STATE OF MINNESOTA
IN COURT OF APPEALS
A06-2281

Richard D. Lewis,
Appellant,

vs.

The University Chronicle,
Respondent.

Filed January 25, 2008
Affirmed
Willis, Judge

Stearns County District Court
File No. CX-05-5539

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Considered and decided by Willis, Presiding Judge; Minge, Judge; and Wright, Judge.

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

WILLIS, Judge

Appellant challenges the district court's grant of summary judgment to respondent college newspaper on appellant's defamation claim. Because we conclude that appellant

was at least a limited-purpose public figure and because there was no evidence on which a reasonable jury could find actual malice, we affirm.

FACTS

Appellant Richard D. Lewis is a tenured professor of history at St. Cloud State University (SCSU). He also served as interim dean and then dean of the College of Social Sciences (COSS) from 1997 until October 2003, when his appointment as dean was terminated.

While Lewis was dean, the SCSU administration commissioned a report regarding anti-Semitism on campus. The report, which was submitted to SCSU's president on July 13, 2001, was based on interviews with 46 individuals, both Jewish and non-Jewish, presently or formerly connected with SCSU, including faculty, former faculty, staff, and students. The report found that there was a strong perception of anti-Semitism on campus.

> Jewish and non-Jewish faculty members and students perceive a consistent and prevailing sense of discrimination and fear of reprisal. Many Jewish respondents feel threatened, ill at ease and in some instances unsafe.
>
> There is a nearly universal perception that regulations are not being followed and that due process is hopelessly compromised. Current procedures for addressing and resolving these problems are seen as completely ineffectual. Existing processes are perceived as time-consuming, cumbersome, closed, unresponsive, often ignored, and even hostile.

The report specifically named the history department and the COSS and their leadership as being "the focus of recurring problems" and that they "seem[ed] to occur disproportionately" there.

In October 2001, three faculty members and a former student, Robbi Hoy, brought a class-action lawsuit against SCSU for religious discrimination and retaliation based on anti-Semitism. The complaint included specific allegations against Lewis as dean of COSS, both in his individual and representative capacities. The lawsuit alleged that Lewis had deliberately changed one of Hoy's grades from an "A" to an incomplete after she organized a public protest in support of one of the faculty plaintiffs, advised her that she would have to retake the course from him to get a grade, and told her that if she wanted a degree in history, she would have to get it somewhere else. In December 2002, the faculty plaintiffs and SCSU agreed to settle for monetary and non-monetary relief, but SCSU denied any wrongdoing. In a separate settlement, Hoy received $7,500 and a letter of apology from the university. A few days later, on December 5, 2002, respondent *The University Chronicle* (the *Chronicle*), the college newspaper at SCSU, published an article describing the settlement, as well as quoting one of the faculty plaintiffs who described the discriminatory acts that he had experienced and described Lewis as the "mastermind behind some of [the] firings of Jewish faculty in the history department." The article also stated that SCSU did not admit to any wrong-doing and that Lewis declined comment.

Meanwhile, there was a reorganization of SCSU's administration and, beginning in June 2002, Lewis reported to a newly hired provost. Although Lewis had previously

received positive performance reviews as dean, in May 2003, the new provost recommended to the president that Lewis's appointment as dean be terminated. This was based, in part, on the provost's expressed lack of confidence in Lewis's ability to handle the numerous interpersonal conflicts that had occurred within the COSS, including those that underlay the 2001 federal discrimination lawsuit. In early October 2003, the president of SCSU terminated Lewis's appointment as dean, and Lewis returned to his position as a tenured professor in the history department.

On October 20, 2003, the *Chronicle* published an article describing Lewis's plan to file an age-discrimination lawsuit because of his termination as dean. The article also stated that Lewis was "familiar with controversy in the university since he was named a perpetrator of anti-Semitism" by a former SCSU faculty member, and the article repeated the allegation made in the 2001 discrimination lawsuit that Lewis had been the "mastermind" behind the firings of Jewish faculty in the history department. The article quoted Lewis's attorney as stating that SCSU had "strenuously refuted" those claims against Lewis, that it had supported Lewis the previous year, and that, therefore, those claims could not be used as the reason for his removal as dean. Lewis declined to comment and referred the matter to his attorney, who was quoted in the article.[1]

Hoy, the former student who had been a plaintiff in the 2001 discrimination lawsuit against the university, read the October 20, 2003 article and learned thereby of

[1] Lewis filed a federal lawsuit claiming age discrimination in October 2004, and the federal district court granted summary judgment to the university. *Lewis v. St. Cloud State Univ.*, No. Civ. 04-4379RHKRLE (D. Minn. Nov. 23, 2005), *aff'd*, 467 F.3d 1133 (8th Cir. 2006).

Lewis's termination as dean. She sent an e-mail to the *Chronicle*, stating that when she found out that Lewis was asked to step down, she "threw a party"; she ended the e-mail by stating, "Cheers to you–and down with the Dean!!" In another e-mail, she claimed that Lewis had "ruined" her education. At Hoy's suggestion, a *Chronicle* reporter interviewed her.

On October 27, 2003, the *Chronicle* published a front-page article entitled "Past Actions Haunt Lewis," based on the interview with Hoy. The article, which was written by the same reporter who had written the article a week earlier describing Lewis's plan to bring an age-discrimination lawsuit against SCSU, contained a number of allegations that Lewis considers defamatory. These include a statement that Lewis had "mistreated" Hoy; that he "disliked" Hoy for opposing discrimination on campus; that Hoy "was shocked to find that [Lewis] could and eventually did put a stop to her educational career"; that Lewis had given Hoy an incomplete in a class in which she had earned an A, telling her that she would have to retake the class from him to get a grade; and that he "would not allow" her "to ever pass or graduate"; that "Hoy even gave testimony that Lewis was anti-Semitic"; and that she "remembered hearing Lewis use racial slurs and make derogatory comments." The article also contained comments from a professor in another department, who was described as a close friend of Hoy's and a plaintiff in the federal religious-discrimination lawsuit. He said that "he did not want to be seen as a supporter for either side," noting that Lewis "is a very friendly man and a reasonable man" but that he had no reason to disbelieve Hoy's story. As Lewis later learned, the

reporter who wrote the October 27, 2003 article had not tried to contact Lewis for comment.

Lewis demanded a retraction from the *Chronicle*. Its faculty adviser called Hoy to ask her about her claims that were printed in the October 27, 2003 article. Hoy responded by stating that she stood behind them, except that the faculty member described in the article as anti-Semitic and as having made racially derogatory comments was not Lewis but rather someone else. On November 20, the *Chronicle* published on page 3 a partial retraction of the October 27, 2003 article; it retracted what it described as the "suggestion" in the article that Lewis is anti-Semitic and the statement attributed to Hoy "that she heard Dr. Lewis use racial slurs and make derogatory comments." The retraction stated: "There is no factual basis for these assertions. The newspaper regrets the errors and apologizes to Dr. Lewis."

Lewis sued SCSU and the state college and university system for defamation based on the October 27, 2003 article. The district court dismissed the lawsuit, and this court affirmed. *Lewis v. St. Cloud State Univ.*, 693 N.W.2d 466, 472 (Minn. App. 2005) (holding that the defendants were not liable because SCSU had no control over the editorial content of the *Chronicle*), *review denied* (Minn. June 14, 2005).

Lewis then sued the *Chronicle*. The district court granted the *Chronicle*'s motion for summary judgment, and this appeal follows.

D E C I S I O N

I. The district court did not err by ruling that Lewis was a limited-purpose public figure.

In an appeal from summary judgment, an appellate court addresses whether there are genuine issues of material fact and whether the district court erred as a matter of law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). The determination of whether the plaintiff in a defamation action is a private individual, a public official, or a public figure affects the plaintiff's burden of proof and is a question of law reviewed de novo. *Britton v. Koep*, 470 N.W.2d 518, 520 (Minn. 1991) (addressing whether a plaintiff was a private individual or a public official); *Jadwin v. Minneapolis Star & Tribune Co.*, 367 N.W.2d 476, 483 (Minn. 1985) (addressing whether a plaintiff was a private individual or a public figure).

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). A different standard of proof applies to a plaintiff who is a private individual from the standard for a plaintiff who is a public official or public figure. *Britton*, 470 N.W.2d at 420. If the plaintiff is a private individual, a negligence standard applies, and the plaintiff must show only that "the defendant knew or in the exercise of reasonable care should have known that the defamatory statement was false." *Jadwin*, 367 N.W.2d at 491. Under the First Amendment, a privilege attaches to speech directed at public officials and public figures.

Chafoulias v. Peterson, 668 N.W.2d 642, 648-49 (Minn. 2003). In that case, a higher standard applies and the plaintiff must show actual malice on the part of the defendant to recover damages for defamation. *Britton*, 470 N.W.2d at 520 (addressing public officials); *Jadwin*, 367 N.W.2d at 482 (addressing public figures).

Here, the district court began its analysis by considering whether Lewis was a "public official." Public officials are "those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." *Britton*, 470 N.W.2d at 522 (citations omitted); *see Elstrom v. Indep. Sch. Dist. No. 270*, 533 N.W.2d 51, 56 (Minn. App. 1995) (holding that a public-school teacher was a public official), *review denied* (Minn. July 27, 1995). Minnesota, however, has not resolved the issue of whether a university professor is a public official. *Rose v. Koch*, 278 Minn. 235, 260-61, 154 N.W.2d 409, 426 (1967) (holding that when a plaintiff was deemed a public figure for purposes of defamation law, the court would not reach question of whether he was a public official). The district court ultimately did not resolve that issue here either. Instead, the court concluded that Lewis was, at the very least, a limited-purpose public figure. Consequently, we first address whether the district court erred as a matter of law by concluding that Lewis was a limited-purpose public figure.

Defamation law recognizes three types of public figures. First, there is an "involuntary" public figure. "An involuntary public-purpose figure is one who becomes a public figure through no purposeful action of his or her own and is an exceedingly rare classification." *Metge v. Cent. Neighborhood Improvement Ass'n*, 649 N.W.2d 488, 495

(Minn. App. 2002). There is no claim that this classification applies here. Second, individuals such as celebrities and prominent social figures may be deemed public figures for "all purposes." There is no showing that Lewis was a celebrity or a prominent social figure. Third, limited-purpose public figures are those "who attain their position by thrusting themselves into the vortex of a public controversy to influence its outcome." *Jadwin*, 367 N.W.2d at 484. We examine whether Lewis should be considered a limited-purpose public figure.

The factors to consider in determining whether a person is a limited-purpose public figure include "(1) whether a public controversy existed; (2) whether the plaintiff played a meaningful role in the controversy; and (3) whether the allegedly defamatory statement related to the controversy." *Chafoulias*, 668 N.W.2d at 651 (citation omitted).

In determining whether Lewis is a limited-purpose public figure for purposes of this lawsuit, we address first the question of whether a public controversy existed. *Chafoulias*, 668 N.W.2d at 651. "A public controversy is a dispute that has received public attention because its ramifications will be felt by persons who are not direct participants." *Id.* (quotation marks omitted). Courts will "look to those controversies that are already the subject of debate in the public arena at the time of the alleged defamation." *Id.* at 652. But mere participation in the litigation of a private dispute does not create a public controversy making a person a limited-purpose public figure. *Id.* In addressing whether a public controversy exists, a court first examines whether there is "some real dispute that is being publicly debated" and then whether it is "reasonably

foreseeable" that there could be substantial ramifications for those beyond the immediate participants. *Id.*

Lewis contends that he is not a limited-purpose public figure merely because he was named as a defendant in the federal discrimination lawsuit. *See Jacobson v. Rochester Commc'ns Corp.*, 410 N.W.2d 830, 835 (Minn. 1987) (holding that a person who had been found guilty in a criminal trial, and whose conviction was later reversed and remanded, was not a limited-purpose public figure because he took no action to further his views but instead merely appeared in court to defend himself and then reacted to the decision reversing his conviction and granting him a new trial). Here, the public controversy was not that a lawsuit was filed against or by Lewis. Instead, the public controversy revolved around allegations of anti-Semitism, discrimination at SCSU based on anti-Semitism, and retaliation against those who opposed it. These disputes could have substantial ramifications for persons other than Lewis and Hoy, namely, the faculty, students, and staff at SCSU.

Lewis also challenges the district court's reliance, in part, on the fact that at the time that the October 27, 2003 article was published, Lewis had made public his intent to sue SCSU for age discrimination because of his removal from his position of dean. He asserts that the age-discrimination charges that he filed with the Equal Employment Opportunity Commission (EEOC) were private; he essentially contends that the district court made an inaccurate fact-finding and erroneously stated that Lewis made public his intent to sue SCSU for age discrimination. The record, as far as we can tell, does not reveal how the *Chronicle* received information about Lewis's intent to file an age-

discrimination lawsuit. In any event, it has not been demonstrated that how the *Chronicle* learned of Lewis's plans is a material fact.

The next question is whether Lewis played a meaningful role in the public controversy. *Chafoulias*, 668 N.W.2d at 652-53. As the supreme court has explained, "we must consider whether [the plaintiff] thrust himself to the forefront of the controversy as we have defined it so as to achieve a 'special prominence' in the debate and became a factor in resolving the controversy." *Id.* at 653. He must have either purposefully tried to influence the outcome of the controversy or have "realistically expected, because of his position in the controversy, to have an impact on its resolution." *Id.* (quotation marks omitted). In examining this question, we must look at the extent to which Lewis's participation in the controversy was voluntary, the extent to which he had access to channels of effective communication to counter false statements, and the prominence of the role he "played in the public controversy." *See id.*

Lewis asserts that he had no significant influence on public issues, no real autonomy, and no authority to hire or fire or affect the budget, but merely oversaw the administration of the COSS. But a party who opposes summary judgment "must do more than rest on mere averments," as Lewis does here. *DLH, Inc. v. Ross*, 566 N.W.2d 60, 71 (Minn. 1997). Lewis's participation in the controversy in his role of dean arose from his voluntary actions in leading the COSS, as shown in the 2001 report and discussed in the newspaper articles. He had the opportunity to comment on false statements when the *Chronicle* sought comments from him, at least regarding the December 5, 2002 article summarizing the settlement of the 2001 discrimination lawsuit and the October 20, 2003

article describing Lewis's plans to file an age-discrimination lawsuit. In addition, Lewis's attorney commented in detail in the latter article.

Finally, Lewis's prominence is shown by the fact that the COSS and its leadership, that is, Lewis, were named in the 2001 report that addressed anti-Semitism at SCSU; he was one of the named defendants in the 2001 discrimination lawsuit, although no wrongdoing was admitted; and his involvement in the controversy was mentioned in the December 5, 2002 article about the settlement of the 2001 federal discrimination lawsuit; the October 20, 2003 article about his planned age-discrimination lawsuit; and the October 27, 2003 article at issue here. The allegedly defamatory statement related to Hoy's disputes with Lewis, which she asserted arose from her public opposition to anti-Semitism and other discrimination on campus and Lewis's alleged retaliation against her for that opposition.

Consequently, the district court properly ruled that Lewis was at least a limited-purpose public figure at the time the allegedly defamatory article at issue here was published. *See Chafoulias*, 668 N.W.2d at 652 (citing articles by local newspaper and two-part series on television to show that particular issues had become a matter of public interest at time of allegedly defamatory article). In light of our decision, we need not reach the issue of whether Lewis was also a public official.

II. The district court did not err by ruling that the record contained no evidence from which a reasonable jury could conclude that the allegedly defamatory statements were made with actual malice.

Because Lewis was a limited-purpose public figure, the *Chronicle* may be held liable for defaming him only if Lewis can show that the *Chronicle* acted with actual

malice. *See Jadwin*, 367 N.W.2d at 482 (describing actual-malice standard). The district court concluded that there was no evidence from which a reasonable jury could find actual malice. We agree.

A statement shows "actual malice" when it is made "with knowledge that it was false or with reckless disregard of whether it was false or not." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 280, 84 S. Ct. 710, 726 (1964). Lewis does not assert that the *Chronicle* had knowledge of the falsity of its statements; instead, Lewis contends that the *Chronicle* should be liable because it made the challenged statements with reckless disregard of the truth.

Reckless disregard is a subjective standard. *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 688, 109 S. Ct. 2678, 2696 (1989); *Chafoulias*, 668 N.W.2d at 655. "Mere errors in judgment are not sufficient to constitute actual malice . . . ." *Hiram v. Rogers*, 257 N.W.2d 563, 566 (Minn. 1977). "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S. Ct. 1323, 1325 (1968). Or there must be "a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 155, 87 S. Ct. 1975, 1991 (1967). "[R]ecklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." *St. Amant*, 390 U.S. at 732, 88 S. Ct. at 1326.

Lewis argues that there is ample evidence from which a reasonable jury could determine that the *Chronicle* acted with actual malice. First, Lewis contends that the *Chronicle* had obvious reasons to question Hoy's veracity because of her statements that showed strong negative feelings about Lewis. But as Lewis acknowledges, and the district court concluded, actual malice may not be inferred from "evidence of personal spite, ill will, or intention to injure on the part of the writer." *Harte-Hanks*, 491 U.S. at 666 n.7, 109 S. Ct. at 2685 n.7.

Lewis also relies on the *Chronicle*'s admitted failure to seek corroboration or verification of Hoy's statements as showing purposeful avoidance of the truth and constituting actual malice. Even an "extreme departure from professional standards" is insufficient to show actual malice. *Id*. at 665, 109 S. Ct. at 2685. In *Harte-Hanks*, actual malice was found only after a reporter failed to consult a key witness called to his attention and failed to listen to a tape recording to verify what were characterized as "highly improbable" charges, on which other witnesses had cast serious doubt. *Id.* at 691-92, 109 S. Ct. at 2696-98 (holding that record was unmistakably sufficient to support a jury finding of actual malice).

Here, the reporter submitted an affidavit stating that she had not contacted Lewis for comment on the article because when she had written the article about his planned age-discrimination lawsuit a week earlier, Lewis declined comment and referred her to his attorney. She stated that she did not believe that she was publishing falsehoods and that she was not aware that portions of the article may have been false. Similarly, the reporter's editor referred to the *Chronicle*'s December 5, 2002 article on the settlement of

the 2001 discrimination lawsuit and the October 20, 2003 article about Lewis's age-discrimination lawsuit, and explained that the October 27, 2003 article was part of the newspaper's ongoing coverage. He noted that he "did not believe at the time that Ms. Hoy's allegations were improbable or untrue, particularly because they were generally consistent with claims that had previously been made about Dr. Lewis."

The district court also noted that Hoy was not "wholly incredible" as a source, citing the settlement of her claim in the federal discrimination lawsuit. It further noted that the October 27, 2003 article made Hoy's animosity toward Lewis apparent, so that readers could judge the credibility of the article themselves. Lewis disagrees with these conclusions, but he has not shown that facts equivalent to those in *Harte-Hanks* existed here. The district court further found that the story was not so implausible that it demanded further investigation. Instead, citing the settlement of the 2001 discrimination lawsuit, the 2001 report on anti-Semitism, and Lewis's prominence in those controversies, the district court found no obvious reason for the *Chronicle* to doubt the veracity of its article. While Lewis asserts that this is a fact question for the jury, the undisputed material facts demonstrate that the standard for showing actual malice by the *Chronicle* has not been met as a matter of law.

It is clear that the *Chronicle* violated journalism standards by failing to contact Lewis for comment on the proposed article and by failing to obtain verification or corroboration of the allegedly defamatory material in the article. Were a negligence standard applicable here, we conclude that this case would present a jury question. But we agree with the district court: the undisputed facts do not present evidence from which

a reasonable jury could conclude that the *Chronicle* published the October 27, 2003 article with actual malice. Consequently, the district court properly granted summary judgment to the *Chronicle*.

III. Lewis waived the issue of recusal by failing to raise it in the district court.

Finally, we consider Lewis's argument that the district-court judge should have recused himself from deciding the summary-judgment motion. Lewis raises this issue for the first time on appeal. "A reviewing court must generally consider 'only those issues that the record shows were presented and considered by the trial court in deciding the matter before it.'" *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (citation omitted); *see Baskerville v. Baskerville*, 246 Minn. 496, 501, 75 N.W.2d 762, 766 (1956) (holding that a litigant who does not raise issue of bias until making a motion for mistrial near the close of trial, and no actual bias was shown, has waived the issue).

At the start of the hearing on the summary-judgment motion, the district court judge advised the parties that he had taught at St. Cloud State University for almost 20 years. He stated, "I'm not going to remove myself. I just think I have to say that, and I'm willing to go ahead with the case." Lewis's counsel stated, "Good morning, Your Honor. This is not our motion, it's the defense's motion." The *Chronicle*'s counsel advised the court that he had no objection to the judge continuing on the case. The judge added that he did not have and never had had any connection with the *Chronicle*. Lewis's counsel did not respond to the district court judge's disclosure by requesting a recusal under Minn. R. Civ. P. 63.03, by asking for more information, or by asking for a continuance so that he would have time to investigate further the possibility of requesting

recusal. There is nothing apparent from the transcript that supports Lewis's arguments that the judge's words amounted to a "fiat" and that it would have been futile for counsel to object. Because Lewis waived the issue of recusal by failing to raise it directly in the district court, he is precluded from raising the issue for the first time on appeal.

Affirmed.