STATE OF MINNESOTA
IN COURT OF APPEALS
A10-130

Stephen Danforth,
Appellant,

vs.

Tim Eling,
Respondent,

Tom Evenstad,
Respondent,

Deirdre Garvey, et al.,
Respondents.

Filed October 19, 2010
Affirmed
Schellhas, Judge

Rice County District Court
File No. 66-CV-09-3787

Stephen Danforth, Faribault, Minnesota (pro se appellant)

Lori Swanson, Attorney General, Margaret E. Jacot, Assistant Attorney General, St. Paul, Minnesota (for respondents Deirdre Garvey, Pat Pawlak, Lynn Dingle, Joan Fabian, and the Minnesota Department of Corrections)

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 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 November 21, 2007, while appellant's appeal from *Danforth V* was pending before the U.S. Supreme Court, the *Prison Mirror*, a prison newspaper, published an editorial by respondent Tim Eling, an MCF-Stillwater inmate and the *Prison Mirror*'s editor. The editorial referred to its subject as "Mr. X," but, due to Eling's reference to details about appellant's case, including his pending appeal before the U.S. Supreme Court, a reader could identify Mr. X as appellant. In January 2008, the *Prison Mirror* also published a responsive letter to the editor submitted by respondent Tom Evenstad, a prison inmate. Evenstad's letter allegedly contained further private facts about appellant and his case.

[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).

On October 30, 2009, appellant filed a complaint in district court against respondents, alleging five causes of action: (I) libel; (II) invasion of privacy by publication of private facts; (III) "Willful And Malicious Violation Of Department Of Corrections Policies And Procedures"; (IV) "Constitutional Tort Of Denial Of Substantive Due Process, Infliction Of Cruel And Unusual Punishment, And Denial Of Rights And Privileges"; and (V) "Intentional Infliction Of . . . Toxic Incarceration." Appellant also filed an application to proceed in forma pauperis. The district court determined that appellant's claims were frivolous and therefore 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 and modifications 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 the district court erred by dismissing his libel claim as frivolous. He alleged in his complaint that the November 21, 2007 article contains the following "false and defamatory" statements:

> a. [Appellant's] then-pending appeal in the United States Supreme Court was "frivolous," and was heard by that Court only "because of a technicality";
>
> b. The existence of [appellant's] appeal to the United States Supreme Court makes it harder for inmates with what inmate editor [respondent] Eling implied are more meritorious grounds for relief to get such other grounds to be taken seriously by courts;
>
> c. [Appellant] is one among "guys who abuse the law library and legal system by filing frivolous appeals and bogus lawsuits";
>
> d. [Appellant] is one of the "cons" who "refuse to accept responsibility for their crimes" (discrediting [appellant's] claim of innocence) "and attempt to use legal tricks to wiggle out of their sentences";
>
> e. [Appellant] is among a portion of inmates "trying to get away with something," and is "up to no good," and is "messing up the system"; and
>
> f. [Appellant] spends "most of his free time filing appeals, lawsuits, etc."

Appellant also alleged that the following excerpts from the article defamed him "as a whole":

> This places the people we are counting on for help in the position of wondering whether we are *all* trying to get away with something. Are we *all* up to no good? . . .
>
> Is it any wonder why people aren't jumping through hoops to help you with your legal work when people like [appellant] are messing up the system?

Appellant alleged that the article was published to inmates, prison employees, judges, prosecutors, legislators, attorneys, and other government officials with the intent to make appellant "into a 'lightning rod' for every inmate who is disappointed at his own lack of success in the courts, and who is looking for someone . . . to blame for it."

Appellant asserted his libel claim against Eling individually and "as the agent and employee" of respondent Minnesota Department of Corrections, alleging that Eling acted within the scope of his employment and that his acts were known to and ratified by prison staff, including respondents Deirdre Garvey, Pat Pawlak, and Lynn Dingle. Appellant alleged that respondents knew or had reason to know "that each specific misstatement" and "the overall theme" of the article were untrue or, alternatively, that respondents acted with "bad faith and reckless disregard as to the truth or falsity" of the statements. Appellant alleged that he suffered damage as a result of the article.

Respondents argue that appellant's libel claim is barred by the two-year statute of limitations provided in Minn. Stat. § 541.07(1) (2008), because appellant did not serve the summons and complaint by November 21, 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 and modifications 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.

Additionally, "[e]xpressions of opinion, rhetoric, and figurative language are generally not actionable if, in context, the audience would understand the statement is not a representation of fact." *Bebo v. Delander*, 632 N.W.2d 732, 739 (Minn. App. 2001) (quotation omitted), *review denied* (Minn. Oct. 16, 2001). "For this reason, even vulgar

language or name-calling is not necessarily defamation." *Id.* "For example, as a matter of law, 'troublemaker' is not actionable because of its indefinite character." *Id.* at 740. "Courts consider four factors when determining whether a statement is one of fact or opinion: (1) the precision and specificity of the statement; (2) the statement's verifiability; (3) the social and literary context of the statement; and (4) the public context in which the statement was made." *Id.*

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 as a matter of law. The majority of allegedly defamatory statements were non-actionable opinion statements. Generally, the statements simply expressed the author's opinion that appellant was a "troublemaker" with respect to his use of the library and the court system. These statements were not actionable as a matter of law. *See Bebo*, 632 N.W.2d at 740. And the "gist" or "sting" of the remainder of the statements was 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. He alleged in his complaint that publication of the following statements in the *Prison Mirror* article, in addition to the statements recited in his libel claim, constituted tortious publication of private facts:

a) "Psychiatrists have found" [appellant] "to be a pattern sex offender," and [appellant] "will likely be committed even if his case is overturned[]";

b) [Appellant] "look[s] at pictures of children for sexual gratification," and that [appellant] told a jury that[];

c) [Appellant] "is a convicted child molester who is serving 26 years for sexually abusing a six-year-old boy[]"; and

d) [Appellant] "is a repeat pedophile."

Appellant also challenged the article's reference to a recent *Star Tribune* article which stated that appellant "acknowledged that he had served a previous term for molestation" and that he "admitted in court that he was later a voyeur." Appellant also alleged that Evenstad's January 2008 letter to the editor contained the following tortiously disclosed private facts:

a) [Appellant] is "a pedophile" and a "child molester";

b) [Appellant's] then-pending United States Supreme Court appeal is "this pedophile's challenge[]"; and

c) [Appellant's] "crimes and pathology are sick and disturbing."

Appellant alleged that all respondents were complicit in the publication of these private facts and were therefore liable.

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 complained did not concern his private life: every fact mentioned in the article and the letter was already in the public record of appellant's criminal trial and subsequent appellate proceedings. Additionally, while appellant's *behavior* was likely to be highly offensive to a reasonable person, the publication of the details of that behavior, after appellant's conviction, was not offensive. And the facts surrounding a convicted child molester's alleged abuse of the legal system

in an attempt to obtain reversal of his conviction 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.

"Willful And Malicious Violation Of Minnesota Department Of Corrections Policies And Procedures"

Appellant alleged that respondents violated a variety of Minnesota Department of Corrections rules, causing appellant damage. Respondents argue that no private cause of action for violation of prison rules exists, citing *Moore v. Rowley*, 126 F. App'x 759, 760 (8th Cir. 2005) (holding that violation of prison policy does not give rise to 42 U.S.C. § 1983 liability), *Gardner v. Howard*, 109 F.3d 427, 430 (8th Cir. 1997) (reviewing prison official's opening of an inmate's confidential legal mail, which was against prison policy, for a constitutional violation), and *Moore v. Schuetzle*, 486 F. Supp. 2d 969, 989 (D.N.D. 2007) ("In order to set forth a claim under 42 U.S.C. § 1983, an inmate must show a violation of his constitutional rights, not merely a violation of prison policy."). Appellant argues correctly that these cases establish only that he could not base a *federal § 1983* claim on the violation of prison policy, and that he made no § 1983 claim in Count III. Appellant argues that, in Count III, he instead sought "first-time judicial recognition and application of a new private cause of action for that 'package' of willful, malicious violations" that caused him harm.

Creating a new tort is a function reserved for the supreme court. *Federated Mut. Ins. Co. v. Litchfield Precision Components, Inc.*, 456 N.W.2d 434, 439 (Minn. 1990).

Appellant's claim has no basis in current law, and the district court correctly dismissed it as frivolous.

Constitutional Claims

In Count IV, appellant alleged that, "[b]y all of the foregoing, respective, wrongful actions and inactions of [respondents] Garvey, Pawlak, Dingle, and Fabian," respondents: (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 the supreme court justices read the *Prison Mirror* 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 facilitate 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, although not explicit in the complaint, appellant appears to have asserted the 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 characterizes his claim as one arising out 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 did not explain in his complaint or on appeal how his substantive-due-process rights were violated. Instead, he asserts a procedural-due-process claim by arguing that respondents' defamatory actions deprived him of a liberty or property interest—namely, his interest in his reputation—without due process of law, and that he therefore has stated a claim for relief under the Fourteenth Amendment.

"[I]njury to reputation by itself is not a 'liberty' interest protected under the Fourteenth Amendment." *Williams v. Bd. of Regents of the Univ. of Minn.*, 763 N.W.2d 646, 654 (Minn. App. 2009) (citing *Siegert v. Gilley*, 500 U.S. 226, 233, 111 S. Ct. 1789, 1794 (1991)). But "a liberty interest is implicated when a loss of reputation is coupled with the loss of some other tangible interest." *Boutin v. LaFleur*, 591 N.W.2d 711, 718 (Minn. 1999) (citing *Paul v. Davis*, 424 U.S. 693, 701–02, 96 S. Ct. 1155 (1976)). "[T]o bring a successful procedural due process challenge a person must suffer more than mere stigma[;] the injury to reputation must also be coupled with the loss of some other recognizable interest." *Id.* This standard has become known as the "stigma-plus" test. *Id.* For example, a government employee who is discharged from employment because of a defamatory statement made by a government official may state a § 1983 claim against the defamer. *See Paul*, 424 U.S. at 706, 96 S. Ct. at 1163; *Williams*, 763 N.W.2d at 654. *But see Siegert*, 500 U.S. at 233–34, 111 S. Ct. at 1794 (holding mere foreclosure of *future* employment opportunities insufficient); *Paul*, 424 U.S. at 697, 711–12, 96 S. Ct. at 1159, 1165–66 (same).

Here, appellant argues that he has satisfied the "stigma-plus" test because prison officials' handling of the article violated prison rules and policies which violated "his rights and status under those very rules, as part of state law."

Appellant's argument is premised on the article's being defamatory, which it is not. For this reason alone, appellant's "stigma-plus" claim fails. But even if the article were defamatory, and even if appellant had a recognizable interest in the unwavering enforcement of prison policies and procedures, the publication of the article was not coupled with the alleged failure of respondents to enforce those policies in the sense required to state a "stigma-plus" claim. Appellant's alleged loss of the protection of prison rules was not the result of the article; i.e., he was not called in for discipline as a result of statements in the article and told that he would no longer benefit from prison rules because of them. To the contrary, appellant alleged the opposite—that the publication of the article was the result of a violation of prison rules. Because the alleged defamatory statements in the article did not *cause* appellant to lose a recognizable interest, his "stigma-plus" claim has no basis in fact or law, and the district court correctly dismissed it as frivolous.

Eighth Amendment

Appellant alleged that prison-official respondents' allowing the article to be published violated his Eighth Amendment right to be free of cruel and unusual punishment. 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).

Appellant first argues that being subjected to the defamatory statements in the article constituted cruel and unusual punishment in and of itself. Appellant's claim fails because, as discussed above, the article was not defamatory.

Appellant next argues that his Eighth Amendment claim was sustained by his allegations that respondents allowed the article to be published knowing that it would incite violence against him. In *Farmer*, the Supreme Court held that prison officials could be liable under the Eighth Amendment for placing a transsexual inmate in the general male prison population, where she was subject to violence, if the officials knew of and disregarded a substantial risk that she would be harmed. 511 U.S. at 830, 847, 114 S. Ct. at 1975, 1984.

But the Eighth Amendment requires prison officials only to take *reasonable* measures to protect inmate safety, "a standard that incorporates due regard for prison officials' unenviable task of keeping dangerous men in safe custody under humane conditions." *Id.* at 844–45, 114 S. Ct. at 1982–83 (quotation omitted). Because the statements in the article were true and publicly available, sustaining appellant's claim would require a holding that prison officials can be liable under the Eighth Amendment simply for failing to withhold *true, publicly accessible information* about one inmate from another inmate where that information could potentially result in violence. Such a standard would put an unreasonable burden on prison officials—every criminal case in the prison law library would have to be redacted to remove identifying characteristics of

the defendants, and every newspaper coming into the prison would have to be censored. Appellant's Eighth Amendment claim therefore has no basis in fact or law, and the district court correctly dismissed it as frivolous.

"Toxic Incarceration"

Appellant sought recognition and application of a new common-law tort of "toxic incarceration." Creating a new tort is a function reserved for the supreme court. *Federated Mut.*, 456 N.W.2d at 439. Appellant's claim has no basis in existing law, and the district court correctly dismissed it as frivolous, notwithstanding appellant's assertion that a reasonable argument for the expansion of the law is not frivolous.

The district court properly determined that all of appellant's allegations in his complaint were frivolous and therefore properly dismissed the action.

Affirmed.