STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1333

Jason L. Gabbert,
Appellant,

vs.

Star Tribune Media Company, LLC,
Respondent,

Gail Van Der Linden,
Respondent,

and

Susan Seim,
Respondent.

Filed July 25, 2022
Affirmed
Connolly, Judge

Hennepin County District Court
File No. 27-CV-20-14100

Abraham Kaplan, Parker Law Firm, Minneapolis, Minnesota (for appellant)

Leita Walker, Ballard Spahr LLP, Minneapolis, Minnesota (for respondent Star Tribune)

Dennis B. Johnson, Chestnut Cambronne, P.A., Minneapolis, Minnesota (for respondent Van Der Linden)

Michael J. Tomsche, Tomsche, Sonnesyn & Tomsche, P.A., Minneapolis, MN (for respondent Seim)

Considered and decided by Larkin, Presiding Judge; Connolly, Judge; and Halbrooks, Judge.*

NONPRECEDENTIAL OPINION

CONNOLLY, Judge

Appellant challenges the district court's dismissal under Minn. R. Civ. P. 12.02(e) of his defamation action against respondents, arguing that respondents collectively wrote and published defamatory statements that were not protected by the fair and accurate reporting privilege and were actionable. Because we see no error in the district court's dismissal of appellant's action, we affirm.

FACTS

Following an incident at an August 2018 Twins game in Target Field, the Twins issued a trespass notice banning appellant Jason Gabbert from Target Field for a year. Appellant brought a negligence action against the Twins, seeking to prevent enforcement of the ban (the 2018 litigation). The Twins moved for summary judgment, and the district court granted the motion on the ground that the Twins were a private entity leasing Target Field and could issue trespass notices as they wished. The *Star Tribune* newspaper (*Star Tribune*) published an article about the lawsuit.

Appellant then brought two actions. First, he brought a negligence action against the Twins, alleging that their nonfeasance allowed appellant to be harmed by the *Star Tribune's* article. The Twins moved to dismiss appellant's complaint under Minn. R. Civ.

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

P. 12.02(e) for failure to state a claim on which relief can be granted. The motion was granted, and this court affirmed that decision. *Gabbert v. Minnesota Twins*, *LLC*, No. A21-0317, 2021 WL 3136693, at *2 (Minn. App. July 19, 2021) (order op.) ("Because [appellant's] negligence claim is based on third-party harm resulting from nonfeasance, there is no recognized duty of care, and his claim fails as a matter of law."), *rev. denied* (Minn. Sept. 30, 2021).

Second, appellant brought this defamation action against respondent Star Tribune Media Company, which is the publisher of the *Star Tribune* and the employer of reporters Randy Furst and Rochelle Olson and columnist Patrick Reusse, and respondents Gail Van Der Linden and Susan Seim, who wrote letters to the editor that the *Star Tribune* published. Respondents moved to dismiss the complaint. The district court granted their motion, concluding that the fair and accurate reporting privilege protected the Furst report and the Olson report and that the Van der Linden letter, the Seim letter, and the Reusse column were nonactionable statements of opinion.

Appellant challenges the dismissal of his action.

DECISION

"We . . . review de novo the district court's grant of a motion to dismiss under Minn. R. Civ. P. 12.02(e). In so doing, we consider only the facts alleged in the complaint, accepting those facts as true." *Sipe v. STS Mfg., Inc*., 834 N.W.2d 683, 686 (Minn. 2013) (quotation and citation omitted).

1. The Furst Report and the Olson Report Are Protected by the Fair and Accurate Reporting Privilege.

> [R]ecovery for defamation requires a plaintiff to prove four elements: (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.

Larson v. Gannett Co., 940 N.W.2d 120, 130 (Minn. 2020). "[T]he fair and accurate reporting privilege shields a speaker from liability under the common law rule of republication . . . [which provides that] a speaker may be liable for repeating the defamatory statements of another." *Id*. at 131.

> [L]ike an absolute privilege, the fair and accurate reporting privilege cannot be defeated by common law malice—that is, proof of ill will or improper motive in the publication of the statements. Unlike an absolute privilege, however, the fair and accurate reporting privilege may be lost by a showing that the report is not a fair and accurate representation of the proceedings or meetings.

Id. (quotation and citation omitted). "Whether the fair and accurate reporting privilege applies . . . is a question of law that we review de novo." *Id.*

The most significant item that appellant claims is defamatory is the Furst Report, published on November 15 and 16, 2018, in the online and print versions of the *Star Tribune*. Furst interviewed appellant and quoted him several times in the report. The headline of the online version was, "Twins fan banned from Target Field over pursuit of baseballs goes to bat to stay at games"; an introductory paragraph in smaller type read, "Twins officials say Jason Gabbert, who chases baseballs thrown to fans in stands, has

been disruptive, but he disagrees. One judge has already backed the team." The district court concluded that "[t]he statements from the Furst Report materials . . . are fair and accurate statements as to the 2018 Litigation and are subject to the fair reporting privilege" because they fairly reflect appellant's disagreement with the Twins' evidence, and his disagreement with the substance of those statements "do[es] not defeat application of the privilege."

Appellant contends that "the district court erred in failing to find that the Furst Report is an inaccurate and unfair summary" of his 2018 litigation with the Twins. He specifically challenges the sentence "One judge has already backed the team," which he claims would cause readers to think that a court had found that appellant deserved the trespass notice and that the allegations of misconduct in the Furst Report were credible. For this contention, he relies on *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), of which he says "Time forfeited the fair report[ing] privilege by inaccurately reporting that the court found Mary Firestone to have committed adultery." But appellant misreads the *Time* case: Time reported that the court had granted a divorce on grounds of extreme cruelty and adultery, while the court had actually said that it discounted much of the testimony on cruelty and adultery as unreliable. The privilege was lost because Time did not accurately report what the court had done. Here, there is no inaccurate report of what the court did: "One judge has already backed the team" was supported by the fact that a district court judge had granted the Twins' motion and dismissed appellant's 2018 complaint seeking to enjoin enforcement of the no trespass order.

Appellant also relies on *Nixon v. Dispatch Printing Co.*, 112 N.W. 258 (Minn. 1907), claiming that it says the privilege does not apply to "libelous matter that appears in court documents, but is not acted upon by the court." But appellant also misreads *Nixon*, which actually says that the privilege does apply to any document that has "been presented to the court for its action." *Nixon*, 112 N.W. at 259. The district court did not err in concluding that appellant's view that the privilege applies only to matters on which the court has acted or to documents cited in the court's decisions was "unduly narrow."

Appellant's argument—that both the inclusion of "additional contextual material" in the Furst Report and the "omission of a pertinent fact, the court's findings" from the Furst Report defeat the fair reporting privilege—is based on a misunderstanding of the privilege. *Larson* extended the privilege to hold that it "protects news reports that accurately and fairly summarize statements about a matter of public concern." 940 N.W.2d at 133. A news report is not required either to provide every fact or to omit information that some may consider merely contextual in order to be protected by the privilege.[1] The Furst Report was entitled to the fair reporting privilege.

The district court also concluded that the Olson Report concerning fan behavior, published on August 25, 2019, was entitled to the fair reporting privilege. It said in relevant part that "the Twins banned [appellant] . . . from the ballpark, claiming that he had violated

[1] At oral argument, appellant's attorney raised the issue of whether a video was improperly omitted from the Furst Report. The omission of the video was not mentioned in appellant's brief, which was pro se. Issues not briefed on appeal are waived. *Am. Fed'n of State, Cnty, Mun. Emps. v. Grand Rapids Pub. Util. Comm'n.*, 645 N.W.2d 470, 474 n.1 (Minn. App. 2002), *rev. denied* (Minn. Aug. 6, 2002). Therefore, this issue is not properly before us, and we do not address it.

the Twins' code of conduct for guests with his overly aggressive behavior in chasing down foul balls in the stands" and that the district court "dismissed [appellant's] lawsuit with prejudice, meaning he could not refile." Appellant concedes that this court's decision on whether the fair reporting privilege applies to the Furst Report would be dispositive of whether the privilege also applies to the Olson Report. Because we agree that the fair reporting privilege applies to both reports, we do not address the Olson Report separately.

2. The Letters to the Editor and the Reusse Column Are Nonactionable.

"The First Amendment protects statements of pure opinion from defamation claims." *McKee v. Laurion*, 825 N.W.2d 725, 733 (Minn. 2012). If a statement "cannot be reasonably interpreted as stating a fact and . . . cannot be proven true or false," it constitutes non-actionable opinion and is protected under the First Amendment. *Id.* When a speaker is expressing "a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable." *Schlieman v. Gannett Minn. Broad. Inc*., 637 N.W.2d 297, 308 (Minn. App. 2001) (quotations omitted), *rev. denied* (Minn. Mar. 19, 2002). The context of a statement is relevant to the determination of whether it is fact or opinion. *See*, *e.g.*, *Hunter v. Hartman*, 545 N.W.2d 699, 707 (Minn. App. 1996) (concluding that statements made in the context of sports commentary were opinion), *rev. denied* (Minn. June 19, 1996). The district court concluded that neither the letters nor the Reusse column, all published in November 2019, were actionable.

The Van Der Linden letter, directed to appellant, said in relevant part:

> [Y]ou have no desire to be a well-mannered, polite fan in the stands, especially when a baseball finds its way into your vicinity. . . . [O]ther fans have no right to obtain a prized game souvenir when you're within arm's reach or tackle zone. . . . [Y]ou are thumbing your nose at the Twins organization which [has] . . . giv[en] you a no-trespass notice for a year by professing you have no intention of staying away.

The Seim letter, published a few days later, said:

> Regarding the lovely picture of our local baseball snatcher . . . [w]ouldn't it be more useful to follow the wise practice of omitting a perpetrator's name and image when reporting "crimes," so as not to create much-desired notoriety? [Appellant] continues to gain fame through his narcissistic behavior. Yet again, he wins.

These letters express the writers' opinions of appellant, his conduct, and the Twins' response. The district court pointed out that the letters-to-the-editor section of a newspaper is "a forum for expressing opinions," and letters often express the writers' opinions of what has appeared in the paper. The district court also observed that Van Der Linden "expresses her opinion that [appellant] should be ashamed of his reported behavior" and that Seim's "use of quotations around the word 'crimes' suggests she is aware that [appellant] did not actually commit a crime" so her letter "cannot reasonably be interpreted as a factual statement that [appellant] committed a crime." We agree.

Appellant also argues that Van Der Linden's statement that Twins fans who saw appellant's picture in the newspaper could either stay away from him or wear protective gear when seated near him would cause reasonable readers to leave or to "brace themselves for physical contact" with appellant. But that statement, as appellant concedes in his brief,

is not fact but hyperbole, and hyperbole is nonactionable as a matter of law. *McKee*, 825 N.W.2d at 733.

Finally, appellant also argues that Seim's references to a "baseball snatcher," a "perpetrator of crimes," and the "narcissistic behavior" of a Harry Potter character known as "He-Who-Must-Not-Be-Named" were defamatory. But these statements, like Van Der Linden's, were expressions of opinion, not of fact. The quotation marks around "crimes" indicate Seim's awareness that appellant was not guilty of an actual crime and had not been arrested or prosecuted for any crime; again, readers could consult the Furst Report to determine whether appellant was a perpetrator of crime. Finally, Seim's view that appellant's behavior was comparable to that of the narcissism of a fictional character is clearly a matter of opinion. Neither the Van Der Linden letter nor the Seim letter rises to the level of defamation because neither asserts any facts.

For the same reason, the section of the Reusse sports column that appellant views as defamatory is a reference to an unpopular golfer whom Reusse compares to "a Target Field ball hog triumphantly holding a foul ball after wrestling it from a 6 year old girl." Appellant argues that "the timing of the column and statements are sufficiently similar to language used in the other published materials to make the assertions sufficiently recognizable as a reference to [appellant]." But, to be defamatory, a statement must refer to a specific individual. *See State v. Crawley*, 819 N.W.2d 94, 104 (Minn. 2012). As the district court noted, the statements about the unpopular golfer had nothing whatever to do with appellant or his conduct, and no reference was made to appellant taking a ball from any child, let alone specifically from a girl aged six. The district court concluded that,

because the statement was not a recognizable reference to appellant, it was not defamatory. We agree.

Moreover, like the letters, the Reusse Column was a statement of opinion, not of fact; it merely conjectured that spectators at a golf course would greet an unpopular golfer the same way they would greet someone who had wrestled a baseball away from a child. There was no factual basis to the comparison. Appellant asserts that readers of the Reusse Column "need only believe that Reusse was referring to [appellant] having committed an act of wrongdoing that earned him mention in the column" for the column to be defamatory. By that standard, anyone mentioned in any context, humorous or otherwise, as committing any "act of wrongdoing" could claim defamation. That notion is contrary to the law and defies basic common sense.

Affirmed.