STATE OF MINNESOTA
IN COURT OF APPEALS
A10-128

Stephen Danforth,
Appellant,

vs.

Star Tribune Holdings Corporation,
Defendant,

Avista Capital Partners, LP, et al.,
Respondents,

John and/or Jane Does 1–3,
Respondents,

Pat Diamond, et al.,
Respondents,

Lori Swanson, et al.,
Respondents.

Filed November 2, 2010
Affirmed
Schellhas, Judge

Rice County District Court
File No. 66-CV-09-3686

Stephen Danforth, Faribault, Minnesota (pro se appellant)

John P. Borger, Leita Walker, Faegre & Benson LLP, Minneapolis, Minnesota (for respondents Avista Capital Partners LP, Avista Capital Partners (Offshore) LP, Christopher M. Harte 1992 Family Trust, Kevin Diaz, Rene Sanchez, Nancy C. Barnes, and Christopher M. Harte)

Michael O. Freeman, Hennepin County Attorney, Jean Burdorf, Assistant County Attorney, Minneapolis, Minnesota (for respondents Hennepin County, Pat Diamond, Michael O. Freeman, Richard and/or Rachel Roes 1–3)

Lori Swanson, Attorney General, John S. Garry, Assistant Attorney General, St. Paul, Minnesota (for respondents Lori Swanson and State of Minnesota)

Considered and decided by Schellhas, Presiding Judge; Klaphake, Judge; and Shumaker, Judge.

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

SCHELLHAS, Judge

Appellant, a state-prison inmate, argues that the district court abused its discretion when it denied his application to proceed in forma pauperis and dismissed his civil complaint under Minn. Stat. § 563.02, subd. 3 (2008), on the basis that his claims were frivolous. We affirm.

FACTS

In 1996, appellant Stephen Danforth was convicted of first-degree criminal sexual conduct for sexually abusing a six-year-old child. *State v. Danforth*, 573 N.W.2d 369, 372 (Minn. App. 1997), *review denied* (Minn. Feb. 19, 1998). The district court found the child incompetent to testify at trial but admitted a video of the child's interview at CornerHouse, a non-profit sexual-abuse treatment center. *Id.* During the video-taped interview, the child made statements that "clearly indicated that he had been sexually abused by [appellant]." *Id.* On direct appeal, this court affirmed the admission of the video, concluding that the child's video-taped statements were "sufficiently reliable to be admitted into evidence," and affirmed the conviction. *Id.* at 375–76, 378. This court

later affirmed appellant's sentence. *State v. Danforth*, No. C5-98-2054, 1999 WL 262143 (Minn. App. May 4, 1999), *review denied* (Minn. July 28, 1999).

In 2004, the United States Supreme Court held in *Crawford v. Washington* that "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." 541 U.S. 36, 68–69, 124 S. Ct. 1354, 1374 (2004). Shortly thereafter, appellant moved the district court for postconviction relief, arguing that he was entitled to a new trial because the admission of the video violated the rule announced in *Crawford*. *Danforth v. State*, 718 N.W.2d 451, 455 (Minn. 2006) (*Danforth V*), *rev'd in part*, *Danforth v. Minnesota*, 552 U.S. 264, 128 S. Ct. 1029 (2008). The Minnesota Supreme Court affirmed denial of appellant's petition.[1] *Id.*

On October 22, 2007, while appellant's appeal from *Danforth V* was pending before the U.S. Supreme Court, the Minneapolis *Star Tribune* ran a story by respondent Kevin Diaz titled "Right to confront accuser propels pedophile's case." On October 30, appellant filed a complaint in district court against respondents, alleging three causes of

[1] In *Danforth V*, the Minnesota Supreme Court reasoned that *Crawford* did not have retroactive application under *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060 (1989), and that Minnesota courts were not permitted to apply a retroactivity standard broader than that prescribed in *Teague*. *Danforth V*, 718 N.W.2d at 455–57. The United States Supreme Court granted appellant's petition for a writ of certiorari on May 21, 2007, limited to the question of whether the state could adopt a broader retroactivity standard than that set forth in *Teague*. *Danforth v. Minnesota*, 550 U.S. 956, 127 S. Ct. 2427 (2007) (mem.). The Court ultimately ruled in appellant's favor, holding that states were not bound by *Teague* in crafting retroactivity standards for federal constitutional decisions. *Danforth v. Minnesota*, 552 U.S. at 282, 128 S. Ct. at 1042. But on remand, the Minnesota Supreme Court held that it would continue to apply *Teague* by choice, and reaffirmed denial of appellant's postconviction petition. *Danforth v. State*, 761 N.W.2d 493, 500 (Minn. 2009).

action: (I) libel, (II) invasion of privacy by publication of private facts, and (III) "Libel And Invasion Of Privacy As Comprising Constitutional Tort Of Denial Of Substantive Due Process, Infliction Of Cruel And Unusual Punishment, And Denial Of Rights And Privileges." Appellant also filed an application to proceed in forma pauperis. The district court determined that appellant's claims were frivolous, denied his application to proceed in forma pauperis, and dismissed his complaint pursuant to Minn. Stat. § 563.02, subd. 3.

This appeal follows.

D E C I S I O N

The district court may dismiss an action commenced by an inmate plaintiff who seeks to proceed in forma pauperis if the court determines that the action is frivolous or malicious. Minn. Stat. § 563.02, subd. 3(a). "In determining whether an action is frivolous or malicious, the court may consider whether . . . the claim has no arguable basis in law or fact . . . ." *Id.*, subd. 3(b)(1); *see also Maddox v. Dep't of Human Servs.*, 400 N.W.2d 136, 139 (Minn. App. 1987) ("A frivolous claim is without any reasonable basis in law or equity and could not be supported by a good faith argument for a modification or reversal of existing law." (quotation omitted)). The court may dismiss the action "before or after service of process, and with or without holding a hearing." Minn. Stat. § 563.02, subd. 3(c). The district court has broad discretion in considering proceedings in forma pauperis and will not be reversed absent an abuse of discretion. *Maddox*, 400 N.W.2d at 139.

Libel Claim

Appellant argues that that district court erred by dismissing his libel claim as frivolous. He alleged in his complaint that the October 22, 2007 article contains the following "false and defamatory" statements:

> A. "The U.S. Supreme Court will hear a Minnesota man's appeal over a 1996 trial in which *the victim, 6, testified on videotape*."
>
> B. "From the Prairie Correction Facility in Appleton, Minnesota, where he is serving a 26-year term for *sexually abusing a 6-year-old boy . . . .*"
>
> C. "But there will be little, if anything, said about the day in July 1995 when *he molested the son of a friend at a swimming pool in Richfield*[.]"
>
> D. "Convicted by a Hennepin County jury of first degree criminal sexual conduct, Danforth, a repeat pedophile *whom psychiatrists termed a pattern sex offender . . . .*"
>
> E. "Representing himself in his 1996 trial, *he admitted to a multitude of 'petty insanities and strange practices' . . . .*"
>
> F. "During a sentencing appeal in 1998, *he complained about 'vicious prosecutors who have conspired to stamp out child abuse.'*"
>
> G. "Danforth's accuser, identified in court papers as J.S. was scheduled to testify at Danforth's original trial. But [the district court judge], now retired, decided after interviewing the boy that he was not competent to testify before a jury. *Although the boy had the ability to know and remember what happened*, the judge concluded, he was not capable of paying attention long enough to testify meaningfully."
>
> H. "Instead, *the boy told his story on videotape*."
>
> I. "Danforth . . . said he had reformed, *resolving merely to look at pictures of children for sexual gratification. I've become a voyeur*, he said."

Appellant alleged that the statements in the article originated from respondents Pat Diamond and Richard and/or Rachel Roes 1–3, who were employees of the Hennepin County Attorney's Office, that they prompted Diaz and the *Star Tribune* to write and publish the article, and that the statements were made with defamatory intent.

Appellant also alleged that Diaz's acts in writing the article were "known to, accepted by, and ratified by" respondent Rene Sanchez in his capacity as the *Star Tribune*'s managing editor, respondent Nancy Barnes in her capacity as the *Star Tribune*'s editor, respondent Christopher Harte in his capacity as the *Star Tribune*'s publisher, and respondents John and/or Jane Does 1–3 as *Star Tribune* employees. Appellant alleged that defendant Star Tribune Holdings Corp.,[2] and respondents Avista Capital Partners LP, Avista Capital Partners (Offshore) LP, and Christopher M. Harte 1992 Family Trust are "collectively the 'publisher'" of the *Star Tribune* and are liable directly to appellant and pursuant to the doctrine of *respondeat superior*. Additionally, appellant alleged that respondents Hennepin County Attorney Michael Freeman and Minnesota Attorney General Lori Swanson "accepted and ratified the statements in question."

Appellant alleged that these respondents "knew that each specific defamatory statement . . . and the overall theme of said article were untrue," or, alternatively, had no reasonable basis to believe that the statements were true, or, alternatively, recklessly failed to investigate the truth or falsity of the statements by failing to contact appellant.

[2] Appellant's claims against Star Tribune Holdings Corp. were discharged by the United States Bankruptcy Court. Star Tribune Holdings Corp. is no longer participating in this appeal pursuant to the May 20, 2010 order of this court.

Appellant alleged that these respondents "acted with actual malice toward, and with wrongful intent to injure" appellant, and that he consequently suffered damages.

Respondents argue that appellant's libel claim is barred by the two-year statute of limitations in Minn. Stat. § 541.07(1) (2008), because appellant did not serve the summons and complaint by October 22, 2009. Appellant makes various arguments about why he was legally justified in not serving the summons and complaint before the expiration of the limitations period. Because we conclude that appellant's libel claim fails on the merits, we do not address this issue.

"To establish a defamation claim, a plaintiff must prove three elements: (1) the defamatory statement is communicated to someone other than the plaintiff, (2) the statement is false, and (3) the statement tends to harm the plaintiff's reputation and to lower the plaintiff in the estimation of the community." *Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910, 919–20 (Minn. 2009) (quotations omitted). "[T]he plaintiff cannot succeed in meeting the burden of proving falsity by showing only that the statement is not literally true in every detail." *Jadwin v. Mpls. Star & Tribune Co.*, 390 N.W.2d 437, 441 (Minn. App. 1986). "If the statement is true in substance, inaccuracies of expression or detail are immaterial." *Id.* "A statement is substantially accurate if its gist or sting is true, that is, if it produces the same effect on the mind of the recipient which the precise truth would have produced." *Id.* (quotation omitted). "[T]he substantial truth test is broad: if any reasonable person could find the statements to be supportable interpretations of their subjects, the statements are incapable of carrying a defamatory meaning, even if a reasonable jury could find that the statements were

mischaracterizations." *Hunter v. Hartman*, 545 N.W.2d 699, 707 (Minn. App. 1996) (quotations omitted), *review denied* (Minn. June 19, 1996). "Where there is no dispute as to the underlying facts, the question of whether a statement is substantially accurate is one of law for the court." *Jadwin*, 390 N.W.2d at 441.

In determining that appellant's libel claim was frivolous, the district court implicitly took judicial notice of appellant's criminal-case record. *See* Minn. R. Evid. 201 (allowing district court to take judicial notice of adjudicative facts "not subject to reasonable dispute"). Our careful comparison of that record with the allegedly libelous statements persuades us that the district court's decision was correct. The record establishes that the six-year-old victim's video interview was admitted at trial, that appellant was convicted of sexually abusing the victim, that appellant was sentenced as a patterned sex offender, and that appellant made statements substantially similar to those for which he was quoted in the article. Appellant complains of "inaccuracies of expression or detail," which are immaterial. *See Jadwin*, 390 N.W.2d at 441. The "gist" or "sting" of all statements of which appellant complains is true. Appellant's libel claim has no basis in fact or law and the district court correctly dismissed it as frivolous.

Invasion of Privacy

Appellant argues that the district court erred by dismissing his invasion-of-privacy claim as frivolous. Appellant alleged in his complaint that publication of the following statements in the *Star Tribune* article, in addition to the statements recited in his libel claim, constituted tortious publication of private facts:

A. Plaintiff is a "disbarred Minnesota attorney."

B. Plaintiff "is serving a 26-year term for sexually abusing a 6-year-old boy."

C. In 1996, Plaintiff was "[c]onvicted by a Hennepin County jury of first degree criminal sexual conduct."

D. Plaintiff is a "repeat pedophile."

E. Plaintiff pursued "a sentencing appeal in 1998."

F. The asserted sole basis for [the criminal-trial judge's] ruling of testimonial incompetence of Plaintiff's "accuser," [J.S.], was that that boy "was not capable of paying attention long enough to testify meaningfully."

G. "The Minnesota Court of Appeals . . . rul[ed] the statement [i.e., complainant J.S.'s interview] was sufficiently reliable to be used as evidence against him. Subsequent petitions to the Minnesota Supreme Court and to federal courts were also denied."

H. "In one of his last appearances before a jury," Plaintiff, "then 45, acknowledged that he had served a previous prison term for child molestation . . . . 'I've become a voyeur,' [Plaintiff] said."

Respondents argue that section 541.07(1)'s two-year statute of limitations applies to the invasion-of-privacy claim. Appellant counters that the running of the limitations period was tolled for a variety of reasons. Because we conclude that appellant's invasion-of-privacy claim fails on the merits, we do not address this issue.

The Minnesota Supreme Court first recognized the tort of invasion of privacy by publication of private facts in *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 235 (Minn. 1998). To succeed, a plaintiff must demonstrate that (1) the defendant gave "publicity to a matter concerning the private life" of the plaintiff; and (2) "the matter

publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public." *Lake*, 582 N.W.2d at 233.

Citing *Briscoe v. Reader's Digest Ass'n*, 483 P.2d 34 (Cal. 1971), appellant argues that "[c]onvictions themselves, albeit a matter of permanent public record, lose their newsworthiness after years, and thereby eventually become private." But the California Supreme Court overruled *Briscoe* in *Gates v. Discovery Commc'ns*, 101 P.3d 552, 563 n.9 (Cal. 2004). The court stated: "[W]e conclude that an invasion of privacy claim based on allegations of harm caused by a media defendant's publication of facts obtained from public official records of a criminal proceeding is barred by the First Amendment to the United States Constitution." *Gates*, 101 P.3d at 562 (citing *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 495, 95 S. Ct. 1029 (1975)). *Briscoe* therefore is not an accurate statement of current law in California, much less in Minnesota, and is unpersuasive.

The statements of which appellant complains did not concern his private life: every fact mentioned in the article is already in the public record of appellant's criminal trial and the subsequent appellate decisions. Additionally, while appellant's *behavior* might be highly offensive to a reasonable person, the publication of that behavior, after appellant has been convicted for it, is not offensive. And the facts surrounding a convicted child molester's attempts to have his conviction reversed fall squarely within the realm of legitimate public concern, regardless of the merit of the convict's claims. The district court therefore correctly dismissed appellant's claim as frivolous.

Constitutional Claims

For his third cause of action, appellant alleged that due to the actions described in Counts I and II, Freeman, Diamond, the Roes, and Swanson (a) deprived him of his right to due process under U.S. Const. amend. XIV and Minn. Const. art. I, § 5; (b) inflicted cruel and unusual punishment upon him in violation of U.S. Const. amend. VIII and Minn. Const. art. I, § 5; and (c) deprived him of his rights and privileges without law of the land and judgment of his peers in violation of Minn. Const. art. I, § 2. Appellant claimed that after remand from the United States Supreme Court in *Danforth v. Minnesota*, the Minnesota Supreme Court ruled against him because supreme court justices read the article and were biased against him. He alleged that judges who preside over cases that he may bring in the future also may have read the article, which will "gravely prejudice" those judges against him, and that the assertions in the article were intended to bias judges and the public against him to ease a future attempt to civilly commit him. Appellant also alleged that he had been subjected to contempt, ridicule, violence, verbal abuse, harassment, and ostracism in prison as a result of the article. He claimed that respondents were not only aware that the article might have these effects, but "acted with the hope and specific intent that all such harms would in consequence be wreaked upon" him.

As to appellant's state constitutional claims, "there is no private cause of action for violations of the Minnesota Constitution." *Guite v. Wright*, 976 F. Supp. 866, 871 (D. Minn. 1997), *aff'd on other grounds*, 147 F.3d 747 (8th Cir. 1998). No legal basis

supports appellant's claims for violations of the Minnesota Constitution, and the district court correctly dismissed them as frivolous.

As to appellant's federal constitutional claims, he asserted these claims under 42 U.S.C. § 1983 (2006). To state a claim under § 1983, a plaintiff must allege that some person has deprived him of a federal right while acting under color of state or territorial law. *Gomez v. Toledo*, 446 U.S. 635, 640, 100 S. Ct. 1920, 1923 (1980). Appellant argued that respondents' actions have deprived him of substantive due process. "A cognizable claim of a Fourteenth Amendment substantive due process violation must describe governmental conduct so egregious that it 'shocks the conscience.'" *Mumm v. Mornson*, 708 N.W.2d 475, 487 (Minn. 2006) (quoting *Rochin v. California*, 342 U.S. 165, 172–74, 72 S. Ct. 205 (1952)). In analyzing a substantive-due-process claim, courts first consider whether the plaintiff possessed a right arising under the Fourteenth Amendment, and then determine whether the defendants' conduct deprived the plaintiff of that right within the meaning of the Due Process clause. *Ganley v. Mpls. Park & Rec. Bd.*, 491 F.3d 743, 749 (8th Cir. 2007). "To meet [his] burden, [the plaintiff] must demonstrate that the government action complained of is truly irrational, that is something more than arbitrary, capricious, or in violation of state law." *Id.* (quotations and modification omitted). The plaintiff must "articulate which fundamental right—that is, one deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed—is at stake." *Id.* (quotation omitted).

Appellant does not explain in either his complaint or on appeal exactly how his substantive-due-process rights have been violated, except to reallege that he has been defamed as a result of Hennepin County Attorney employees' disclosures that were incorporated into the *Star Tribune* article. Appellant therefore has failed to allege the necessary elements of a substantive-due-process claim in his complaint, and the district court correctly determined it to be frivolous.

Eighth Amendment

Appellant appears to contend that the contempt, ridicule, violence, verbal abuse, harassment, and ostracism he has suffered in prison since the article's publication constitute a violation of the Eighth Amendment's prohibition of cruel and unusual punishment. According to appellant, respondents intended this result when they provided the information in the article.

An inmate plaintiff states a claim for a violation of the Eighth Amendment where he alleges that a *prison official* was deliberately indifferent to a substantial risk of serious harm to the inmate. *Farmer v. Brennan*, 511 U.S. 825, 828, 114 S. Ct. 1970, 1974 (1994). "[O]nly prison officials and those to whom they delegate penological responsibilities for prisoners have Eighth Amendment duties and attendant liabilities." *Smith v. Cochran*, 339 F.3d 1205, 1213 (10th Cir. 2003).

None of the respondents in this case is a prison official. While *Smith* is not binding precedent in Minnesota, appellant offers no support, and we have found none, for the proposition that an Eighth Amendment claim can be sustained against an individual who is not a prison official, but who is alleged to have conspired from outside the prison

system to make the inmate's conditions worse. Appellant's Eighth Amendment claim therefore has no basis in law and the district court correctly dismissed it as frivolous.

Affirmed.