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**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1402**

Dr. Vibhu Kapoor,
Appellant,

vs.

Dr. Ellen Brown, et al.,
Respondents.

**Filed April 21, 2014
Affirmed
Kirk, Judge**

Stearns County District Court
File No. 73-CV-12-2707

LeAnne D. Miller, Sarah R. Jewell, Reichert Wenner, P.A., St. Cloud, Minnesota (for appellant)

William M. Hart, Margaret R. Ryan, Meagher & Geer, P.L.L.P., Minneapolis, Minnesota (for respondents)

Considered and decided by Larkin, Presiding Judge; Worke, Judge; and Kirk, Judge.

UNPUBLISHED OPINION

KIRK, Judge

On appeal from the district court's grant of summary judgment, appellant argues that the district court erred by: (1) granting summary judgment on his claim for

defamation; (2) finding that the allegedly defamatory statements are protected by a qualified privilege; and (3) not addressing his claim for slander per se. We affirm.

FACTS

Appellant Vibhu Kapoor, M.D., began working for Medical Scanning Consultants, P.A. (MSC), as a radiologist in November 2007. MSC provides radiology services to the Center for Diagnostic Imaging (CDI). Although MSC and CDI are separate entities, their respective employees work together on a daily basis. During his employment at MSC, Dr. Kapoor received compliments about the quality of his work. However, Dr. Kapoor also had several confrontations with his supervisors at MSC. On one occasion, Dr. Kapoor resigned, but he later reconsidered and decided to stay. From 2009 through 2011 the MSC partners discussed terminating Dr. Kapoor's employment, but they continued to employ him due to their concerns about adequate staffing.

In December 2010, Dr. Kapoor's wife gave birth to their son at respondent St. Cloud Medical Group, P.A. (SCMG). Because Kimberly Spaulding, M.D., Dr. Kapoor's wife's family-practice physician, was not available for the delivery, an on-call doctor, Christina Rexine, M.D., attended the delivery. The delivery was normal, but Dr. Kapoor was upset about the way it was handled and filed complaints with the hospital and the board of medical practice against Dr. Rexine and the medical resident who assisted with the delivery. Dr. Kapoor's wife withdrew from Dr. Spaulding's care and scheduled a postpartum appointment with another doctor, respondent Ellen Brown, M.D., in February 2011.

In preparation for Dr. Kapoor's wife's appointment, Dr. Brown reviewed her paper chart and asked her nurse and receptionist why Dr. Kapoor's wife was seeing her; they told her that Dr. Kapoor's wife was unhappy with Dr. Spaulding's care. Dr. Brown cancelled the appointment because of her department's policy to not see patients in the OB/GYN department if they have been delivered by a family-practice physician.

On April 14, Dr. Brown called MSC and asked to speak to a member of management after she reviewed a CT scan report that Dr. Kapoor had interpreted. Dr. Brown was concerned that because Dr. Kapoor was upset about the delivery of his son, his ability to impartially interpret the scans was compromised. Dr. Brown spoke to a member of CDI's scheduling department and requested that none of her patients' CT scans be read by Dr. Kapoor, explaining that she did not trust him. After their conversation, the scheduler contacted Kaye Cunningham, CDI's director of operations and business development, and told her about Dr. Brown's phone call. She also sent an email to Cunningham and Dr. Kapoor reporting Dr. Brown's phone call. She explained that Dr. Brown "stated that there was a conflict with another CentraCare physician in the delivery room and she 'just doesn't trust him.'"

In May 2011, Dr. Spaulding learned that a complaint had been filed against her with the board of medical practice. Dr. Spaulding believed that Dr. Kapoor or his wife made the complaint because it involved the delivery of their son and she knew Dr. Kapoor was upset with her. She was also aware that Dr. Kapoor and his wife had filed a complaint against Dr. Rexine with the board of medical practice. Dr. Spaulding notified respondent Diana White, the administrator of SCMG, that she had been reported to the

board of medical practice and asked White if it was possible to not have Dr. Kapoor read her scans.

On May 26, White called Cunningham to discuss a billing matter. During their conversation, White told Cunningham that Dr. Spaulding was concerned about Dr. Kapoor reading her patient's scans because he was angry with her and had reported her to the board of medical practice. She also told Cunningham that Dr. Spaulding was concerned about Dr. Kapoor and wondered if he had lost his mind. The next day, Cunningham emailed CDI's senior vice president of operations to report White's phone call, stating that "SCMG no longer wants Dr. Kapoor to step foot into either of their buildings or read any of their cases." In another email, Cunningham explained that "SCMG is VERY upset about this and think[s] 'he has lost his mind' (their exact words). Also, one of their doctors witnessed his behavior in the delivery room and based on that says she feels he can not be trusted." MSC discharged Dr. Kapoor in June.

In March 2012, Dr. Kapoor filed a complaint against Dr. Brown and SCMG, alleging defamation and slander per se. He later amended the complaint and added White as a defendant. Respondents Dr. Brown, SCMG, and White moved for summary judgment. Following a hearing, the district court granted their motion. This appeal follows.

D E C I S I O N

A motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled

to a judgment as a matter of law.” Minn. R. Civ. P. 56.03. On appeal from an award of summary judgment, the appellate court reviews de novo whether there is a genuine issue of material fact and whether the district court erred when it applied the law. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002). This court must “view the evidence in the light most favorable to the party against whom summary judgment was granted.” *Id.* We will affirm the award of summary judgment if it can be sustained on any ground. *Winkler v. Magnuson*, 539 N.W.2d 821, 828 (Minn. App. 1995), *review denied* (Minn. Feb. 13, 1996).

I. The district court did not err by granting summary judgment on Dr. Kapoor’s claim for defamation.

To establish a claim for defamation, a plaintiff must prove that: “(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). The plaintiff must also prove “that the recipient of the false statement reasonably understands it to refer to a specific individual.” *State v. Crawley*, 819 N.W.2d 94, 104 (Minn. 2012). Truth is a complete defense to defamation, and true statements are not actionable. *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 255 (Minn. 1980).

The district court summarized the three statements that Dr. Kapoor alleged were defamatory: (1) Dr. Brown’s April 14, 2011, statement to the CDI scheduler that she did not want Dr. Kapoor to read her patients’ scans because she did not trust him; (2) Dr.

Spaulding's May 2011 statement to White that Dr. Kapoor had reported her to the board of medical practice and that she did not want him involved with her patients' care; and (3) White's May 26, 2011, statement to Cunningham that SCMG no longer wanted Dr. Kapoor to provide services for their patients because of the complaints he made about Dr. Rexine and Dr. Spaulding, and because SCMG believed that he had lost his mind. However, the district court determined that Dr. Kapoor had not properly pleaded the allegedly defamatory statements that Dr. Spaulding made to White and White's statement to Cunningham that SCMG did not want Dr. Kapoor to be involved in the care of their patients or on the clinic's property. Despite that determination, the district court considered the merits of the claims related to those statements because it observed there was a conflict between caselaw and the Minnesota Rules of Civil Procedure regarding the amount of detail required in defamation pleadings.

As an initial matter, respondents argue that the district court properly determined that the allegedly defamatory statements not contained in the complaint are beyond the scope of Dr. Kapoor's defamation claim.¹ In general, Minnesota law requires allegedly defamatory statements to be alleged verbatim. *Moreno v. Crookston Times Printing Co.*, 610 N.W.2d 321, 326 (Minn. 2000); *see also Benson v. Nw. Airlines, Inc.*, 561 N.W.2d 530, 538 (Minn. App. 1997) (concluding that the allegedly defamatory statements that

¹ Respondents also argue that Dr. Kapoor abandoned this argument by not addressing it in his brief. *See Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982). However, the district court considered the merits of the claims relating to the statements despite its finding that they were not pleaded in the complaint, and Dr. Kapoor challenges the district court's determination about the merits of the statements. Therefore, it is appropriate for this court to address this argument here.

were not included in the complaint were beyond the scope of the plaintiff's claim), *review denied* (Minn. June 11, 1997). A plaintiff's failure to recite "the exact language spoken" is not fatal to the claim, but at the very least the plaintiff must identify which defendants made the allegedly defamatory statements. *Schibursky v. Int'l Bus. Machs. Corp.*, 820 F. Supp. 1169, 1182 (D. Minn. 1993) (applying Minnesota law). In contrast, the general rules of pleading require only that a pleading "contain a short and plain statement of the claim showing that the pleader is entitled to relief." Minn. R. Civ. P. 8.01.

One of the three statements that Dr. Kapoor alleged were defamatory was not included in either the original or amended complaint: Dr. Spaulding's May 2011 statement to White. But because the district court considered the merits of Dr. Kapoor's claim regarding all three statements, we will consider all three statements as well.

Dr. Kapoor argues that he met his burden to present evidence sufficient to prove that the respondents defamed him. The first and fourth elements of a defamation claim are not in dispute because the parties agree that the statements at issue referred to Dr. Kapoor and were communicated to someone other than Dr. Kapoor. But the parties dispute whether Dr. Kapoor established that the statements were false statements of fact. The district court determined that the statements "either do not constitute false statements of fact or do not reasonably convey a defamatory meaning."

Private-citizen defamation actions are analyzed under state common law principles, and Minnesota common law generally does not distinguish between statements of fact and statements of opinion. *Weissman v. Sri Lanka Curry House, Inc.*,

469 N.W.2d 471, 473 (Minn. App. 1991).² But the Minnesota Supreme Court recently reaffirmed that “[t]he First Amendment protects statements of pure opinion from defamation claims.” *McKee v. Laurion*, 825 N.W.2d 725, 733 (Minn. 2013). “Expressions 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). In general, “the truth or falsity of a statement is a question for the jury.” *McKee*, 825 N.W.2d at 730. Whether a defamatory meaning was reasonably conveyed by the statement is to be determined by the court. *Utecht v. Shopko Dep’t Store*, 324 N.W.2d 652, 653 (Minn. 1982).

Viewing the evidence in the light most favorable to Dr. Kapoor, there is no genuine issue of material fact as to whether the statements at issue in this matter are actionable. Dr. Brown’s April 14, 2011, statement to the CDI scheduler that she did not trust Dr. Kapoor was an expression of her subjective opinion about Dr. Kapoor based on her understanding of Dr. Kapoor’s behavior toward two of her colleagues after the birth of his son. In addition, Dr. Brown’s statement to the CDI scheduler that she did not want Dr. Kapoor to read her patients’ scans, Dr. Spaulding’s statement to White that she did not want Dr. Kapoor involved in her patients’ care, and White’s request to Cunningham that Dr. Kapoor no longer read scans for SCMG patients were merely expressions of their

² There is some confusion in Minnesota caselaw on this issue. *Compare Weissman*, 469 N.W.2d at 473 *with Hunt v. Univ. of Minn.*, 465 N.W.2d 88, 93-94 (Minn. App. 1991) (stating that there is narrow protection under the First Amendment for statements of opinion).

preferences not to have him involved in their patients' care. The statements cannot reasonably be interpreted as representations of fact.

Further, in context, White's statement to Cunningham that SCMG felt that Dr. Kapoor had "lost his mind" cannot reasonably be interpreted as stating a fact. The statement cannot be proven true or false; instead, it was "rhetorical hyperbole." See *McKee*, 825 N.W.2d at 733 ("[A]n opinion amounting to mere vituperation and abuse or rhetorical hyperbole . . . cannot be the basis for a defamation action." (quotation omitted)); *Hunt v. Univ. of Minn.*, 465 N.W.2d 88, 94-95 (Minn. App. 1991) (stating that a statement is protected speech when it cannot be proven true or false). The statement did not literally mean that SCMG believed that Dr. Kapoor had lost his mind. Rather, the statement conveyed the subjective concern of SCMG's employees that Dr. Kapoor was so upset with Drs. Rexine and Spaulding that his ability to objectively perform his professional duties for SCMG was compromised.

Finally, Dr. Spaulding's statement to White that Dr. Kapoor reported her to the board of medical practice is an assertion of fact. But "[i]f the statement is true in substance, minor inaccuracies of expression or detail are immaterial." *McKee*, 825 N.W.2d at 730. "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." *Oaks Gallery & Country Store-Winona, Inc. v. Lee Enters., Inc.*, 613 N.W.2d 800, 803 (Minn. App. 2000) (quotation omitted), *review denied* (Minn. Sept. 13, 2000). The record does not establish that Dr. Spaulding's statement was literally true because Dr. Kapoor denied that he or his wife made the complaint to the board of

medical practice, and the board confirmed that they had not done so. However, the record shows that the “gist or sting” of the statement was true. Dr. Kapoor was very upset about the care his wife received during his son’s delivery. He told Dr. Spaulding that he did not want her near him or his family and he removed his wife from her care. Dr. Kapoor also submitted complaints to the hospital about Dr. Rexine, Dr. Spaulding, and the resident who assisted in the delivery of his son. He submitted additional complaints to the board of medical practice regarding Dr. Rexine and the resident. Finally, the record establishes that someone filed a complaint against Dr. Spaulding with the board of medical practice for the incident involving Dr. Kapoor’s son’s delivery.

Therefore, the district court did not err by granting summary judgment on Dr. Kapoor’s claim for defamation. Because we reach this conclusion, we need not reach Dr. Kapoor’s argument that the district court erred by finding that the statements are protected by a qualified privilege.

II. The district court did not err by granting summary judgment without addressing Dr. Kapoor’s claim for slander per se.

Dr. Kapoor argues that the district court erred by granting summary judgment without addressing his claim for slander per se. He contends that the district court should not have granted summary judgment on both counts of the complaint because he proved all of the elements of slander per se. “Slander” is “[a] defamatory assertion expressed in a transitory form.” *Black’s Law Dictionary* 1514 (9th ed. 2009). “Slander per se” is slander that affects the plaintiff in his business, trade, or profession. *Stuempges*, 297 N.W.2d at 255. As previously discussed, the district court correctly determined that Dr.

Kapoor did not meet his burden to identify defamatory statements. Therefore, by definition he has also not proved the elements of slander per se. *See id.* The district court did not err by granting summary judgment without analyzing Dr. Kapoor's claim for slander per se.

Affirmed.