STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1812

Jeffrey C. Brown PLLC, et al.,
Appellants,

vs.

Gold Star Taxi and Transportation Service Corporation, et al.,
Respondents.

Filed August 17, 2020
Affirmed
Bjorkman, Judge

Hennepin County District Court
File No. 27-CV-19-3939

Jeffrey C. Brown, Jeffrey C. Brown PLLC, Minneapolis, Minnesota (attorney pro se and for appellant Jeffrey C. Brown PLLC)

Tamara L. Novotny, Cousineau, Van Bergen, McNee & Malone, P.A., Minnetonka, Minnesota (for respondents Gold Star Taxi and Transportation Service Corporation and Nabil Ali)

Considered and decided by Bjorkman, Presiding Judge; Bratvold, Judge; and Cochran, Judge.

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 deceptive-trade-practices claims arising out of a negative review respondents posted online, and the

denial of his motion to amend the complaint to seek punitive damages. Because the offending statement is one of pure opinion, we affirm.

FACTS

Appellant Jeffrey C. Brown is an attorney and part-time conciliation court referee in Hennepin County District Court. In 2018, he presided over a matter involving respondents Gold Star Taxi and Transportation Service Corporation and its chief executive officer, Nabil Ali (collectively, Gold Star). Ali was not pleased with Brown's handling of the case. On August 24, 2018, Ali posted a one-star review on the Jeffrey C. Brown, PLLC Google My Business website listing. In addition to the single star, Ali posted the sentence "Need to go back to law school." Brown commenced this action on behalf of himself and his law firm (collectively, Brown) alleging the statement is defamatory and violates the Uniform Deceptive Trade Practices Act, Minn. Stat. §§ 325D.43-.48 (2018) (the act). The complaint seeks damages in excess of $170,000 and injunctive relief.[1]

In its answer, Gold Star admits posting the statement but avers that it is a non-defamatory statement of opinion. Gold Star also alleges that Brown's deceptive-trade-practices claim is moot because Gold Star deleted the review "within a few weeks" after it was posted.

Both parties moved for summary judgment. Brown also moved to amend the complaint to add a claim for punitive damages. Following a hearing, the district court

[1] The chief justice of the Minnesota Supreme Court appointed a Ramsey County District Court judge to handle the case.

granted summary judgment for Gold Star and denied the other motions.[2] The district court concluded that Ali's statement is not defamatory and that Brown did not establish grounds for amending the complaint to seek punitive damages because his underlying claim fails as a matter of law. The district court also concluded that Brown's deceptive-trade-practices claim fails because he did not show that the statement was a "commercial advertisement" or made "in the course of business," and the claim is moot. Brown appeals.

D E C I S I O N

Summary judgment is proper if "there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Minn. R. Civ. P. 56.01. We review a grant of summary judgment de novo, viewing "the evidence in the light most favorable to the nonmoving party and resolv[ing] all doubts and factual inferences against the moving part[y]." *Maethner v. Someplace Safe, Inc.*, 929 N.W.2d 868, 874 (Minn. 2019) (quotation omitted). A party is entitled to summary judgment when the nonmoving party fails to establish an essential element of his claim. *Bebo v. Delander*, 632 N.W.2d 732, 737 (Minn. App. 2001), *review denied* (Minn. Oct. 16, 2001).

I. Brown's defamation claim fails as a matter of law.

To prevail on a defamation claim, the plaintiff must establish that

> (1) the defamatory statement was communicated to someone other than the plaintiff; (2) the statement is false; (3) the statement tends to harm the plaintiff's reputation and to lower [the plaintiff] in the estimation of the community; and (4) the recipient of the false statement reasonably understands it to refer to a specific individual.

[2] Brown also moved for a default judgment and judgment on the pleadings. He does not challenge the denial of those motions.

McKee v. Laurion, 825 N.W.2d 725, 729-30 (Minn. 2013) (alteration in original) (quotations and citation omitted). When such a statement concerns "a person's business, trade, or professional conduct," it is defamatory per se. *Becker v. Alloy Hardfacing & Eng'g Co.*, 401 N.W.2d 655, 661 (Minn. 1987). When a statement is defamatory per se, harm is presumed and the plaintiff need not prove actual damages. *Schlieman v. Gannett Broad. Inc.*, 637 N.W.2d 297, 307 (Minn. App. 2001) ("'[D]efamatory per se' defines a rule of damages, not of defamatory meaning . . . ."), *review denied* (Minn. Mar. 19, 2002). But a plaintiff who alleges defamation per se must prove the remaining elements to prevail on his claim. *Bebo*, 632 N.W.2d at 739. "The question of whether a statement's language reasonably conveys a defamatory meaning is one of law." *McKee*, 825 N.W.2d at 731.

Brown argues that Ali's online post is defamatory because it impugns his professional competence. We are unpersuaded by Brown's argument.

The fact that a message conveys a negative or derogatory meaning does not, in and of itself, make it defamatory; the message must be a false statement of fact. This is so because of the broad constitutional protection afforded to speech. The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I; *accord* Minn. Const. art. I, § 3 ("[A]ll persons may freely speak, write on, and publish their sentiments on all subjects . . . ."). Indeed, the First Amendment protects opinion statements "because (supposedly) there is no such thing as a false opinion." *Fine v. Bernstein*, 726 N.W.2d 137, 144 (Minn. App. 2007), *review denied* (Minn. Apr. 17, 2007).

In determining whether a statement is one of fact or opinion, courts consider: "(1) a statement's precision and specificity; (2) a statement's verifiability; (3) the social and literary context in which the statement was made; and (4) a statement's public context." *Id*. If a statement expresses "a subjective view, an interpretation, a theory, conjecture, or surmise . . . , the statement is not actionable." *Schlieman*, 637 N.W.2d at 308 (quotation omitted). If, in context, an audience would understand that an "expression[] of opinion, rhetoric, [or] figurative language" was "not a representation of fact," it is not actionable. *Fine*, 726 N.W.2d at 144 (quotation omitted). Likewise, statements that reflect "mere vituperation and abuse" or "rhetorical hyperbole" are not actionable because they show no real intent to defame and are understood by listeners not to be defamatory. *McKee*, 825 N.W.2d at 733 (quotation omitted).

Application of these four factors leads us to conclude that the statement "[n]eed to go back to law school" can only be interpreted as an expression of pure opinion. *McKee* is instructive. There, a doctor sued a patient's son who posted a statement referring to the doctor as "a real tool" on several "rate-your-doctor" websites. *Id*. at 728. The supreme court held that the challenged statement "falls into the category of pure opinion" because the term "cannot be reasonably interpreted as stating a fact and it cannot be proven true or false." *Id.* at 733. Rather, the term "a real tool" is non-actionable "vituperation and abuse" or "rhetorical hyperbole." *Id*. (quotation omitted).

As in *McKee*, the offending statement is vague—it does not indicate whether Brown, some other member of his law firm, or the law firm itself "[n]eed to go back to law school." The statement could be interpreted to mean that Brown did not finish law school,

or that he was required to return for some reason unrelated to his performance as an attorney. The ungrammatical aspect of the statement—that either Brown or his law firm "need" to go back to law school, adds to the uncertainty. As the district court observed, the language suggests that the poster is not "in a position to assess whether an individual should go back to law school." And the statement is not verifiable. It does not suggest any facts against which the need to return to law school could be judged, suggesting to readers that the statement cannot be proven true or false. Finally, Ali posted his derogatory statement in the review section of a website that is a repository for opinions about businesses. The forum for and context of the posting are reasonably understood by readers to express opinions rather than factual statements. As in *McKee*, Ali's online post is a statement of pure opinion.

We are mindful that derogatory statements of opinion may negatively impact the subject of the statements. And we do not condone abusive comments and rhetoric. But the law does not make such statements actionable. Because Brown's defamation claim is premised on a statement that can only be viewed as one of pure opinion, the claim fails as a matter of law.[3]

[3] Because Brown's defamation claim fails as a matter of law, we need not consider whether the district court abused its discretion in denying his motion to amend the complaint to add a claim for punitive damages. *See In re 3M Bair Hugger Litigation*, 924 N.W.2d 16, 24 (Minn. App. 2019) (applying abuse-of-discretion standard to review the denial of a motion to amend to add a claim for punitive damages), *review denied* (Minn. Mar. 27, 2019).

II. Brown's deceptive-trade-practices claim fails as a matter of law.

"A person engages in a deceptive trade practice when, in the course of business, vocation, or occupation, the person: . . . (8) disparages the goods, services, or business of another by false or misleading representation of fact[.]" Minn. Stat. § 325D.44, subd. 1(8). The act provides for injunctive relief. Minn. Stat. § 325D.45, subd. 1. Brown contends that the district court erred by dismissing his claim under the act. We disagree.

First, as with the defamation claim, Brown has not made the threshold showing that Ali made a "false or misleading representation[] of fact." Minn. Stat. § 325D.44, subd. 1(8). An action under the act will not lie when the claimant fails to show that the defendant's statements are false or misleading. *United Wild Rice, Inc. v. Nelson*, 313 N.W.2d 628, 635 (Minn. 1982) (holding that a corporation did not violate the act because a letter sent to a competitor's client did not contain false or misleading information); *see also Insignia Sys., Inc. v. News Am. Mktg. In-Store, Inc.*, 661 F. Supp. 2d 1039, 1070 (D. Minn. 2009) (holding that an in-store promotions company president did not violate the act by making statements of opinion regarding a competitor's business). As discussed above, Ali's statement, "[n]eed to go back to law school," is a statement of opinion, not fact. Just as it does not support a defamation claim, it does not support a claim under the act.

Second, Brown has not shown that Ali posted the statement "in the course of business." Minn. Stat. § 325D.44, subd. 1; *see Nw. Airlines, Inc. v. Friday*, 617 N.W.2d 590, 595 (Minn. App. 2000) (stating that the act "clearly aim[s] at events occurring in the course of trade or business"). There is no business relationship between the parties. Gold

Star is a litigant who appeared, through Ali, before Brown in his capacity as a court referee—the two did not conduct trade with each other or have any sort of business relationship. *See, e.g.*, *McClure v. Am. Family Mut. Ins. Co.*, 223 F.3d 845, 854-55 (8th Cir. 2000) (rejecting a deceptive-trade-practices claim when the "challenged communications [did] not relate to [the claimants'] 'business, services, or goods' and so f[e]ll outside the scope of the [act]"). For this reason, the act, by its terms, does not apply.

Finally, the act requires a claimant to allege that he is "likely to be damaged" by a deceptive trade practice. Minn. Stat. § 325D.45, subd. 1. Courts have interpreted this to require an allegation of facts demonstrating a risk of future harm. *See Nelson v. Am. Family Mut. Ins. Co.*, 262 F. Supp. 3d 835, 862 (D. Minn. 2017) (stating that "[a] plaintiff's failure to present evidence that he/she faces a risk of future harm requires dismissal of [a claim brought under the act]"). Brown has offered no facts showing that there is any risk of future harm to him. The post was removed from the website, and Ali has averred in an unchallenged affidavit that Gold Star will not post a similar negative review in the future.

In sum, because Brown's defamation and deceptive-trade-practices claims fail as a matter of law, the district court properly dismissed this action.

Affirmed.