STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0649

Paul Swartwood,
Appellant,

vs.

Mark Fodness, et al.,
Respondents.

Filed December 17, 2018
Reversed and remanded
Stauber, Judge[*]

Beltrami County District Court
File No. 04-CV-17-2540

Patrick T. Tierney, Collins, Buckley, Sauntry & Haugh, P.L.L.P., St. Paul, Minnesota (for appellant)

Lori Swanson, Attorney General, Kathryn I. Landrum, Assistant Attorney General, St. Paul, Minnesota (for respondents)

Considered and decided by Bjorkman, Presiding Judge; Worke, Judge; and Stauber, 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

STAUBER, Judge

Appellant Paul Swartwood challenges the district court's order dismissing his defamation claim against respondent Mark Fodness for failing to state a claim upon which relief can be granted. Because Swartwood's complaint pleads his defamation claim with sufficient specificity, we reverse and remand.

F A C T S

In August, 2017, appellant Paul Swartwood, a local tennis instructor and president of the Bemidji Area Tennis Association, sued respondent Mark Fodness for defamation and Bemidji State University for vicarious liability. The complaint alleges that, in late September 2015, Fodness, "while acting in the course and scope of his employment" as the Bemidji State University tennis coach, "made false and defamatory statements about Paul Swartwood to the members of the Bemidji State University women's tennis team and others." The complaint states that Fodness told the tennis team to "stay away from Paul Swartwood because he was a sexual predator who acted inappropriately around young women." The complaint also states that Fodness made similar statements on other occasions. The complaint alleges that the statements were false and affected Swartwood's professional reputation.

In September 2017, Fodness filed a motion to dismiss under Minn. R. Civ. P. 12.02(e), for failing to state a claim upon which relief can be granted.[1] Fodness argued

[1] Bemidji State moved to dismiss under Minn. R. Civ. P. 12.02(d), for insufficient service of process of the vicarious liability claim. Swartwood later conceded there was insufficient

that Swartwood failed to "identify (1) who heard the alleged statements; (2) when the alleged statements were made; or (3) where the alleged statements were made." Fodness argued that Swartwood failed to adequately plead defamation because the complaint did not provide the "precise defamatory language or even the context in which the alleged statements were made." Fodness also moved for a more definite statement, under Minn. R. Civ. P. 12.05, and Swartwood conceded that he does not have any additional facts to add to his complaint.

On December 21, 2017, the district court heard arguments on the motion to dismiss. Fodness argued that the complaint did not provide sufficient specificity to satisfy the requirements of a defamation claim, and that instead, the "complaint contains an inflammatory characterization as to what Mr. Swartwood thinks might have been said by [Fodness] to unknown persons at an unknown time at an unknown place." Counsel for Swartwood argued that the complaint states specifically that "Fodness told the members of the Bemidji State University Women's tennis team" that Swartwood "was a sexual predator," which are two facts sufficient to meet the "more rigid standard in defamation cases." Swartwood also argued that Minnesota law allows him to commence this lawsuit and "conduct discovery to determine what the precise language is."

On March 9, 2018, the district court issued a written order granting the motion to dismiss. The district court determined that, aside from the allegation that Fodness "advised members of the [tennis team] to stay away from [Swartwood] because he is a sexual

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service of process upon Bemidji State and effectively withdrew the vicarious-liability claim. The withdrawal of the vicarious-liability claim is not at issue on appeal.

predator who has acted inappropriately around young women," "[n]o further information is provided in the complaint as to the exact statement made, which individuals heard the statement, where the alleged defamation occurred, or even any context in which the alleged statements were made." The district court continued, "[t]his description of the defamation is imprecise and vague."

Swartwood appeals.

D E C I S I O N

Swartwood argues that the district court erred by dismissing his complaint because the facts pleaded in his complaint are sufficiently precise—in September 2015, Fodness told the members of the Bemidji State tennis team that Swartwood was a sexual predator. Swartwood also argues that, although defamation claims should generally be alleged verbatim, in this case, he need only include a short and plain statement of the claim.

A district court may dismiss a complaint when the plaintiff fails to state a claim upon which relief can be granted. Minn. R. Civ. P. 12.02(e). In deciding a motion to dismiss on that ground, the district court must take the facts alleged in the complaint as true and draw inferences in favor of the nonmoving party. *See Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003). "We review de novo whether a complaint sets forth a legally sufficient claim for relief. We accept the facts alleged in the complaint as true and construe all reasonable inferences in favor of the nonmoving party." *Walsh v. U.S. Bank, N.A*, 851 N.W.2d 598, 606 (Minn. 2014) (citation omitted).

Generally, "[a] pleading which sets forth a claim for relief . . . shall contain a short and plain statement of the claim showing that the pleader is entitled to relief."

Minn. R. Civ. P. 8.01. The supreme court has observed that "[a] claim is sufficient against a motion to dismiss for failure to state a claim if it is possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded." *Walsh*, 851 N.W.2d at 603.

In pleading a claim for defamation, a plaintiff must show that another person made a false statement, communicated it to a third party, and that the statement harmed the plaintiff's reputation in the community. *Weinberger v. Maplewood Review*, 668 N.W.2d 667, 673 (Minn. 2003). Generally, "the defamatory matter must be set out verbatim." *Moreno v. Crookston Times Printing Co.*, 610 N.W.2d 321, 326 (Minn. 2000). But, if a plaintiff's complaint does not state the exact language spoken, it is not fatal to the claim as long as the plaintiff identifies who made the defamatory statement. *See Schibursky v. Int'l Bus. Machs. Corp.*, 820 F. Supp. 1169, 1182 (D. Minn. 1993).

The parties rely on numerous cases, the majority of which are unpublished cases[2] and regard the written or broadcasted publication of allegedly defamatory statements. *See, e.g.*, *Moreno*, 610 N.W.2d 321; *American Book Co. v. Kingdom Publ'g Co.*, 73 N.W. 1089 (Minn. 1898); *Special Force Ministries v. WCCO Television*, 584 N.W.2d 789 (Minn. App. 1998). Each of these cases appealed from summary judgment or judgment as a matter of law, not from dismissal under rule 12.02. These cases are not on all-fours with the case before us.

[2] Unpublished opinions of this court are not precedential and can be used only as persuasive authority. *See* Minn. Stat. § 480A.08, subd. 3(c) (2018).

Swartwood's complaint makes more than a broad characterization or general assertion that someone said that he acted inappropriately around young women. Rather, Swartwood's complaint alleges that, in late September 2015, a particular person—Fodness—told an identifiable and readily ascertainable audience—the women of the Bemidji State women's tennis team and others—that Swartwood was a sexual predator. Swartwood's failure to provide a verbatim quotation of the defamatory statement, which was made out of his presence, is not fatal to his claim. Because Swartwood's complaint alleges with sufficient specificity that a known individual made a false statement about him to third parties, and that the statement harmed his reputation in the community, he satisfied the general pleading standard of rule 8.01. Therefore, the district court erred by dismissing the complaint under rule 12.02(e).

Reversed and remanded.