IN THE COURT OF APPEALS OF IOWA

No. 18-0662
Filed September 11, 2019

PURYEAR LAW P.C. and ERIC D. PURYEAR,
Plaintiffs-Appellants,

vs.

DIRK J. FISHBACK and JESSICA HARBAUGH,
Defendants-Appellees.

Appeal from the Iowa District Court for Scott County, Nancy S. Tabor, Judge.

Plaintiffs appeal the district court's dismissal of a defamation action against the defendants. **AFFIRMED.**

Eric D. Puryear and Eric S. Mail of Puryear Law P.C., Davenport, for appellants.

Dirk Fishback and Jessica Harbaugh, Garber, pro se appellees.

Considered by Doyle, P.J., May, J., and Mahan, S.J.* Tabor, J., takes no part.

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2019).

MAHAN, Senior Judge.

Puryear Law P.C. and Eric Puryear (collectively, Puryear) appeal the district court's dismissal of a defamation action against Dirk Fishback and Jessica Harbaugh (collectively, Fishback), contending the district court erred in granting Fishback's motion for directed verdict. Upon our review, we affirm.

I. Background Facts and Proceedings

Fishback sought Puryear's representation for a postconviction-relief proceeding. Fishback entered into a contract for legal services with Puryear and deposited a $1000 retainer. Fishback made two additional payments, $192 and $135, over the next several months. Puryear reviewed Fishback's case and explained his "options." Fishback decided to end Puryear's representation with a $112.50 balance remaining due on his account. Thereafter, Fishback posted a negative online review about Puryear on Google.[1] "Dirk Fishbackk" wrote:

> I would not recommend this lawfirm and agree with some of the other neg[ative] reviews as I had the same issues after being charged $1500 for really nothing being done. Can't even make an appointment until they are paid in full and up to date. You might get 7 days to pay. Working on the road I was overdue before I even had a chance to get the bill.

Puryear filed a petition raising claims of breach of contract and defamation against Fishback. The case was tried to a jury; at the close of Puryear's evidence

[1] Google offers an internet service that allows customers to post voluntary, public, and non-anonymous reviews about their experience with a business and its services. *See* Google My Business Help, *Get Reviews on Google*, https://support.google.com/business/answer/3474122?hl=en&ref_topic=6001257 (last visited Aug. 22, 2019) ("Reviews on Google provide valuable information about your business to both you and your customers. Business reviews appear next to your listing in Maps and Search, and can help your business stand out on Google."). Google allows business-owners to reply to individual reviews by accessing their business profile on Google Maps or request that Google remove the review. *Id*.

and again at the close of all the evidence, Fishback moved for directed verdict on the defamation claim. The district court granted the motion and dismissed the defamation claim. Puryear then voluntarily dismissed the breach-of-contract claim. Puryear appeals.[2]

II. Standard of Review

We review the district court's rulings on motions for directed verdict for correction of errors at law. *Estate of Pearson ex rel. Latta v. Interstate Power & Light Co.*, 700 N.W.2d 333, 340 (Iowa 2005). In reviewing such rulings, we view the evidence in the light most favorable to the nonmoving party to determine whether the evidence generated a fact question. *Dettmann v. Kruckenberg*, 613 N.W.2d 238, 250–51 (Iowa 2000). "To overcome a motion for directed verdict, substantial evidence must exist to support each element of the claim or defense." *Yates v. Iowa W. Racing Ass'n*, 721 N.W.2d 762, 768 (Iowa 2006). "Substantial evidence exists if reasonable minds could accept the evidence to reach the same findings." *Id.*

III. Discussion

Iowa's defamation law "embodies the public policy that individuals should be free to enjoy their reputation unimpaired by false and defamatory attacks." *Bandstra v. Covenant Reformed Church*, 913 N.W.2d 19, 46–47 (Iowa 2018) (citation omitted). "We recognize two types of defamation: per quod and per se." *Id.* Per se defamation has "a natural tendency to provoke the plaintiff to wrath or expose [the plaintiff] to public hatred, contempt, or ridicule, or to deprive [the

[2] Fishback did not file a responsive brief on appeal.

plaintiff] of the benefit of public confidence or social intercourse." *Bierman v. Weier*, 826 N.W.2d 436, 444 (Iowa 2013) (citation omitted). In actions between a private plaintiff and a nonmedia defendant, per se defamation does not require proof of malice, falsity, or damage. *See id*. Per quod defamation requires a third party to refer "to facts or circumstances beyond the words actually used to establish the defamation." *Bandstra*, 913 N.W.2d at 46. "To succeed in proving defamation per quod, a party must prove six elements: (1) publication, (2) a defamatory statement, (3) falsity, (4) maliciousness, (5) the statement was of or concerning the party, and (6) a resulting injury." *Id*.

Here, Puryear's petition raised the claim of defamation per se, alleging Fishback's statements were "false" and "attack[ed] the integrity and moral character of [Puryear]." At the outset of trial, Puryear reiterated it was proceeding as a defamation per se action. The parties focused on two statements in Fishback's review—"charged $1500 for really nothing being done" and "[c]an't even make an appointment until they are paid in full and up to date." Fishback moved for directed verdict, claiming Puryear had not shown Fishback's statements were false, rather than "just an opinion," and Puryear had not presented any evidence of damages.

The district court granted Fishback's motion, observing the first statement "is subjectively capable of proof, not objectively, because whether or not the statement was intended to say that there was no billable hours for that or whether there was no result from those billable hours is capable of two different reasonable meanings." The court also noted that considering the statement "in the context of the entire testimony and the context that it was stated, . . . the category of its

publication was a category of reviews where the website encourages people to tell others what experience they had with a particular business, . . . the statement is a statement of opinion." On appeal, Puryear contends the court erred in concluding the statement could be construed as an opinion "where [it] was surrounded by other factual statements and the statement itself is capable of factual verification."

We observe our supreme court has continued to recognize defamation per se claims, despite acknowledging the "present-day" realities regarding the ability to spread "accusations . . . quickly and inexpensively" through various "social interactions."[3] *Bierman*, 826 N.W.2d at 455. There is no strict dichotomy between "opinion" and "fact" in evaluating such claims; we must consider "whether the alleged defamatory statement can reasonably be interpreted as stating actual facts and whether those facts are capable of being proven true or false." *Yates*, 721 N.W.2d at 771. If there is ambiguity, then the question must be reserved for the

[3] The supreme court explained its "justification" for retaining defamation per se claims against nonmedia defendants as follows:

> We think libel per se plays a useful role in helping to keep our social interactions from becoming ever more coarse and personally destructive.
>
> We are not persuaded that debate and discussion are insufficiently robust in Iowa, or that libel jury verdicts and the costs of defending libel actions are a drag on free speech in this state, or that Iowa has less vibrant discourse when compared with other states that have abolished libel per se.
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> . . . .
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> In recent years, . . . the Internet and social media have evened the playing field somewhat, by giving individuals with access to a computer a ready platform for spreading falsehoods or engaging in cyberbullying. Yet unlike the media, these individuals may have fewer incentives to self-police the truth of what they are saying. For example, they may speak anonymously or pseudonymously. Also, because they are not in the communications business, they may care less about their reputation for veracity. In short, as compared to a generation ago, nonmedia defendants may have a greater capacity for harm without corresponding reasons to be accurate in what they are saying.

Bierman, 826 N.W.2d at 456–57.

jury.[4] *Vinson v*. *Linn-Mar Cmty*. *Sch*. *Dist*., 360 N.W.2d 108, 116 (Iowa 1984) ("The rule is that when the language of the publication is unambiguous, the issue of whether the publication is defamatory per se is for the court. If the language is capable of two meanings including the one ascribed by the complainant, it is for the jury to say whether such meaning was the one conveyed."). It would follow then that here, if the district court determined Fishback's statement was capable of two meanings, the question should have been submitted to the jury.

But our supreme court has not been asked to distinguish between a private-citizen plaintiff and a business plaintiff, the latter of which arguably acquiesces to the posting of online reviews (both positive and negative) by entering the electronic marketplace inherent with today's business world.[5] The court has also not been asked to decide whether online reviews, due to their very nature, could be considered matters of public concern. The per se defamation claim brought in this case implicates both these questions.

We first observe that "libel per se is available only when a private figure plaintiff sues a nonmedia defendant for certain kinds of defamatory statements *that do not concern a matter of public importance*." *Bierman*, 826 N.W.2d at 448 (emphasis added). Puryear alleged it was "not a public figure" and Fishback's statements "were not a matter of public concern." There is no dispute Puryear is not a public figure. Fishback did not dispute Puryear's assertion that the

[4] "Obviously, this does not preclude [a defendant] from raising other defenses (such as truth . . .)." *Bierman*, 826 N.W.2d at 464.

[5] Indeed, at trial, Eric Puryear testified his firm spends approximately $4000 per month on advertising, and he acknowledged that information about the firm can be found online. He stated the firm had "some positive, some negative" reviews on Google. He acknowledged, "We've had the unfortunate reality of the legal system is that there's probably more friction and emotion in those cases than other kinds of businesses."

statements were not a matter of public concern, but he could have. *Cf*. *Dun & Bradstreet*, *Inc*. *v*. *Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985) (whether a statement addresses matter of public concern must be determined by statement's content, form, and context, as revealed by whole record). Fishback's review was posted on a publicly accessible website, and the content of the review was related to matters of general interest to the public, particularly those members of the public in the market for an attorney. *See Unelko Corp*. *v*. *Rooney*, 912 F.2d 1049, 1056 (9th Cir. 1990) (finding Andy Rooney's statement on *60 Minutes* that a consumer product "didn't work" involved a matter of public concern, because it "was of general interest and was made available to the general public"); *Neumann v*. *Liles*, 369 P.3d 1117, 1125 (Or. 2016) (concluding a wedding guest's negative review of a wedding planning business posted on Google involved a matter of public concern).

"[S]tatements regarding matters of public concern that are not sufficiently factual to be capable of being proven true or false and statements that cannot reasonably be interpreted as stating actual facts are absolutely protected under the Constitution." *Bandstra*, 913 N.W.2d at 47; *but see Bierman*, 826 N.W.2d at 462 ("[T]he events described in the book would not reasonably be expected to have an impact beyond the parties involved. They take on broader significance only to the extent Scott has *written* about them and urged us to learn lessons from them. Accordingly, we do not believe there is any constitutional or common law bar to applying libel per se to Scott." (citation omitted)). Assuming Fishback's statements related to matters of public concern, the determinative question is

whether they could be interpreted as implying assertions of objective fact.[6] *Cf*. *Bierman*, 826 N.W.2d at 444 ("[A] statement would be deemed libel per quod where the words in themselves were not considered sufficiently harmful to the plaintiff without further context.").

We are persuaded by the conclusions reached by other courts that have encountered this specific type of issue regarding online reviews in defamation cases. In *Spencer v*. *Glover*, 397 P.3d 780, 783 (Utah Ct. App. 2017), a dissatisfied client posted a review on yelp.com[7] regarding his attorney and his attorney's services.[8] The district court dismissed the attorney's defamation claim,

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[6] We note this case is a far cry from other defamation per se cases, such as *Vinson*, where a school district inaccurately accused its bus driver of falsifying time cards. 360 N.W.2d at 115–16; *see also*, *e.g.*, *Bierman*, 826 N.W.2d at 464–65 (publishing a book stating a person has been molested by their father and suffers from bipolar disorder could be considered defamation per se); *Kiesau v*. *Bantz*, 686 N.W.2d 164, 178 (Iowa 2004) (finding substantial evidence supported a jury finding that a doctored image of plaintiff appearing topless was libel per se), *overruled on other grounds by Alcala v*. *Marriott Int'l*, *Inc*., 880 N.W.2d 699 (Iowa 2016); *Wilson v*. *IBP*, *Inc*., 558 N.W.2d 132, 139–40 (Iowa 1996) (holding an accusation of untruthfulness was sufficient evidence to support a jury finding of libel per se); *Huegerich v*. *IBP*, *Inc*., 547 N.W.2d 216, 221 (Iowa 1996) (accusing employee of possessing illegal drugs is libel per se); *Rees v*. *O'Malley*, 461 N.W.2d 833, 835 (Iowa 1990) (accusing plaintiff of extortion is libel per se).

[7] "Yelp Inc. is a company that 'describes itself generally as an online networking platform that connects people with great local businesses by hosting user-generated reviews.'" *Spencer*, 397 P.3d at 783 (citation omitted).

[8] The review stated:

> Worst ever. Had to fire him after I gave him a chance for well over a year. Paid him his $2500 retainer, then paid him another $2500 shortly after . . . and I still owe him another several thousand dollars! . . . all for his hunt-and-peck filing typing b.s. while he makes me watch. I'd be willing to wager that he was sitting on it and running the bill up until I produced money that she had not gotten her hands on. There was none that she had not gotten her hands on. She admitted that she spent the $40k in the safe. My order is _still_ based on substantially higher income earned the hard way in the Middle East, supporting my family by supporting those who protect our freedom. The arrears [have] become astronomical and ORS is threatening to take my license and passport . . . Yelled at me once when I called to ask him about something his office had sent me that day. Told me to "GOOGLE IT!" Worst. Ever. Filed a Utah Bar complaint and strongly considering suing him. Just have to find someone to do it.

Spencer, 397 P.3d at 783.

finding that even assuming the statements in the review were false and resulted in damage to the attorney, they were the client's "mere opinion." *Spencer*, 397 P.3d at 783. On appeal, the Utah Court of Appeals affirmed the district court's dismissal of the claim, concluding the broader setting and context of the online review suggested the client's statements were expressions of opinion rather than assertions of fact and "the underlying facts stated in the review [were] not defamatory." *Spencer*, 397 P.3d at 787.

The Oregon Supreme Court analyzed a similar claim in more detail. In *Neumann*, 369 P.3d at 1119, a wedding guest posted a negative review about a wedding planning business on Google after attending a wedding at the business's venue, which spawned a defamation claim against the guest by the business.[9] The court viewed the issue presented to be "how an actionable statement of fact is distinguished from a constitutionally protected expression of opinion in a defamation claim and whether the context in which a statement is made affects that analysis." *Neumann*, 369 P.3d at 1119. After first determining the statement involved a matter of public concern, the court proceeded to address whether the

[9] The review stated:

> There are many other great places to get married, this is not that place! The worst wedding experience of my life! The location is beautiful the problem is the owners. Carol (female owner) is two faced, crooked, and was rude to multiple guest[s]. I was only happy with one thing. It was a beautiful wedding, when it wasn't raining and Carol and Tim stayed away. The owners did not make the rules clear to the people helping with set up even when they saw something they didn't like they waited until the day of the wedding to bring it up. They also changed the rules as they saw fit. We were told we had to leave at 9pm, but at 8:15 they started telling the guests that they had to leave immediately. The "bridal suite" was a tool shed that was painted pretty, but a shed all the same. In my opinion [s]he will find a why [sic] to keep your $500 deposit, and will try to make you pay even more.

Neumann, 369 P.3d at 1119.

statement implied "an assertion of objective fact."[10] *Id*. at 1124. Ultimately, the court concluded, "[A] reasonable factfinder could not conclude that [the guest]'s review implies an assertion of objective fact. Rather, his review is an expression of opinion on matters of public concern that is protected under the First Amendment." *Id*. at 1126.

"[S]tatements of opinion can be actionable if they imply a provable false fact, or rely upon stated facts that are provably false." *Yates*, 721 N.W.2d at 771 (citation omitted). Significantly, "[t]he statement that the plaintiff must prove false is not the literal wording of the statement but what a reasonable reader or listener would have understood the author to have said." *Id*. We utilize a four-part test to determine whether a statement is factual or a protected opinion. *Bandstra*, 913 N.W.2d at 47.

> The first factor is "whether the alleged defamatory statement 'has a precise core of meaning for which a consensus of understanding exists or, conversely, whether the statement is indefinite and ambiguous.'" The second factor is "the degree to which the [alleged defamatory] statements are . . . objectively capable of proof or disproof[.]" The third factor is "the context in which the alleged defamatory statement occurs." The final factor we consider is "the broader social context into which [the alleged defamatory] statement fits."

Id. (alterations in original) (internal citations omitted).

Here, the district court implemented this analysis to reach the conclusion that Fishback's statement did not imply a provable false fact, as set forth above.

[10] To answer that question, the court adopted a three-part inquiry: "(1) whether the general tenor of the entire publication negates the impression that the defendant was asserting an objective fact; (2) whether the defendant used figurative or hyperbolic language that negates that impression; and (3) whether the statement in question is susceptible of being proved true or false." *Id*. at 1124–25.

We agree with the district court's reasoning. The general tenor of Fishback's statements "charged $1500 for really nothing being done" and "[c]an't even make an appointment until they are paid in full and up to date" reflect his subjective reaction as a client of the law firm and negate the impression that he was asserting objective facts; his review was not capable of being proved true or false because when considered as a whole and without considering words in isolation, it generally reflects his strong personal opinion as a client of Puryear. We further observe the use of hyperbolic vocabulary further negates the impression Fishback was asserting objective facts. Finally, considering the broader context in which the statements were made—a website where people post business reviews and comment on their experiences and degrees of satisfaction with particular businesses—indicates the statements were an expression of opinion.

The district court also found Puryear had not proved damages to establish a claim of defamation. Puryear contends the court erred in concluding there was no evidence to submit to the jury on the issue of damages "where the evidence showed the statement was false, that the review given by [Fishback] negatively impacted [Puryear's] online rating, and that the value of potential missed cases as a result of the defamatory review was significant."

"Recovery is for damages that are the natural and probable consequences of the libel." *Kelly v*. *Iowa State Educ*. *Ass'n*, 372 N.W.2d 288, 300 (Iowa Ct. App. 1985); *accord Rees v*. *O'Malley*, 461 N.W.2d 833, 839 (Iowa 1990). "The jury must therefore be presented with evidence upon which the consequences of the libel can be judged, evidence such as the nature of the plaintiff's reputation before the libel was published and the extent of the publication." *Kelly*, 372 N.W.2d at 300.

Eric Puryear testified his firm has had "thousands of clients" over the years, and "[t]he number of clients the firm has had always goes up." He acknowledged the firm's reviews on Google averaged "1.9 stars." Puryear did not present evidence about the firm's reputation before Fishback's review was published. Eric Puryear testified, "I can't possibly tell you if someone read [Fishback's] comment and then just didn't give us a call because I would never learn that, but obviously that sort of thing happens."

The district court concluded Puryear "has not given the jury any evidence for which they can even calculate an amount"; "[t]here was absolutely no evidence regarding his reputation before this and after this." We find no error in the court's conclusion that Puryear failed to demonstrate resulting damage from Fishback's review. *See Johnson v. Nickerson*, 542 N.W.2d 506, 510 (Iowa 1996) (requiring plaintiff show resulting damage); *but see, e.g.*, *Kelly*, 372 N.W.2d at 300 (reviewing per se claim and finding, "Kelly did present evidence that he had a good reputation as an administrator before defendant's writings were published. He presented evidence that the writings would adversely affect his reputation. He also submitted evidence of the extent of the publication. In addition, he presented evidence of special damages: emotional distress and lost speaking fees").

Upon our review of the issues presented on appeal, we affirm the district court's dismissal of Puryear's defamation action against Fishback.

AFFIRMED.