IN THE COURT OF APPEALS OF IOWA

No. 6-931 / 06-0803
Filed January 31, 2007

JANICE S. STUECKRATH, MICHAEL E. STUECKRATH, EMILY STUECKRATH, a Minor, JOEY STUECKRATH, a Minor, ADAM STUECKRATH, a Minor,
Plaintiffs-Appellants,

vs.

BANKERS TRUST COMPANY, MINDY NUSBAUM-BELL, SHARON K. GRAFFT and TRACY L. ABBAS,
Defendants-Appellees.

KERMIT J. ALBERTSON and RENEE HARDMAN,
Defendants.

Appeal from the Iowa District Court for Polk County, D.J. Stovall, Judge.

Plaintiffs appeal from a district court summary judgment ruling that dismissed their claims against defendants. **AFFIRMED**.

Robert M. Holliday of Sullivan & Ward, West Des Moines, and Steven P. Wandro and Jill Southworth of Wandro, Baer & Appel, P.C., Des Moines, for appellants.

Mark McCormick, Michael R. Reck and Tricia A. Johnston of Belin, Lamson, McCormick, Zumbach & Flynn, P.C., Des Moines, for appellees.

Heard by Zimmer, P.J., and Miller and Baker, JJ.

MILLER, J.

Plaintiffs Janice, Michael, Emily, Joey, and Adam Stueckrath appeal from a summary judgment ruling that dismissed their claims against defendants Bankers Trust Company, Mindy Nussbaum-Bell, Sharon Grafft, and Tracy Abbas. They contend the district court erred in dismissing their claims for slander. We affirm the district court.

I. Background Facts and Proceedings.

Janice Stueckrath was employed by Bankers Trust Company (Bankers Trust) in the Personal Trust Department. Nussbaum-Bell, Grafft, and Abbas also worked in the Personal Trust Department. Stueckrath did not get along with Nussbaum-Bell, Grafft, or Abbas, but enjoyed a friendly relationship with departmental supervisor Dave Arens. Stueckrath and Arens, and their respective spouses and children, enjoyed a social relationship outside of work.

In December 2002 Stueckrath spoke with co-worker Diana Van Vleet about her difficulties in getting along with people in her department. Van Vleet commented that the departmental staff resented Stueckrath's working relationship with Arens and perceived that they were "too close." Stueckrath then asked co-worker Jodi Corcoran whether she perceived or had heard others state that Stueckrath and Arens were "too close." Corcoran said she had not heard such a rumor, and told Stueckrath not to worry.

In January 2003 Corcoran attended a Bankers Trust recognition banquet, which was also attended by Arens and his wife Marsha. That evening Corcoran told Marsha there was a rumor Stueckrath and Arens were having an affair. According to Marsha's deposition testimony, Corcoran stated the rumor was

started by "a few other women," specifically Nussbaum-Bell, Grafft, and Abbas, who did not like working with Arens. Marsha also stated that Corcoran never indicated the source of her information. According to Corcoran's affidavit and deposition testimony, she learned of the rumor from Stueckrath, and no one else had ever spoken to her about the alleged affair. Both Marsha and Corcoran asserted that neither of them had taken the rumor seriously.

Arens was informed of the rumor by Marsha and Corcoran, and spoke with Stueckrath. Stueckrath then sent a memorandum to Vice President for Human Resources Renee Hardman accusing unidentified co-workers of starting a rumor that she was having an "improper relationship" or "'affair'" with Arens.

Several weeks later, Nussbaum-Bell, Grafft, and Abbas approached Senior Vice President Kermit Albertson to express concerns about Stueckrath's behavior. Albertson involved Hardman. According to the affidavits of Albertson, Hardman, Nussbaum-Bell, Grafft, and Abbas, none of the complaints suggested that Stueckrath was having an affair with anyone, and Nussbaum-Bell, Grafft, and Abbas all stated that they had never spread a rumor that Stueckrath and Arens were having an affair, and that such an affair was "inconceivable." Rather, the complaints involved accusations that Stueckrath had engaged in "inappropriate workplace behavior," including constant gossip, negativity, and outbursts. Hardman also stated there were concerns that Stueckrath was "creat[ing] an appearance of favoritism" and that Arens "acknowledged that he inadvertently could have created an impression of favoritism . . . by lending a patient ear on the many occasions when Ms. Stueckrath wanted to sound off."

Stueckrath contended Albertson informed her that Nussbaum-Bell, Grafft, and Abbas had alleged that her relationship with Arens was an "inappropriate relationship." However, notes and other documents generated in relation to various meetings make no mention of an "affair" or "inappropriate relationship" between Stueckrath and Arens. They do indicate that Stueckrath was told to modify her "flirtatious/inappropriate behavior/interpersonal relations with" Arens. Specifically, Stueckrath was told to cease telling others she was bringing Arens cookies for one-on-one meetings; to stop staying after meetings to speak with Arens alone, while making a point of this fact to the group; to behave professionally at all times, at and outside of work; and to stop allowing her friendship with Arens "to cloud the perception of others" because "the behavior and perceptions of the team have been affected by [the] relationship."

Finally, in May 2003, a co-employee informed Stueckrath that a former Bankers Trust employee, Lisa Dreyer, stated she had heard a rumor Stueckrath and Arens were having an affair. Stueckrath spoke with Dreyer in June 2003, and was informed that Dreyer had received the information from Steve Simon. At the time, Simon was employed by Bankers Trust as a senior vice president, but did not work in Stueckrath's department or have any role in supervising her or investigating the complaints against her. In an affidavit prepared by Stueckrath's attorneys, Dreyer stated that Simon had informed her Stueckrath and Arens "were having an affair." In a later affidavit, Dreyer stated that Simons had in fact told her there was a rumor the two were having an affair, that neither she nor Simon believed the rumor was true, and that her conversation with Simon occurred

during a "chance encounter outside the bank," and was "on a social basis and . . . not business related."

Stueckrath eventually resigned from Bankers Trust. In November 2005 Stueckrath and her husband Michael, both individually and on behalf of their children, brought a multi-count suit against Bankers Trust, Nussbaum-Bell, Grafft, Abbas, Albertson, and Hardman. Relevant to this appeal is a claim that Bankers Trust, Nussbaum-Bell, Grafft, and Abbas made slanderous statements that Stueckrath and Arens "were having an affair and an inappropriate relationship."[1]

The defendants sought a summary judgment ruling dismissing the claim, asserting that Stueckrath failed to present any admissible evidence that a slanderous statement was made by any of the individual defendants or on behalf of Bankers Trust, and that any comments about Stueckrath's "inappropriate" behavior were both a matter of opinion and privileged. In resistance to the summary judgment request, Stueckrath relied on Marsha Arens's deposition testimony and Dreyer's first affidavit.[2]

The district court granted the defendants' motion and dismissed the slander claims. The court concluded that both Dreyer's affidavit and Marsha Arens's deposition testimony were hearsay and could not be considered by the court as

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[1] Stueckrath's slander claim provides a partial basis for the loss of consortium claims made by Michael and the children. All discussions of Stueckrath's slander claim apply with equal force and effect to the loss of consortium claims based thereon. The remaining claims of libel and intentional inflection of emotional distress against the above defendants, a claim of negligence against Albertson, Hardman, and Bankers Trust, a claim of outrageous conduct against all defendants, and the related loss of consortium claims, have been dismissed and are not at issue on appeal.

[2] Stueckrath also asserted the affidavits of Nussbaum-Bell, Grafft, and Abbas generated a fact question as to whether the three defendants had effectively admitted to publishing a defamatory statement because they demonstrated the three had "talked among themselves in a negative fashion about Ms. Stueckrath and made statements subject to interpretation as to meaning." She does not, however, renew this contention on appeal.

evidence of a disputed fact. Looking to the remaining record, the court concluded Stueckrath could not state a claim for slander against any of the individually-named defendants because expressing an opinion that Stueckrath was behaving inappropriately did not rise to the level of defamation, and moreover that defamation cannot be based on unspecified statements. The court similarly concluded Stueckrath could not state a claim for slander against Bankers Trust because she did not present any admissible evidence that any slanderous statements were made by Bankers Trust employees "during working hours and/or in furtherance of the [bank's] business . . . ." The plaintiffs appeal.

II. Scope and Standards of Review.

Summary judgment rulings are reviewed for the correction of errors at law. Iowa R. App. P. 6.4; *General Car & Truck Leasing Sys., Inc. v. Lane & Waterman*, 557 N.W.2d 274, 276 (Iowa 1996). Where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law, summary judgment is appropriate. Iowa R. Civ. P. 1.981(3); *City of West Branch v. Miller*, 546 N.W.2d 598, 600 (Iowa 1996).

The court reviews the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, if any. *City of West Branch*, 546 N.W.2d at 600. All facts are viewed in the light most favorable to the party opposing the motion for summary judgment. *Bearshield v. John Morrell & Co*., 570 N.W.2d 915, 917 (Iowa 1997). However, the asserted facts must meet the standards of admissible evidence. *See Willis v. City of Des Moines*, 357 N.W.2d 567, 573 (Iowa 1984). Moreover, a party resisting a properly supported summary judgment motion must "set forth specific facts showing that there is a genuine issue for trial. If the

adverse party does not so respond, summary judgment, if appropriate, shall be entered." Iowa R. Civ. P. 1.981(5).

III. Discussion.

Defamation is the invasion of another person's interest in his or her reputation or good name. *Taggart v. Drake Univ.*, 549 N.W.2d 796, 802 (Iowa 1996). It is composed of the twin torts of libel and slander: Libel involves written statements while slander involves oral statements. *Kiesau v. Bantz*, 686 N.W.2d 164, 174 (Iowa 2004). To establish a prima facie case for slander, a plaintiff must demonstrate a defendant published an oral statement that was both defamatory and of and concerning the plaintiff. *Taggart*, 549 N.W.2d at 802; *see also Kiesau*, 686 N.W.2d at 175 (noting attack on person's integrity or moral character is defamatory per se, and falsity, malice, and injury are presumed). Fundamental to such a claim is proof the statement was communicated by the defendant to someone other than the plaintiff. *Belcher v. Little*, 315 N.W.2d 734, 737 (Iowa 1982) (noting exception when "the wrongdoer knows or should know that the statements must eventually come to the attention of others"). Moreover, "[t]he injured party cannot create his own cause of action by communicating the slanderous statements to others unless under strong compulsion to do so." *Id*. at 738. When we review the summary judgment record in light of the foregoing principles, we conclude it does not contain genuine issues of material fact that would justify submitting the slander claims to a jury.

Stueckrath correctly notes that testimony recounting direct observation of an allegedly defamatory statement made by or imputable to a defendant is not hearsay, but rather an admission by a party opponent offered to prove, not the

truth of the matter asserted, but the fact the statement was made. *See Higgins v. Gordon Jewelry Corp*., 433 N.W.2d 306, 311-12 (Iowa Ct. App. 1988). Thus, an affidavit or deposition testimony asserting first-hand knowledge of a statement made by the individual defendants or imputable to Bankers Trust would be admissible. *See Reihmann v. Foerstner*, 375 N.W.2d 677, 682 (Iowa 1985). However, an out-of-court statement that asserts a defendant slandered the plaintiff is hearsay, because it is being offered for the truth of the assertion that the defendant in fact made the statement. *Id*. Accordingly, an affidavit or deposition testimony that asserts the affiant or witness learned of the allegedly defamatory statement, not through first-hand observation but via a declaration by a third-party, would be admissible only if the third party's out-of-court statement falls within an exception to the hearsay rule. *See id*.

In her summary judgment resistance, Stuekrath relied primarily on the deposition testimony of Marsha Arens. That testimony indicates Marsha was told of the rumored affair by Corcoran, who attributed the rumor to the individual defendants. In order for Marsha's testimony to be admissible against the individual defendants (or against Bankers Trust, to the extent Stueckrath asserts the individual defendants' statements are imputable to the bank), Corcoran's statement must come within an exception to the hearsay rule. The only exception even arguably asserted by Stueckrath is that Corcoran's statement is an admission by a party-opponent. However, pursuant to Iowa Rule of Evidence 5.801(*d*)(2), a statement by a third person is an admission by a party-opponent under only limited circumstances, specifically when it is

> (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the

> party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party . . . ."

Clearly, this standard is not met as to the individual defendants.

In addition, to the extent Stueckrath argues that Corcoran's own statement is slander imputable to the bank, her contention is without merit. Even if Corcoran's statement could be categorized as defamatory, for Bankers Trust to be liable Corcoran must have published the statement while acting within the scope of her employment. *Huegerich v. IBP, Inc*., 547 N.W.2d 216, 221 (Iowa 1996). "[F]or an act to be within the scope of employment the conduct complained of 'must be of the same general nature as that authorized or incidental to the conduct authorized'" or "'necessary to accomplish the purpose of the employment and is intended for such purpose.'" *Godar v. Edwards*, 588 N.W.2d 701, 705-06 (Iowa 1999) (citation omitted). Here, the record indisputably demonstrates the statement was made in a social setting in the context of a casual conversation, and there is no evidence from which it could be reasonably inferred that Corcoran's statements were made within the scope of her employment with Bankers Trust.

Moreover, even viewed in the light most favorable to Stueckrath, the record indicates only that Corcoran was repeating Stueckrath's contention that the individual defendants had generated a false rumor. Merely disclosing the alleged slanderous statement of a third party does not support a slander claim against the bank, *see Reihmann*, 375 N.W.2d at 682, particularly when the information was received from the allegedly defamed party, *Belcher*, 315 N.W.2d at 737.

In resisting summary judgment Stueckrath also relied on the affidavit made by Dreyer, which related a statement by Simon that Stueckrath and Arens "were having an affair." Clearly, this statement has no application to the claims against the individual defendants. Moreover, Dreyer's second affidavit asserted the statement, whatever its content, was made in a social context and was not business related. Nothing in the record contradicts this assertion. As with Corcoran, there is no evidence this statement was made within the scope of Simon's employment. *Huegerich*, 547 N.W.2d at 221.

Stueckrath also urges us to consider (1) her own statement that Albertson informed her that the individual defendants told him Stueckrath and Arens had an "inappropriate relationship," and (2) a portion of Corcoran's affidavit that asserts Corcoran asked Arens directly "if he heard that there was a rumor that he was having an affair with Jan Stueckrath." However, these statements were not relied on by Stueckrath in resistance to the summary judgment motion, were not addressed by the district court in the summary judgment ruling, and were not the subject of any post-trial motion. We accordingly decline to consider them on appeal. *See Lloyd v. Drake Univ.*, 686 N.W.2d 225, 232 (Iowa 2004).

IV. Conclusion.

We have considered all of the appellants' contentions, whether or not specifically discussed.[3] Upon review of the admissible evidence properly before

[3] We are mindful of Stueckrath's contention that the district court improperly applied a heightened standard, in that it stated the court had an expanded role in summary judgment matters that relate to defamation claims. *See Bitner v. Ottumwa Cmty. Sch. Dist.*, 549 N.W.2d 295, 300 (Iowa 1996). While this concept may not be entirely applicable under the particular facts of this case, we cannot conclude it erroneously influenced the district court's decision. A review of the district court's ruling indicates it properly set forth and applied the correct summary judgment standards.

us on appeal, we conclude the record is insufficient, as a matter of law, to support a claim for slander against any defendant. Accordingly, the district court did not err in granting summary judgment and dismissing the slander claims.

AFFIRMED.