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Minn. Stat. § 480A.08, subd. 3 (2006).

STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1375

Adam Steele,
Appellant,

vs.

Louise Mengelkoch,
Defendent,

Bemidji State University,
Respondent,

William Batchelder,
Defendent,

Google, Inc.,
a Delaware corporation doing interstate
business, and business in Minnesota,
Respondent,

and

other unnamed Persons and entities,
Defendants.

Filed August 5, 2008
Affirmed in part and reversed in part
Klaphake, Judge

Beltrami County District Court
File No. 04-C3-06-001870

Adam Steele, P.O. Box 1132, Bemidji, MN 56619 (pro se appellant)

Lori Swanson, Attorney General, Paul K. Kohnstamm, Assistant Attorney General, 1100 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134 (for respondent Bemidji State University)

Bart E. Volkmer, 650 Page Mill Road, Palo Alto, CA 94304-1050; and

Justice Ericson Lindell, Winthrop & Weinstine, P.A., 225 South Sixth Street, Suite 3500, Minneapolis, MN 55402 (for respondent Google, Inc.)

Considered and decided by Klaphake, Presiding Judge; Minge, Judge; and Huspeni, Judge.*

UNPUBLISHED OPINION

KLAPHAKE, Judge

In October 2006, appellant Adam Steele initiated a pro se, in forma pauperis action against respondents Bemidji State University (BSU) and Google, Inc. (Google), a well-known Internet search engine provider, among others. Google had posted an article entitled "All the News That's Not Fit to Print" that was published in an on-line magazine, Minnesota Law and Politics. Louise Mengelkoch, a BSU professor, authored the article. Appellant's complaint alleges that William Batchelder, a BSU alumnus, attended a lecture given by Mengelkoch and made defamatory statements about him after the lecture. Appellant's complaint also alleges libel against Google, claiming $50 billion in damages, and slander, conspiracy to commit slander, and other torts against BSU.[1] BSU and Google each moved to dismiss. Appellant challenges the district court's judgment

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

[1] Appellant also made various tort claims against Mengelkoch and Batchelder in district court, but they are not parties to this appeal.

dismissing these claims as to BSU and Google and requiring appellant to pay their attorney fees and expenses, which totaled $12,637.58. Because appellant failed to set forth legally sufficient claims for relief against respondents, we affirm the district court's dismissal of the claims against respondents for failure to state a claim; but because the court was not authorized to award monetary sanctions under the facts presented, we reverse the sanctions award.

D E C I S I O N

Failure to State a Claim

In reviewing a case involving dismissal for failure to state a claim, an appellate court considers "whether the complaint sets forth a legally sufficient claim for relief," considering the facts alleged in the complaint as true and construing any reasonable inferences in the nonmoving party's favor. *Bodah v. Lakeville Motor Express, Inc.,* 663 N.W.2d 550, 553 (Minn. 2003). An appellate court gives de novo review to questions of law. *Falls v. Coca Cola Enters., Inc.,* 726 N.W.2d 96, 100 (Minn. 2007).

As to Google, appellant asserted a claim for libel, arguing that Google was responsible for the veracity of Mengelkoch's article that was placed on Google's website. Section 230 of the Communications Decency Act states in pertinent part that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C.A. § 230(c)(1) (2001). The statute further provides that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." *Id.* § 230(e)(3). Federal courts have uniformly applied

this statute to bar claims brought against Internet service providers for defamation and other claims arising from the publishing of third-party content, and some of the cases involve Google as a party. *See, e.g., Carafano v. Metrosplash.com, Inc.,* 339 F.3d 1119, 1125 (9th Cir. 2003); *Green v. America Online,* 318 F.3d 465, 471 (3d Cir. 2003); *Ben Ezra, Weinstein & Co. v. America Online, Inc.*, 206 F.3d 980, 986 (10th Cir. 2000); *Zeran v. America Online, Inc.,* 129 F.3d 327, 330 (4th Cir. 1997); *Murawski v. Pataki,* 514 F. Supp. 2d 577, 591 (S.D.N.Y 2007); *Langdon v. Google, Inc.,* 474 F. Supp. 2d 622, 631 (D. Del. 2007); *Parker v. Google, Inc.,* 422 F. Supp.2d 492, 501 (E.D. Pa. 2006); *Novak v. Overture Servs., Inc.,* 309 F. Supp. 2d 446, 452 (E.D.N.Y. 2004). In *Zeran,* the Fourth Circuit Court of Appeals stated:

> By its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service. Specifically, § 230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role. Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions-such as deciding whether to publish, withdraw, postpone or alter content-are barred.

129 F.3d at 330.

Recently, the federal district court for Minnesota heard a case involving an operator of a website that allowed users to post comments. *Gregerson v. Vilana Fin., Inc.*, No. 06-1164, 2008 WL 451060 (D. Minn. Feb. 15, 2008). The court concluded that the website operator was not an interactive computer service provider within the meaning of section 230 and therefore could not be held liable for third-party comments posted on his website. *Id.,* slip op. at *9. Under federal case law, as well as the plain language of

the statute itself, the Communications Decency Act clearly bars appellant's claim against Google. Thus, the district court did not err in granting Google's motion to dismiss.

As to BSU, appellant claimed that its conduct constituted a civil conspiracy to slander him. The district court dismissed this claim because Minnesota courts have consistently held that there is no claim for civil conspiracy in the absence of an underlying intentional tort.

"A conspiracy is a combination of persons to accomplish an unlawful purpose or a lawful purpose by unlawful means." *Harding v. Ohio Cas. Ins. Co.,* 230 Minn. 327, 337, 41 N.W.2d 818, 824 (1950). Civil conspiracy requires the conspirators to have a meeting of the minds as to plan or purpose of action to achieve a certain result. *Bukowski v. Juranek*, 227 Minn. 313, 318, 35 N.W.2d 427, 429 (1948). In addition, an underlying tort must be present to support a civil conspiracy claim. *D.A.B. v. Brown*, 570 N.W.2d 168, 172 (Minn. App. 1997).

Here, the alleged facts do not establish a prima facie case of civil conspiracy because there is no allegation linking BSU and Batchelder in any plan or demonstrating a "meeting of the minds" to slander appellant.[2] Appellant's complaint alleged only that BSU allowed Batchelder to slander him and that BSU "willfully" allowed the slander "to take place on its grounds and facilities" and thus "participated in the slander." Appellant's complaint stated that Batchelder attended a Mengelkoch lecture and made some defamatory statements about him after the lecture; this conduct is insufficient to

[2] Appellant alleged that BSU and Batchelder were part of a conspiracy, but he did not extend these allegations to the remaining parties.

establish a claim of civil conspiracy. *See Bukowski,* 227 Minn. at 318, 35 N.W.2d at 429.[3] For these reasons, the district court properly dismissed appellant's complaint for failure to state a claim against BSU.

Sanctions

Appellant next claims that the district court erred by ordering him to pay a portion of respondents' attorney fees and expenses as a rule 11 sanction. Minn. R. Civ. P. 11.02 provides that by submitting pleadings to the court, an "unrepresented party" certifies that its "claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law[.]" Rule 11 is designed to "provide[] relief to parties who are victims of bad pleading and abuse of process." *Pratt Inv. Co. v. Kennedy*, 636 N.W.2d 844, 851 (Minn. App. 2001) (quotation omitted).

Under Minn. R. Civ. P. 11.03(a)(2), a court may sua sponte initiate rule 11 proceedings, but the party subject to possible sanctions must receive notice and an opportunity to respond. Here, appellant received notice of the court's description of his conduct that purportedly violated rule 11; appellant filed a memorandum and affidavit in opposition to the imposition of sanctions; and he testified at a hearing on the matter. When a court initiates rule 11 proceedings sua sponte, however, the court may not award "[m]onetary sanctions . . . unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is . . .

[3] Further, appellant failed to establish that he was damaged by the alleged underlying tort of slander, an essential element of a civil conspiracy claim. *See Dunn v. Nat'l Beverage Corp.*, 729 N.W.2d 637, 650 (Minn. App. 2007), *aff'd* 745 N.W.2d 549 (Minn. 2008).

to be sanctioned." Minn. R. Civ. P. 11.03 (b)(2); *see Willhite v. Van Sickle,* 459 F.3d 866, 870 (8th Cir. 2006) (stating that under Fed. R. Civ. P. 11, "[i]t is not permissible to award attorneys' fees under Rule 11 when the sanctions are imposed sua sponte").

While the district court may have had a proper basis for ordering non-monetary sanctions, it could not award monetary sanctions, because the court issued the order for dismissal of the case contemporaneously with initiation of rule 11 proceedings. The general rationale for rule 11.03(b)(2) is that a party should be given the opportunity to correct sanctionable conduct before sanctions are imposed. *Cf. Gibson v. Coldwell Banker Burnet,* 659 N.W.2d 782, 790 (Minn. App. 2003) (noting that in the context of attorney–initiated sanctions, federal law requires "that motions for sanctions brought after the conclusion of the trial must be rejected precisely because the offending party is 'unable to withdraw the improper papers or otherwise rectify the situation'"). Thus, under the provisions of rule 11.03(b)(2) and relevant caselaw, the district court abused its discretion by awarding monetary sanctions in this case.[4]

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[4] Both respondents acknowledge that the district court lacked authority to order monetary sanctions under rule 11, but they contend that appellant waived this precise issue by failing to raise it below. Under *Thiele v. Stich,* 425 N.W.2d 580, 582 (Minn. 1988), it is well-settled law that appellate courts do not generally address issues or theories not raised in the district court. The rule of *Thiele v. Stich* is not applicable in all circumstances, however. Where "prejudicial error is obvious[,]" *Schoepke v. Alexander Smith & Sons Carpet Co.,* 290 Minn. 518, 519-20, 187 N.W.2d 133, 135 (1971), or where the interests of justice indicate, this court will address an issue that was not properly preserved for appeal. *Putz v. Putz,* 645 N.W.2d 343, 350 (Minn. 2002) (noting that rule of *Thiele v. Stich* is not "ironclad" and that appellate court has authority to address issues not raised in district court "as the interest of justice may require"); *see* Minn. R. Civ. App. P. 103.04 (allowing appellate court to take "any . . . action" in the interests of justice in fashioning appellate disposition). Because the district court clearly lacked authority under rule 11 to award monetary sanctions, because the parties and the court did address other aspects of

Google claims that the district court had inherent authority independent of rule 11 to order sanctions and that this authority provides an independent basis for upholding the sanctions award. We reject this assertion because the district court's award of sanctions was based exclusively on rule 11. The April 16, 2007 order required appellant to appear before the court "pursuant to Minn. R. Civ. P. 11.03(a)(2) to show cause why sanctions should not be imposed against him pursuant to Minn. R. Civ. P. 11.02(b)." The court's sanctions order was also explicitly based on appellant's violation of rule 11. Further, while Minn. Stat. § 549.211 (2006) also provides authority for a monetary award of sanctions, it also requires 21 days' notice and the opportunity to withdraw the challenged pleadings or arguments before the court may consider the imposition of sanctions. Minn. Stat. § 549.211, subd. 5(b). Because the district court lacked authority under rule 11 and Minn. Stat. § 549.211 to order monetary sanctions, Google's argument is unavailing.

We affirm the district court's dismissal of the action for failure to state a claim and reverse the district court's award of sanctions.

Affirmed in part and reversed in part.

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rule 11 during the sanction proceedings, and because of appellant's pro se and in forma pauperis status, this court will address the issue in the interests of justice.