.
. . . .
COURT: When you amend the complaint, it relates back to the date of the filing of the original complaint.
[APPELLANT'S COUNSEL]: But even that, judge, I would say is outside the statute of limitations for these e-mails, for two years.
COURT: I think if you allege an ongoing enterprise, the last act of the ongoing enterprise is the time when the statute of limitation expires. So I think for purposes of this discussion, that one doesn't sound hard for me.

Respondents then renewed their motion, which the district court denied.

Appellant then testified and denied sending, or participating in the sending of, any of the 2005 anonymous mochasoccer e-mails, including the e-mail on which her name appeared at the bottom. Appellant also testified that she was not present at the Dunn Brothers locations from which the anonymous mochasoccer e-mails were sent. Appellant testified that at one point she sent an e-mail to "Blah Blah" asking "Blah Blah" to stop sending e-mails.

When asked why the jury should believe that she did not have anything to do with the anonymous mochasoccer e-mails, appellant stated:

> I have been very vocal with MYSA. I have repeatedly asked to meet with them on several occasions. They have not wanted to do that. I'm not a coward. I'm not gonna hide behind something. If I'm gonna write something, I'm gonna have documentation to back it up, and I want them to know it's from me.

On cross-examination, appellant admitted that, in the past, she had met Hawkins at the Dunn Brothers coffee shop in Elk River from which some of the anonymous mochasoccer e-mails were sent.

Appellant further testified that she did not write the anonymous mochasoccer e-mails, but that she believed the statements therein were true. Appellant maintained that Ericson attempted to blackmail her when he told her that if she "got rid of the restraining order, it would go a long way in getting the club reinstated." She admitted that she did not know what Hollenbeck was taking pictures of at the ERU practice or whether he was actually taking pictures.

At the conclusion of the presentation of evidence, respondents renewed their motion, arguing that judgment as a matter of law was appropriate:

> We now have [the] record established, and based on that record there is no evidence that Mr. Hollenbeck is a pedophile. . . . [T]here is no evidence of any sort of improper or immoral extramarital affair between Lani Hollenbeck and Dave Ericson, and there is no evidence of lying in court which, of course, is perjury. There is simply no evidence in the record to support these false charges.
>
> And the evidence in the record on extortion, blackmail, fraud, stalking, threatening behavior, is absolutely not sufficient for a jury to conclude that there could be any truth. . . . So based on the evidence we have before this Court, which at best, is that Mike Hollenbeck was at a soccer field with a camera. Can that possibly be construed by a reasonable jury as being stalking, threatening, sexually deviant behavior, you know the allegations. Based on the evidence, could there possibly be any truth to extortion, blackmail, and fraud[.] . . . There is no reason for a jury to consider falsity on pedophilia, approval of pedophilia, extramarital affair, lying in court. . . .
>
> We know for certain that [appellant] has sent e-mails, multiple e-mails, before the first blah blah e-mail, alleging sexually deviant behavior. We know that she has sent e-mails alleging fraud and extortion and blackmail. And we know that she has sent that. That's a fact. And that, as a matter of law, is defamatory.

In response, appellant's counsel stated:

> Your Honor, I think [respondents' counsel] is missing out on something here. And that's the fact that my client's defense is that she never sent these anonymous e-mails alleging pedophilia, approval of pedophilia, sexually deviant behavior, affairs, perjury. She didn't write these e-mails, judge, and I think the jury is entitled to make that determination, not the Court.
>
> As far as allegations of extortion, blackmail, my client made those statements. That's correct. But her contention is that they are completely true. Mr. Ericson did try to extort and blackmail her into dropping this restraining order.

The district court then determined that, as a matter of law, appellant had defamed respondents and explained its reasoning:

> There is no question in my mind, and I think I've indicated this before, that accusations of condoning pedophilia are, as a matter of law, defamatory, if untrue. And that's also the case with regard to the stalking and the extortion. Again, if untrue. The claim of permitting deviant behavior, it seems to me, of Ellie Singer and the MYSA condoning deviant behavior by their actions in relationship to the thing, it seems to me that is defamatory as a matter of law, assuming it's not true. And there's been nothing to show that there was any deviant behavior.
>
> . . . .
>
> My point is, is that there is no possible way that what Hollenbeck did is construed to be deviant by any person with any understanding of the meaning of the word. It's not deviant behavior to take pictures, you know, at a practice.
>
> . . . .
>
> With regard to the – a claim, if made by [appellant] that somebody was condoning pedophilia or in any way associated with it, is clearly defamatory if it's false. There has been no evidence of any pedophilia. So the question is whether she said it or not or caused it to be said.
>
> The stalking is clearly defamatory.
>
> The claim of sexually deviant behavior is clearly defamatory, if false. And again, there's been no evidence on that, and no evidence on the stalking.
>
> And the extortion issue is to some extent in the mind of the beholder.

The jury then returned to the courtroom, and respondent presented rebuttal testimony.

The jury was provided with a special verdict form. The relevant questions for purposes of this appeal are the following:

> 1. Did Kathleen Hallaway make defamatory comments or communications concerning Plaintiff David Ericson?

> 2. *If you answered yes to Question 1, answer this question:* Were any of the defamatory comments or communications false?
>
> 3. *If you answered yes to Question 2, answer this question:* What amount of money will fairly and adequately compensate Mr. Ericson for being defamed?
>
> 4. Did Kathleen Hallaway make defamatory comments or communications concerning Plaintiff Ellie Singer?
>
> 5. *If you answered yes to Question 4, answer this question:* Were any of the defamatory comments or communications false?
>
> 6. *If you answered yes to Question 5, answer this question:* What amount of money will fairly and adequately compensate Ms. Singer for being defamed?
>
> 7. Did Kathleen Hallaway make defamatory comments or communications concerning Plaintiff Minnesota Youth Soccer Association?
>
> 8. *If you answered yes to Question 7, answer this question:* Were any of the defamatory comments or communications false?
>
> 9. *If you answered yes to Question 8, answer this question:* What amount of money will fairly and adequately compensate the Minnesota Youth Soccer Association for being defamed?

As the district court explained to the jury before closing arguments, the district court answered some of the questions on the special verdict form for the jury:

> Now I have granted [judgment as a matter of law] regard[ing] allegations of stalking, deviant behavior, pedophilia, and approval of deviant behavior and pedophilia. These statements, if published as a matter of law, are defamatory, per se. The evidence demonstrates that some of these statements are false. Also, the evidence is that Kathleen

> Hallaway published allegations about condoning stalking and deviant behavior.
>
> As a result, I have answered questions 1, 2, 4, 5, 7, and 8 of the special verdict form as yes. You shall complete questions 3, 6, and 9 which asks you what amount of money you should award Mr. Ericson, Ms. Singer and MYSA for Ms. Hallaway's defamatory communications. In answering questions 3, 6, and 9, you may consider the impact of any other defamatory statement that you find Ms. Hallaway made.
>
> The answers to questions 1, 2, 4, 5, 7, and 8, are yes, and you must presume that the plaintiffs have been harmed. No evidence of actual harm is required. The only question for you to decide is the amount of money plaintiffs are entitled to receive for harm to their reputation and standing in the community, mental stress, humiliation, embarrassment.

The jury returned its verdict on November 28, 2006, awarding Ericson $200,000 for defamation, Singer $75,000 for defamation, and MYSA $150,000 for defamation. The jury also found that appellant intentionally inflicted emotional distress upon Ericson and Singer and awarded them $50,000 and $25,000, respectively, in damages. The jury also awarded respondents punitive damages of $50,000.

Appellant moved for judgment as a matter of law, a new trial, or remittitur. In its March 2007 written order, the district court concluded that there was sufficient evidence to show that appellant was one of the authors of the anonymous mochasoccer e-mails, respondents suffered severe emotional distress, no conditional privilege existed, judgment as a matter of law in favor of respondents on the issue of defamation was proper, and the amendment of the complaint was proper.

Based on Ericson's and Singer's testimony that they sustained severe emotional distress, and that MYSA was financially damaged by the e-mails, the district court concluded that:

There was sufficient evidence presented at trial to show that Defendant Hallaway was one of the authors of the mochasoccer@hotmail.com emails. Defendant maintains the evidence presented at trial shows that Eric Hawkins was present at the location where the anonymous emails were sent and she was not. However, the fact that Hawkins sent the email does not preclude the fact that there may have been multiple drafters. Hallaway admits to writing the original draft, which was substantially similar to the email that was sent from the mochasoccer@hotmail.com account, and sending it to others for comment. Moreover, many of the mochasoccer@hotmail.com emails mirrored in language and tone the emails that Hallaway admits to sending in 2002 and 2003.

. . . .

The allegations contained in the five emails Hallaway admitted to publishing include allegations of approval of stalking and deviant behavior. The March 14, 2005 email and the emails published from mochasoccer@hotmail.com add allegations of approval of pedophilia, blackmail, extortion, an extra-marital affair, and lying in Court. These allegations are outrageous and intolerable to the civilized community.

. . . .

Hallaway admitted to sending defamatory emails from September 23, 2003 to March 14, 2005 from her personal email account, and there is ample evidence in the record of her authoring, at least in part, mochasoccer@hotmail.com emails from March 15, 2005 to October 2, 2005. Hallaway's defamatory campaign lasted in excess of two years. . . . Hallaway admitted writing an email on March 14, 2005 that is substantially similar to the March 15, 2005 email, and a reasonable jury could conclude the former was a draft of the latter and authored at least in part by Hallaway. In total, Hallaway admitted to sending four defamatory emails in 2003 and 2004, and one on March 14, 2005. From March 15, 2005 to October 2, 2005, nineteen defamatory emails were sent from mochasoccer@hotmail.com that allege approval of deviant behavior, approval of pedophilia, blackmail and extortion, an extra-marital affair . . . and lying in court. . . .

> The volume of defamatory emails, their malicious content, the length of time during which the emails were sent, and Plaintiffs' testimony regarding the impact of the emails was more than sufficient to allow claims of Intentional Infliction of Emotional Distress to proceed to a jury.

The district court also concluded that the compensatory damages awarded to Ericson and Singer were reasonable "to compensate Plaintiffs for injury to their reputations over an extended period of time." The district court concluded that the awards were not "gratuitous as a matter of law, " but reduced the compensatory damages award to MYSA by $50,000.

This appeal follows. Respondent filed a notice of review.

D E C I S I O N

I

Appellant argues that the district court erred by allowing respondents to amend their complaint to include new defamation claims based upon e-mails admittedly authored by appellant in 2003 and 2004 and introduced by appellant at trial.

A district court has broad discretion to grant leave to amend a pleading, and its ruling will not be reversed absent a clear abuse of discretion. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). Leave to amend shall be freely given when justice so requires. *Id.* But leave to amend a pleading should not be given if the amendment would prejudice the adverse party. *Rosenberg v. Heritage Renovations, LLC*, 685 N.W.2d 320, 332 (Minn. 2004). Prejudice may be demonstrated by a lack of notice, procedural irregularities, or a lack of meaningful opportunity to respond to the motion. *Septran, Inc.*

v. Indep. Sch. Dist. No. 271, 555 N.W.2d 915, 920 (Minn. App. 1996), *review denied* (Minn. Feb. 26, 1997).

Here, in its March 2007 order, the district court concluded that "[t]here could be no surprise to [appellant] when the pleadings were amended to include emails she wrote in 2003 and 2004 and which she offered as evidence at trial." Because appellant herself introduced the e-mails and offered them into evidence, and because the e-mails were directly related to the subject of the complaint, we conclude that the district court did not abuse its discretion by permitting respondents to amend their complaint.

II

Appellant argues that the district court erred by ruling as a matter of law that appellant defamed respondents, instead of submitting the issue to the jury.

The district court may grant judgment as a matter of law when, as a matter of law, the evidence is insufficient to present a question of fact to the jury. Minn. R. Civ. P. 50.01; *see also* Minn. R. Civ. P. 50 2006 comm. cmt. (recognizing that change of terminology from judgment notwithstanding the verdict and directed verdict did not change substantive law relating to such proceedings). When considering whether to grant such a motion, "the district court must treat as credible all evidence from the nonmoving party and all inferences that may be reasonably drawn from that evidence." *Wall v. Fairview Hosp. & Healthcare Servs.*, 584 N.W.2d 395, 405 (Minn. 1988). Judgment as a matter of law should be granted

> only in those unequivocal cases where (1) in the light of the evidence as a whole, it would clearly be the duty of the trial court to set aside a contrary verdict as being manifestly

> against the entire evidence, or where (2) it would be contrary to the law applicable to the case.

Jerry's Enters., Inc. v. Larkin, Hoffman, Daly & Lindgren, Ltd., 711 N.W.2d 811, 816 (Minn. 2006) (quotation omitted). This court makes an independent determination of the district court's judgment as a matter of law. *Id.*

Appellant argues that the district court applied the incorrect standard when determining whether judgment as a matter of law was appropriate. Appellant states that "[t]he question is not whether there was ample evidence to support the court's [judgment], but whether there would have been sufficient evidence, interpreting all of the evidence in the light most favorable to appellant, to have sustained a contrary verdict."

In its March 2007 order, the district court stated:

> The Court's Order for [judgment as a matter of law] as to liability on Plaintiffs' defamation claims was not in error. Defendant argues it was improper for the court to determine the statements were "defamatory per se" because the jury retains the ultimate responsibility of determining whether statements are defamatory. . . . However, when the Court granted the [motion], Defendant had been fully heard and the Court concluded that there was no legally sufficient evidentiary basis for a reasonable jury to find for her on the issue of defamation. . . . Hallaway admitted to publishing emails dated September 23, 2003, October 30, 2003, December 18, 2003, January 6, 2004, and March 14, 2005. These emails contain allegations of stalking and deviant behavior by Michael Hollenbeck, the husband of an MYSA official, and Plaintiffs' approval of stalking and deviant behavior. There is no evidence in the record to support any allegation that Plaintiffs[] approved of stalking and deviant behavior.

Based on this passage, it appears that the district court applied the correct standard when deciding whether to grant judgment as a matter of law, and thus, we reject that aspect of

appellant's argument. Accordingly, we turn to addressing appellant's substantive arguments challenging the district court's judgment as a matter of law.

A. The Admitted E-mails

1. The statute of limitations does not bar claims related to the admitted e-mails sent in 2003.

Appellant argues that it was improper for the district court to consider the so-called "admitted e-mails" from 2003 and 2004 because any defamation claim relating to those e-mails was barred by the applicable statute of limitations. The Minnesota statute of limitation for defamation claims is two years. Minn. Stat. § 541.07 (2006). Here, the district court considered e-mails from appellant dated September 2003, October 2003, December 2003, January 2004, as well as the Hollenbeck complaint appellant filed with MYSA in October 2003. Respondent's initial complaint in this action was filed November 22, 2005.

To relate back to the original pleading and avoid being barred by the statute of limitations, a claim asserted in the amended pleading must arise out of the same conduct, transaction, or occurrence set forth in the original complaint. Minn. R. Civ. P. 15.03; *see Leaon v. Washington County*, 397 N.W.2d 867, 871 (Minn. 1986) (holding that if certain conditions are met, amendment to proceedings pursuant to Minn. R. Civ. P. 15.03 "will relate back to the date of the original pleading and avoid being barred by the statute of limitations"). "In cases . . . involving the relation back of amendments between existing parties, rule 15.03 is satisfied if the amendment arose out of the conduct, transaction, or occurrence that is the subject of the original pleading." *Save Our Creeks v. City of*

Brooklyn Park, 682 N.W.2d 639, 646 (Minn. App. 2004), *aff'd*, 699 N.W.2d 307 (Minn. 2005); *see also, e.g.*, *Swenson v. Emerson Elec. Co.*, 374 N.W.2d 690, 696 (Minn. 1985) (relation back of amendment adding new claim allowed when defendants had sufficient notice in original complaint of essential elements of new claim and late assertion did not, therefore, infringe on defendants' preparation of adequate defense).

Given that respondents' initial complaint was filed in November 2005, the December 2003 and January 2004 e-mails are not time-barred by the two-year statute of limitations. Moreover, these e-mails relate back to the original complaint because they are similar in content and discuss the same type of conduct addressed in the original complaint. Essentially, the district court allowed respondents to amend their complaint to conform to the evidence introduced at trial by appellant. Therefore, we conclude that the district court did not abuse its discretion by allowing respondents to amend their complaint to include the December 2003 and January 2004 e-mails.

The September 2003 and October 2003 e-mails, however, would be barred by the two-year statute of limitations if it were deemed to run from the date the e-mails were sent. But the district court concluded that all of the 2003 e-mails—including the September and October 2003 e-mails—were part of an "ongoing enterprise" and were, therefore, not barred by the statute of limitations. We agree with the district court.

The September and October 2003 e-mails were part of a series of nearly identical e-mails that appellant admitting sending from September 2003 to January 2004, thus constituting a continuing violation. In some circumstances, courts have concluded that continuing violations "prevent the expiration of the statute of limitations." *Citizens for a*

Safe Grant v. Lone Oak Sportsmen's Clubs, Inc., 624 N.W.2d 796, 803 (Minn. App. 2001) (quotation omitted); *see also Kohn v. City of Minneapolis Fire Dep't*, 583 N.W.2d 7, 11 (Minn. App. 1998) (recognizing that "discriminatory acts that persist over a period of time may constitute continuing violations") (citation omitted), *review denied* (Minn. Oct. 20, 1998); *State v. O'Hagan*, 474 N.W.2d 613, 621 (Minn. App. 1991) (concealing or possessing stolen property is a continuing offense for purposes of the statute of limitations), *review denied* (Minn. Sept. 25, 1991).

Appellant's conduct in this case is not limited to a single occurrence, but must be viewed as an ongoing series of occurrences. Moreover, all of the admitted e-mails, from 2003 through 2004, and the March 14, 2005 e-mail, are similar in that they concern alleged conduct of Hollenbeck, Singer, Ericson, and MYSA. Accordingly, we conclude that the September 2003 and October 2003 admitted e-mails were part of a continuing violation, and their consideration is therefore not barred by the statute of limitations.

2. A jury could reasonably have determined that appellant did not defame respondents based on the evidence she submitted at trial.

Appellant argues that the district court erred in granting judgment as a matter of law in favor of respondents on the issue of whether she defamed respondents.

To prevail in a defamation action, the plaintiff must show "that the defendant made: (a) a false and defamatory statement about the plaintiff; (b) in an unprivileged publication to a third party; (c) that harmed the plaintiff's reputation in the community." *Weinberger v. Maplewood Review*, 668 N.W.2d 667, 673 (Minn. 2003). The truth of a

statement is an absolute defense to a defamation claim. *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 255 (Minn. 1980).

The truth or falsity of a statement is inherently within the province of the jury, and the jury's finding will not be overturned unless it "is manifestly and palpably contrary to the evidence." *Lewis v. Equitable Life Assurance Soc'y of the United States*, 389 N.W.2d 876, 889 (Minn. 1986). "Where there is no dispute as to the underlying facts," however, "the question of whether a statement is substantially accurate is one of law for the court." *Jadwin v. Minneapolis Star & Tribune Co.*, 390 N.W.2d 437, 441 (Minn. App. 1986).

"In private plaintiff/private matter defamation cases, the Minnesota Supreme Court has placed the burden of establishing each element of the claim on the plaintiff." *Benson v. Nw. Airlines, Inc.*, 561 N.W.2d 530, 537 (Minn. App. 1997), *review denied* (Minn. June 11, 1997); *see also Ferrell v. Cross*, 557 N.W.2d 560, 565 (Minn. 1997) (burden of proving falsity is on plaintiff); *Rouse v. Dunkley & Bennett, P.A.*, 520 N.W.2d 406, 410 (Minn. 1994) ("The elements of defamation require the plaintiff to prove that a statement was false . . . ."); *see also Jeffries v. Metro-Mark, Inc.*, 45 F.3d 258, 261 (8th Cir. 1995) (rejecting plaintiff's argument that Minnesota law places burden of proving truth on defendant and holding that the burden of proving falsity was on plaintiff). "Only statements that present or imply the existence of fact that can be proven true or false are actionable under state defamation law." *Schlieman v. Gannett Minn. Broad., Inc.*, 637 N.W.2d 297, 308 (Minn. App. 2001) (citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18–20, 110 S. Ct. 2695, 2705–06 (1990)), *review denied* (Minn. Mar. 19, 2002).

Before granting judgment as a matter of law, the district court was required to treat as credible all evidence from appellant and all inferences reasonably derived from the evidence. Here, appellant's evidence consisted primarily of her testimony. She admitted sending the e-mails in 2003 and 2004 and on March 14, 2005, but claimed their content was true and, therefore, not defamatory. She denied sending the remaining 2005 anonymous mochasoccer e-mails and denied participating in their transmission. Thus, appellant's credibility was important in this case, and credibility determinations are to be made by the jury, not the court.

B. The 2005 Anonymous Mochasoccer E-mails

Appellant also argues that the district court improperly removed from the jury's consideration the contested issue of whether appellant authored the 2005 anonymous mochasoccer e-mails. Respondents counter and argue that the district court did not consider the anonymous mochasoccer e-mails when determining whether appellant had sent defamatory e-mails, and thus, the order for judgment as a matter of law should stand.

At first blush, it appears that the district court based its determination of defamation solely on the 2003 and 2004 e-mails that appellant admitted to sending. But a careful review of the district court's order reveals—as appellant argues—that the district court did not distinguish between the admitted and anonymous mochasoccer e-mails and, indeed, held appellant responsible for all of them. Significantly, the district court told the jury, in relevant part:

> Now I have granted [judgment as a matter of law] regard[ing] allegations of stalking, deviant behavior, pedophilia, and approval of deviant behavior and pedophilia. These

> statements, if published as a matter of law, are defamatory, per se. The evidence demonstrates that *some of these statements* are false. Also, the evidence is that Kathleen Hallaway published allegations condoning stalking and deviant behavior. . . . In answering questions 3, 6, and 9 [on damages], you may consider the impact of *any other defamatory statement that you find Ms. Hallway has made*.

(Emphasis added.) Nothing in this instruction limited the evidence the jury could consider to those e-mails appellant admitted sending. Indeed, the term "pedophilia" referenced by the court only appears in the 2005 anonymous e-mails. Thus, the jury likely considered both the admitted and anonymous mochasoccer e-mails when making its determination regarding damages. This is particularly troubling, given that appellant denied any involvement with the anonymous mochasoccer e-mails. In sum, there are issues of material fact regarding whether the admitted e-mails sent by appellant contained false statements and whether appellant sent the anonymous mochasoccer e-mails. Therefore, we conclude that the district court abused its discretion in granting judgment as a matter of law for respondents on the issue of defamation.

Because we can discern no principled mechanism for determining what evidence the jury actually considered in awarding damages, we reverse and remand for a new trial. Because of this ruling, we need not address appellant's remaining claims or the damages issue raised in respondents' notice of review.

Affirmed in part, reversed in part, and remanded.