STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0729

Generations Law Office, Ltd.,
Appellant,

vs.

Lonny D. Thomas,
Respondent,

Mark A. Severson, et al.,
Respondents,

and

Thomas Law, P.A., et al.,
Respondents,

vs.

Generations Law Office,
Appellant,

Brian T. Carlson,
Defendant.

Filed January 7, 2019
Affirmed
Hooten, Judge

Crow Wing County District Court
File No. 18-CV-15-2008

Brian T. Carlson, Generations Law Office, Ltd., Pequot Lakes, Minnesota (for appellant)

Mark A. Severson, Kurt W. Porter, Severson Porter Law, Crosslake, MN (for respondents Thomas Law, P.A. and Thomas & Severson, P.A. and Mark Severson)

Patrick M. Krueger, Borden, Steinbauer, Krueger & Knudson, P.A., Brainerd, Minnesota (for respondents Lonny Thomas and TAPA, LLC)

Considered and decided by Rodenberg, Presiding Judge; Hooten, Judge; and Stauber, Judge.*

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

HOOTEN, Judge

This appeal involves a dispute over a contract. Following arbitration and summary judgment, appellants[1] challenge the district court's application of the statute of frauds, selection of the arbitrator, grant of summary judgment, and denial of a motion to amend the complaint. We affirm.

FACTS

On June 21, 2013, Generations Law Office, Ltd. and its owner, Brian T. Carlson, entered into a contract with respondents Thomas Law, P.A., Lonny D. Thomas, and Mark A. Severson for the sale of Carlson's estate-planning practice to respondents. The contract anticipated that Carlson would continue to work as an attorney with the practice and would

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

[1] The pleadings in the district court and the notice on appeal filed in this court identified Generations Law Office, Ltd., as the sole plaintiff and appellant, and the caption on appeal reflects that. *See* Minn. R. Civ. App. P. 143.01 (specifying that the caption "not be changed in consequence of the appeal"). The parties have briefed this matter as if both Generations Law Office and Brian T. Carlson appealed, and our analysis addresses all arguments accordingly. We will refer to appellants as "Carlson" and generally refer to the respondents collectively as "respondents" unless clarification is required.

provide training and consulting to respondents over a period of several years. The parties included a paragraph in the contract addressing termination of the contract:

> Either party may terminate this agreement for any reason prior to November 1, 2013. If not terminated, it shall thereafter be binding upon all parties. A termination must be in writing signed by the terminating party and delivered to the other party before November 1, 2013.

The parties also contemplated possible conflicts, agreeing that "[a]ny dispute under this agreement shall be submitted to arbitration and shall not be litigated."

Performance under the contract proceeded without incident until October of 2013. Carlson claims that at this point respondents demanded that the contract be renegotiated and made an anticipatory breach of the contract by telling him that they would no longer perform under the contract. Respondents assert that "the parties orally and mutually agreed to terminate and/or rescind" the contract over the course of October 4 to October 21, 2013.

A year and one-half later, on May 22, 2015, Carlson filed a summons and complaint in district court alleging, inter alia, causes of action for breach of contract and abuse of process. On June 8, 2015, respondents filed an answer and filed their own summons and complaint against Carlson.[2] On July 23, 2015, the two cases were consolidated. Carlson filed a motion to compel arbitration, which was granted on September 8, 2015. Attorney Steven R. Schwegman of Quinlivan & Hughes was appointed arbitrator. The arbitration occurred in August 2016. The arbitrator concluded that "the parties, through their written

[2] It appears that respondents initially served Carlson with the summons and complaint on July 22, 2014, but did not file it in district court until June 8, 2015.

and verbal communications as well as their conduct, waived any requirement that the termination be in writing" and that there was an oral termination of the contract.

In May 2017, respondents moved for summary judgment, and Carlson filed a motion to amend his complaint and for other relief. The district court granted respondents' motion for summary judgment but denied Carlson's motions. This appeal follows.

D E C I S I O N

Carlson raises several issues on appeal. First, he argues that the district court erred in its application of the statute of frauds to the contract. Second, he asserts that the district court erred in its selection of the arbitrator. Third, he contends that the district court erred in granting summary judgment in favor of respondents on three of his claims. And finally, he claims that the district court erred by denying his motion to amend his complaint and in not declaring that some of respondents' statements were libel per se.

I. Statute of Frauds

Carlson first argues that the district court erred in its application of the statute of frauds. On September 8, 2015, in granting Carlson's motion to compel arbitration, the district court addressed respondents' argument that they were not subject to the contract's arbitration clause because the contract had been terminated. There was nothing in writing from respondents terminating the contract, as required by the terms of the contract, but respondents argued that there had been a subsequent oral modification to the contract that permitted oral termination of the contract. They also argued that the contract was terminated by mutual rescission. In rejecting respondents' oral-termination argument, the district court ruled that the contract fell under the statute of frauds because it required

performance exceeding one year, so it could not be orally modified to allow for oral termination.

In a later order granting Carlson's subsequent motion to appoint an arbitrator, the district court addressed respondents' mutual-rescission argument by clarifying its September 8 order. It explained, "While the Court was able to summarily determine that the Agreement could not have been modified by a subsequent oral modification, it remains to be determined if the Agreement was terminated by mutual rescission."[3] The district court then tasked the arbitrator with "wad[ing] into the facts to determine if the Agreement was terminated by mutual rescission."

On appeal, Carlson argues that the district court erred in submitting the issue of mutual rescission to arbitration. Under Minn. Stat. § 572B.07(a) (2018), when there is a motion to compel arbitration, the district court must summarily decide whether there is an enforceable agreement to arbitrate. But under Minn. Stat. § 572B.06(c) (2018), it is up to the arbitrator to "decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable." The district court treated the question of oral modification as a threshold issue as to whether the controversy should go to arbitration, concluding that it should. And the district court treated the question of mutual rescission as an issue that was so tied to the facts that it should be decided by the arbitrator.

[3] We note that in this case the statute of frauds does not apply to mutual rescission. *See Kineto Mach. Co. v. Ugland*, 177 N.W. 1018, 1018 (Minn. 1920).

After a two-day arbitration, the arbitrator determined that the parties had mutually rescinded the contract. "A court will not set aside an arbitration award because it thinks that the arbitrators erred as to the law or the facts." *David A. Brooks Enters., Inc. v. First Sys. Agencies*, 370 N.W.2d 434, 436 (Minn. App. 1985). "Arbitrator's awards will only be impeached if their conclusions were so at variance from conclusions which might legitimately be drawn from the evidence before them as to imply bad faith or failure to exercise an honest judgment." *Id.* In his conclusions of law, the arbitrator found that "the parties, through their written and verbal communications as well as their conduct, waived any requirement that the termination be in writing." The arbitrator also noted that in a memorandum prepared on November 7, 2013, Carlson told Thomas, "Since October 1, 2013 we have not had an agreement." We hold that there is nothing in the record to suggest that the arbitrator's findings and conclusions imply bad faith or a failure to exercise an honest judgment.

II. Arbitrator

Carlson frames the second issue as being about whether the district court erred "in permitting Respondents to select the arbitrator." At the outset, we note that respondents did not, in a literal sense, select the arbitrator. The district court appointed Schwegman after Carlson filed a motion asking the district court to appoint an arbitrator and provided the court with a list of three potential arbitrators, the third being Schwegman.

The argument in Carlson's brief can be broken down into two parts. The first portion deals with the process of selecting an arbitrator. He cites to the selection procedures recommended by the American Bar Association, the American Arbitration Association,

and the rules of JAMS, a private arbitration service, and he cites to cases that discuss the importance of a fair selection process. Carlson concludes that he was "deprived of a fair process in the selection of an arbitrator." But Carlson fails to explain why the fact that the arbitration procedures laid out by ABA, AAA, and JAMS were not followed means that he is entitled to any relief. Rather than articulating a legal argument, Carlson settles on expressing his displeasure with how respondents conducted themselves through the selection process.[4] The first part of Carlson's argument has no merit.

Second, Carlson argues that the arbitrator's award should be vacated because of evident partiality. Under Minn. Stat. § 572B.23(a)(2)(A) (2018), a district court must vacate an arbitration award if there was "evident partiality by an arbitrator appointed as a neutral." And Minn. Stat. § 572B.12(a) (2018) defines the disclosures related to impartiality that an arbitrator must make, including "an existing or past relationship with any of the parties to the agreement . . . , their counsel or representatives, witnesses, or other arbitrators." The district court denied Carlson's motion to vacate the arbitrator's award. "Whether the conduct challenged constitutes 'evident partiality' is reviewed de novo." *Pirsig v. Pleasant Mound Mut. Fire Ins. Co.*, 512 N.W.2d 342, 343 (Minn. App. 1994).

The district court addressed Carlson's evident-partiality argument. It explained:

> The arbitrator in this matter stated, in his Order dated November 9, 2016, that he had disclosed all information to Mr. Carlson with regard to his relationship with [respondents' attorney] before being appointed the arbitrator. The only exception is that [the arbitrator] did not tell Mr. Carlson that

[4] Carlson also briefly seems to argue that respondents "violate[d] their duty as officers of the court." But he cites no statutes or caselaw indicating how respondents violated this duty or what the remedy would be.

> Quinlivan and Hughes had represented [respondents' attorney] in the past.

Under Minn. Stat. § 572B.23(b) (2018), a motion to vacate "predicated upon the ground that the award was procured by corruption, fraud, or other undue means" must be filed within 90 days of learning of the ground. The district court ruled that Carlson's motion was untimely because he had learned about the arbitrator's relationship with respondents' attorney prior to the arbitration, over one year before he filed the motion to vacate. The district court addressed the information that Carlson had learned more recently, and was thus not untimely—that the arbitrator's law firm had represented respondents' attorney. The district court found that the nondisclosure of this event did not rise to the level of undue means or evident partiality because it had occurred 32 years before the arbitration.

Carlson argues that the 90-day period of section 572B.23(b) did not begin to run until the disclosure of the prior representation. But he presents no evidence to contradict the assertion that he was informed by the arbitrator about the prior contacts before the arbitration. Even if the claim had been timely made, the relationship between respondents' attorney and the arbitrator was innocuous. Carlson asserts that respondents' attorney and the arbitrator had known each other for a number of years, that respondents' attorney had been invited to social functions held by the arbitrator's law firm, and that respondents' attorney had been requested to be an arbitrator for cases where the arbitrator's law firm was a party. None of this suggests partiality. It reflects the simple reality that lawyers—

especially those who have worked for a number of years in the same community—tend to know one another.

We are similarly not persuaded with regard to the prior representation of respondents' attorney by the arbitrator's firm. In *Safeco Ins. Co. of Am. v. Stariha*, 346 N.W.2d 663, 666 (Minn. App. 1984), we held that "[a] remote and unrelated attorney-client relationship between the neutral arbitrator and counsel for one of the parties is not a basis to vacate an arbitration award for undue means or evident partiality." Here the representation occurred 32 years before the arbitration and respondents' attorney was represented by the firm, not specifically by the arbitrator. We hold that the district court did not err by concluding that the relationship was too remote and unrelated to be a basis to vacate the arbitration award.

III. Summary Judgment

Carlson next argues that the district court erred in granting summary judgment to respondents on three of his claims. A grant of summary judgment is reviewed de novo to determine if there are genuine issues of material fact and to see if the district court erred in its application of the law. *Montemayor v. Sebright Prods., Inc.*, 898 N.W.2d 623, 628 (Minn. 2017); *see also* Minn. R. Civ. P. 56.03. "A fact is 'material' for purposes of summary judgment if its resolution will affect the outcome of the case." *Sayer v. Minn. Dep't of Transp.*, 790 N.W.2d 151, 162 (Minn. 2010). And evidence is to be viewed "in the light most favorable to the party against whom summary judgment was granted." *Senogles v. Carlson*, 902 N.W.2d 38, 42 (Minn. 2017).

The district court granted respondents' motion for summary judgment on August 30, 2017. It granted summary judgment on Carlson's claims of (1) interference with prospective economic advantage, (2) interference with contractual relations, and (3) abuse of process.

With regard to the interference claims, the district court determined that there was "no factual dispute as to whether [respondents] were aware of [Carlson's] expectation of economic advantage, contractual relations, or economic relations. [Respondents] had no knowledge of a separate contract involving [Carlson]."[5] Tortious interference with prospective economic advantage requires that the defendant knew of the plaintiff's reasonable expectation of economic advantage, *Gieseke ex rel. Diversified Water Diversion, Inc. v. IDCA, Inc.*, 844 N.W.2d 210, 219 (Minn. 2014), and tortious interference with contractual relations requires that the defendant knew of the contract, *R.A., Inc. v. Anheuser-Busch, Inc.*, 556 N.W.2d 567, 570 (Minn. App. 1996), *review denied* (Minn. Jan. 29, 1997).

Carlson asserts on appeal that there was a genuine issue of material fact as to whether respondents had knowledge of a potential sale of his firm to a different buyer. Carlson states this in a conclusory way. He cites to no evidence in the record indicating that respondents had knowledge of the potential sale. Carlson does cite to respondents' affidavits, but those affidavits explicitly deny any knowledge of the sale. Because Carlson

[5] The parties do not make this clear on appeal, but it appears that Carlson's interference claims are based on the idea that he had found an alternative buyer for his law firm in 2014 and that respondents served him with the summons and complaint on July 22, 2014 (although not filed in district court until June 8, 2015) for the purpose of blocking the sale.

does not cite to any evidence that creates a genuine issue of material fact on the knowledge requirements of the interference claims, we hold that the district court did not err.

Carlson also argues that the district court erred by requiring only proof of actual knowledge of the potential sale rather than "knowledge of facts which, if followed by reasonable inquiry, would have led to a complete disclosure of the contractual relations and rights of the parties." *Twitchell v. Nelson*, 155 N.W. 621, 623 (Minn. 1915); *see also Kjesbo v. Ricks*, 517 N.W.2d 585, 588 n.3 (Minn. 1994) (applying the same knowledge requirement in dicta). Carlson is correct that the district court did not contemplate this expansive definition of the knowledge requirement. But Carlson cites to nothing in the record that would suggest that respondents had knowledge of facts which, if reasonably inquired into, would have led to them learning about the contract. He briefly argues that respondents knew that he was nearing retirement age and wanted to sell his practice. But even if respondents were aware of this information, Carlson does not explain why that would mean that respondents knew or should have known that he had another buyer in place. We hold that there is no genuine issue of material fact on this point either.

With regard to the abuse-of-process claim, Carlson argues that there was a genuine issue of material fact as to whether respondents had an ulterior motive in filing their lawsuit against him. "The essential elements for a cause of action for abuse of process are the existence of an ulterior purpose and the act of using the process to accomplish a result not within the scope of the proceedings in which it was issued, whether such result might otherwise be lawfully obtained or not." *Dunham v. Roer*, 708 N.W.2d 552, 571 (Minn. App. 2006) (quotation omitted), *review denied* (Minn. Mar. 28, 2006).

Carlson insists that respondents filed the lawsuit with the "intent of blocking any sale by Appellant." Carlson bases much of his argument on: (1) his belief that respondents had prior knowledge of a potential sale and (2) respondents' frequent use of epithets to describe him. As we stated above, Carlson cites to nothing in the record that suggests that respondents had prior knowledge of the potential sale. But even if respondents *had* known about a potential sale, Carlson fails to point to any evidence that suggests that respondents acted with an ulterior motive in serving him with the summons and complaint. He also fails to demonstrate how the use of epithets is proof that respondents were filing the lawsuit with an ulterior motive rather than proof that they disliked him. We hold that there is no genuine issue of material fact with respect to ulterior motive.

Carlson also asks us "to rule that legally there is no difference between refusing to drop a lawsuit when you gain knowledge of a contract or potential contract and commencing a lawsuit knowing about a contract or potential contract." Carlson cites to no caselaw in support of this argument; he is presumably asking us to create new caselaw. We decline to do so. Even if we were to hold, for the purposes of an abuse-of-process claim, that maintaining a lawsuit after learning of a contract is akin to commencing a lawsuit with knowledge of the contract, Carlson's argument would fail because he does not point to anything in the record suggesting an ulterior motive for maintaining the lawsuit.

IV. Motion to Amend Complaint and Libel Per Se

Carlson argues that the district court erred in denying his motion to amend his complaint and in concluding that respondents' statements were not libel per se. We review the denial of a motion to amend a complaint for an abuse of discretion. *Johnson v.*

Paynesville Farmers Union, 817 N.W.2d 693, 714 (Minn. 2012). A party should be allowed to amend their complaint unless the adverse party would be prejudiced by the amendment. *Id.* But it is not an abuse of discretion to deny such a motion where the proposed claim would not survive summary judgment. *Id.* And whether a statement is defamatory per se is a question of law that requires the application of law to established facts and that we review de novo. *Longbehn v. Schoenrock*, 727 N.W.2d 153, 158 (Minn. App. 2007).

During discovery, Carlson obtained emails that were primarily between respondents Thomas and Severson, which he claimed were defamatory. In a motion to amend his complaint, Carlson sought to clarify claims of aiding and abetting libel, slander, and defamation based upon these emails. In a defamation action, a plaintiff must prove: (1) that a false and defamatory statement was made about him; (2) that the statement was made in an unprivileged publication to a third party; and (3) that his reputation in the community was harmed by it. *Range Dev. Co. of Chisholm v. Star Tribune*, 885 N.W.2d 500, 510 (Minn. App. 2016). The district court found that Carlson had not identified any evidence of slanderous statements made by respondents and therefore found that the aiding-and-abetting-slander claim would not survive summary judgment. The district court then analyzed eight written statements that could potentially be defamatory. It determined that three of the statements were mere hyperbolic opinion, two were too vague to be libel, and three were protected by attorney-client privilege. It concluded that Carlson's proposed amended claims would not survive summary judgment and denied his motion.

Carlson argues that the district court erred with respect to the three statements that it labeled as hyperbolic opinions. "[O]pinion amounting to 'mere vituperation and abuse' or 'rhetorical hyperbole' . . . cannot be the basis for a defamation action." *McKee v. Laurion*, 825 N.W.2d 725, 733 (Minn. 2013). "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, 440–41 (Minn. App. 1986). The statements in question were: (1) in a draft of an email that Thomas was going to send to Carlson, which Thomas sent to Severson and Thomas's wife Diane, Thomas stated, "Actually, in the nearly nine months since you moved into my office and started leaching off me, you have demonstrated that you are one of the most prolific deadbeats I have ever met."; (2) in an email from Thomas to Severson, Thomas stated, "I am going to tell him in no uncertain terms what a complete lying deceptive sack of sh-t I think he is."; and (3) in an email from Severson to Thomas, Severson referred to appellant as a "wretched, reprobate, lying, incorrigible, treacherous, bamboozling sack of sh-t once known as trustworthy Brian." All three statements were hyperbolic opinions, and "in context, the audience would understand" the statements were not representations of fact. *Id.*

Carlson argues that the district court erred in determining that three of the statements were protected by attorney-client privilege. The statements were: (A) in the proposed email to Carlson that Thomas sent to Severson and Diane Thomas, Thomas stated, "Suffice it to say that I welcome the opportunity to present my evidence demonstrating what a complete crook you are and pursuing my damage claim."; (B) in another draft email to

Carlson, this time sent by Severson to Thomas, Severson stated, "I would have never signed an agreement had I known that you secretly deleted the provision providing compensation for legal assistant time."; and (C) in an email from Severson to Thomas and Diane Thomas, Severson stated, "Studying the agreement it seems that [Carlson] took advantage of our focus on the calculation formula to determine the purchase price as several clauses address that issue."

It is unnecessary for us to determine whether the three statements are protected by attorney-client privilege because they are protected by absolute privilege. Typically, absolute privilege may protect defamatory statements if they are "(1) made by a judge, judicial officer, attorney or witness; (2) made at a judicial or quasi-judicial proceeding; and (3) the statement at issue is relevant to the subject matter of the litigation." *Mahoney & Hagberg v. Newgard*, 729 N.W.2d 302, 306 (Minn. 2007). But absolute privilege also "extends to statements published prior to the judicial proceeding" so long as the statements "have some relation to the judicial proceeding." *Id.* This relevance to a judicial proceeding "is defined broadly, not limiting the privilege to statements that are legally relevant but permitting all statements that have reference, relation or connection to the case." *Id.* at 308 (quotation omitted). "The relevance of a statement to litigation is a question of law, and any doubts as to relevance of a statement must be resolved in favor of finding the statements pertinent." *Id.* at 306–07 (quotation omitted). But the application of absolute privilege is limited "to situations in which the public service or the administration of justice requires complete immunity from being called to account for language used." *Matthis v. Kennedy*, 67 N.W.2d 413, 417 (Minn. 1954); *see also Mahoney & Hagberg*, 729 N.W.2d at 306.

The three statements that the district court determined were protected by attorney-client privilege were made by two attorneys involved in a contract dispute about the circumstances surrounding that dispute. And the contract dispute eventually resulted in this litigation. We determine, as a matter of law, that these three allegedly defamatory statements made by Severson and Thomas to each other and to Thomas's wife (who was also acting as their firm's accountant), were relevant to the judicial proceedings that took place in this case. We also determine that, considering the public service and the administration of justice, it is appropriate to apply absolute privilege here. To do otherwise would lead to the absurd conclusion that attorneys involved in a contract dispute and facing potential litigation cannot privately express frustration about the opposing party to one another and their spouses without incurring liability for defamation. Accordingly, we conclude that absolute privilege protected statements (A), (B), and (C).[6]

But even if the statements were not protected by absolute privilege, Carlson's argument would still fail. Statement (A)—that Carlson is a "complete crook"—is an example of "rhetorical hyperbole" that constitutes the kind of opinion statements protected by the first amendment. *McKee*, 825 N.W.2d at 733. This is especially so because the context in which the statements were made matters; and here, the context was two attorneys and the wife of one of the attorneys discussing potential litigation amongst themselves. *See Jadwin*, 390 N.W.2d at 443; *see also Rochester City Lines, Co. v. City of Rochester*, 846

[6] We note that absolute privilege would also likely protect the three statements that were labeled hyperbolic opinions by the district court, but it is unnecessary for us to reach that conclusion in light of our holding that the district court was correct in its assessment of those statements.

N.W.2d 444, 466 (Minn. App. 2014) (holding that the use of the words "hostage," "ransom," "extortion," "robbery," and "stole" was opinion and hyperbole—not a verifiable factual criminal accusation—because of the informal context in which the words were used), *aff'd in part, rev'd in part on other grounds*, 868 N.W.2d 655 (Minn. 2015).

Statement (B)—that Carlson had secretly deleted a provision from the contract—would likely be protected by attorney-client privilege. "[A]dvice given [to] a client by an attorney in the course of his professional duty . . . is protected by the attorney-client privilege." *Woody v. Krueger*, 374 N.W.2d 822, 824 (Minn. App. 1985). A communication protected by attorney-client privilege does not constitute defamation because it does not meet the publication requirement of defamation. *Id.* And it is undisputed from the record that respondents Thomas and Severson are both attorneys and drafted these emails shortly after the relationship with Carlson deteriorated. These emails pertain to the contract that respondents had with Carlson and were written with the possibility of a looming legal action.

And statement (C)—that Carlson took advantage of respondents' focus—is an unverifiable statement of opinion that is not actionable. *See Bebo v. Delander*, 632 N.W.2d 732, 740 (Minn. App. 2001) (listing verifiability as one of four factors to consider when determining whether a statement is one of opinion or fact), *review denied* (Minn. Oct. 16, 2001).

Carlson also argues that the statements made by respondents are defamatory per se. Statements are defamatory per se "if they refer to improper or incompetent conduct involving a person's business, trade, or profession." *Longbehn*, 727 N.W.2d at 158. But

the words "must be peculiarly harmful to the person in his business. General disparagement is insufficient." *Anderson v. Kammeier*, 262 N.W.2d 366, 372 (Minn. 1977). Since we determined that the statements were either rhetorical hyperbole or protected by absolute privilege, this argument is irrelevant. We nonetheless note that while respondents' statements were negative, we cannot say that they were "peculiarly harmful to [Carlson] in his business" so as to amount to libel per se.

We hold that the district court did not abuse its discretion in denying Carlson's motion to amend his complaint because his defamation claims would not survive summary judgment, and we hold that the statements do not constitute libel per se.

Affirmed.