

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1388**

Timothy Jirak,
Respondent,

vs.

Philip Eichten, et al.,
Appellants,

Eleanor Eichten,
Appellant,

Ellen Eichten,
Respondent.

**Filed July 2, 2012
Affirmed
Worke, Judge**

Hennepin County District Court
File No. 27-CV-09-19196

Michael C. Mahoney, Mahoney Anderson, LLC, Wayzata, Minneapolis (for respondent Timothy Jirak)

Patrick T. Tierney, Collins, Buckley, Sauntry & Haugh, P.L.L.P., St. Paul, Minnesota (for appellants Philip Eichten and David Eichten)

John B. Bellows, Jr., St. Paul, Minnesota (for appellant Eleanor Eichten)

Randy J. Sparling, Felhaber, Larson, Fenlon & Vogt, Minneapolis, Minnesota (for respondent Ellen Eichten)

Considered and decided by Halbrooks, Presiding Judge; Worke, Judge; and Bjorkman, Judge.

UNPUBLISHED OPINION

WORKE, Judge

Appellants, an elderly mother and her two sons, challenge the district court's declaratory judgment ruling that the mother's 2006 transfers of approximately \$450,000 to the mother's daughter and her grandson were gifts. Appellants also seek reversal of the district court's judgment in favor of the grandson on his defamation-per-se claim. In his cross-appeal, the grandson requests (1) reversal of the district court's decision to deny attorney fees; (2) an increase in the damages award on the defamation-per-se claim; and (3) reversal of the district court's denial of his punitive-damages claim on the defamation-per-se claim. We affirm.

DECISION

Validity of Gift

The district court determined that there was clear-and-convincing evidence that Eleanor Eichten made a valid 2006 inter vivos gift of approximately \$450,000 to her grandson Timothy Jirak and to her daughter Ellen Jirak. Eleanor Eichten and her sons Philip Eichten and David Eichten challenge that ruling. "When reviewing a declaratory judgment action, we apply the clearly erroneous standard to factual findings, and review the district court's determinations of law de novo." *Onvoy, Inc., v. ALLETE, Inc.*, 736 N.W.2d 611, 615 (Minn. 2007) (citations omitted). A valid inter vivos gift includes the elements of delivery, donative intent, and absolute disposition. *See Oehler v. Falstrom*, 273 Minn. 453, 456-57, 142 N.W.2d 581, 585 (1966). The donee bears the burden to prove by clear-and-convincing evidence that a gift was made. *Id.* at 457, 142 N.W.2d at 585. Donative intent is a question of fact. *Olsen v. Olsen*, 562 N.W.2d 797, 800 (Minn.

1997). In cases such as this one, when the district court sits as the trier of fact and the record consists “almost entirely of oral testimony,” we will alter the district court’s conclusions “only under the most unusual circumstances.” *In re Estate of Lobe*, 348 N.W.2d 413, 415 (Minn. App. 1984); *see* Minn. R. Civ. P. 52.01 (stating that “[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the [district] court to judge the credibility of the witnesses”).

We observe no error in the district court’s determination that the evidence is sufficient to establish Eleanor’s intent to give \$450,000 to Timothy and Ellen. Timothy and Ellen, the family members with whom Eleanor was closest in 2006, testified that Eleanor intended to make the unconditional gift. Leo Dehler, Eleanor’s long-time attorney, who was the only party with no financial interest in the matter, testified in a manner consistent with Timothy’s and Ellen’s testimony. The district court found the testimony of all three credible. *See Opsahl v. State*, 710 N.W.2d 776, 782 (Minn. 2006) (recognizing that a district court has a “unique position to assess witness credibility” and requiring appellate court to give “considerable deference” to the district court’s assessment of witness credibility).

Philip Eichten and David Eichten offered contradictory testimony as to Eleanor’s intent in making the gift, but the district court did not find their testimony credible. Dehler rejected Philip’s and David’s assertions that Eleanor’s funds were to be held in trust for her by Ellen and Timothy; he testified that he viewed any such transfer as illegal and stated that he would not have advised a client to violate the law. We affirm the district court’s determination that Eleanor made a gift of \$450,000 to Timothy and Ellen.

See Lobe, 348 N.W.2d at 415 (affirming district court ruling, based on clear-and-convincing evidence comprised “almost entirely of oral testimony” that donor intended to make a money gift, rather than a loan, to a donee).¹

Appellants raise several legal impediments to Timothy’s right to receive the gift from Eleanor. They assert that Timothy, who was employed in 2006 as a representative for Ameriprise Financial Services, Inc., breached his fiduciary duty as Eleanor’s financial advisor by accepting the gift,² that the gift violated Timothy’s duty of “fair dealing,” and that Timothy breached his duties as a financial broker by accepting a gift without making a proportionate contribution to a brokerage account. Because the breach-of-fiduciary-duty issue was decided by summary judgment in favor of Timothy, this court applies a *de novo* standard of review, viewing the evidence in the light most favorable to the nonmoving party. *Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 371 (Minn. 2008); *see Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995) (stating that summary judgment is appropriately granted when “the record reflects a complete lack of proof on an essential element of the plaintiff’s claim”).

¹ Eleanor’s trial testimony demonstrated that her short-term memory is impaired, and the district court did not rely on her testimony in deciding the validity of the gift. In its summary-judgment order, the district court found that Eleanor was not incapacitated in either 2006, when she made the gift, or in 2008 when Philip and David took certain actions on her behalf.

² This issue was determined by summary judgment. Because the district court granted only partial summary judgment and the case proceeded to trial, the issue is appealable at this time. *See Karlstad State Bank v. Fritsche*, 374 N.W.2d 177, 184 (Minn. App. 1985) (stating that an order granting partial summary judgment is generally not appealable as of right); Minn. R. Civ. App. P. 103.02, subd. 2 (providing that “[a]fter one party timely files a notice of appeal, any other party may seek review of a judgment or order in the same action by serving and filing a notice of related appeal”).

Appellants argue that the district court erred by refusing to apply Minn. Stat. § 45.026 (2010), which establishes that a person who holds himself out as a financial planner owes a fiduciary duty to his or her clients. The statute broadly applies to those persons who hold themselves out as financial planners “on advertisements, cards, signs, circulars, letterheads,” or via other means. *Id.*, subd. 1(b). Timothy sent two letters to Eleanor in January 2006 that discuss Eleanor’s financial plans with regard to the \$450,000 gift. The letters qualify Timothy as a financial planner within the meaning of Minn. Stat. § 45.026, subd. 1. Subdivision 2 of the statute creates a fiduciary duty for “[p]ersons who represent that they are financial planners,” but the duty applies only “to persons for whom services are performed *for compensation.*” *Id.*, subd. 2 (emphasis added). The evidence demonstrates, and the district court found, that Timothy did not charge Eleanor for any of his financial advice and that Eleanor repeatedly ignored Timothy’s advice and made her own financial decisions. On this record, the district court did not err by granting summary judgment in favor of Timothy.

For the first time on appeal, appellants argue that Timothy violated a code of conduct for broker-dealers by failing to deal fairly with Eleanor, by making unsuitable recommendations to her, and by failing to make a proportionate contribution before sharing in a broker account. *See* Minn. R. 2876.5021, subpts. 1-2 (2011) (requiring every broker-dealer to have a “fundamental responsibility for fair dealing in all of their relationships with customers” and to make suitable recommendations to customers). Also for the first time on appeal, appellants assert a violation of a Financial Industry Regulatory Authority (FINRA) rule, requiring securities exchange members to have

reasonable grounds for making recommendations on securities to customers and requiring members to have a fundamental responsibility for fair dealing.

We decline to address appellants' arguments. First, they were not included in any pleadings to the district court, most notably lacking in Eleanor's answer and counterclaim of August 11, 2009, which merely allege that Timothy represented that he was a "licensed registered representative and advisor affiliated with Ameriprise." Second, in granting summary judgment, the district court ruled only on appellants' claim that Timothy's conduct constituted a breach of his fiduciary duty to Eleanor. The district court's ruling did not address any other related breaches of law due to this alleged conduct. Appellants argue that the district court "erred when it refused to impose duties of 'fair dealing' and 'suitability'" on Timothy, but the record does not show that the district court was ever asked to rule on those particular issues or theories. As such, those issues are not properly before this court because they were neither raised to nor considered by the district court. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that appellate court will not consider matters not raised or considered by the district court; "[n]or may a party obtain review by raising the same general issue litigated below but under a different theory"). We also note that it is unclear whether FINRA creates a private cause of action for those affected by a breach of FINRA members' rules of conduct.

Defamation Per Se

Appellants also challenge the district court ruling that their conduct amounted to defamation per se of Timothy. "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); *Weinberger v. Maplewood Review*, 668 N.W.2d 667, 673 (Minn. 2003). "If the defamation affects the plaintiff in his business, trade, profession, office or calling, it is defamation per se and thus actionable without any proof of actual damages." *Bahr*, 766 N.W.2d at 920 (quotations omitted). Defamatory statements may not be actionable if they are covered by an absolute or qualified privilege. *Matthis v. Kennedy*, 243 Minn. 219, 227-28, 67 N.W.2d 413, 419 (1954). "To be privileged, a communication must be made on a proper occasion, with a proper motive, and be based upon reasonable grounds." *Elstrom v. Indep. Sch. Dist. No. 270*, 533 N.W.2d 51, 55 (Minn. App. 1995), *review denied* (Minn. July 27, 1995).

A statement is only actionable under defamation law if it is capable of being proved true or false. Because the dichotomy between 'opinion' and 'fact' is artificial, courts consider the statement's broad context, which includes the general tenor of the entire work and its statements, setting, and format; the specific context of the statements, including the use of figurative or hyperbolic language and the reasonable expectations of the audience; and whether the statement is sufficiently objective to be susceptible of being proved true or false.

Nexus v. Swift, 785 N.W.2d 771, 784-85 (Minn. App. 2010) (citation and quotation omitted).

The record supports the district court's determination that appellants' actions constituted defamation per se. On December 18, 2008, and January 14, 2009, appellants

sent letters to Ameriprise, Dehler, and attorney David W. Johnson.³ In the letters, appellants stated that Timothy committed a “wrong” towards Eleanor, “failed catastrophically in his fiduciary responsibilities,” committed “numerous occasions of malfeasance,” committed “a fraudulent act” by “embezzle[ing]” funds from Eleanor, and played the “central character in the exploitation and manipulation of” Eleanor, his client. The strong statements in the letters were false and were not mere statements of opinion. As noted by the district court, Philip and David “recklessly chose not to do an investigation of any facts,” and they ignored a January 8, 2009 letter sent by Dehler warning them that their claims were unfounded. These actions caused direct harm to Timothy’s business. *Bahr*, 766 N.W.2d at 919-20; *see* Minn. R. Civ. P. 52.01 (stating that in evaluating a district court’s findings of fact, “due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses”).

Appellants argue that Eleanor, as Timothy’s client, and Philip and David, as her attorneys-in-fact beginning in 2008, together had a qualified privilege to send the complaint letters to Ameriprise. Even if it is conceded that Philip and David had proper occasion to send the letters to Ameriprise, the facts do not show that they had either a “proper motive” or that their motivation was based on “reasonable grounds,” for purposes of establishing a qualified privilege to defame Timothy. *Elstrom*, 533 N.W.2d at 55. The trial record shows that Philip made threats to pressure Timothy to return the gift funds to Eleanor and to stop Ellen from spending the funds. Given that the funds transfer was a valid gift from Eleanor to Ellen and Timothy, Philip lacked a proper motive. Further,

³ The first letter was signed by only Philip; the second letter was signed by Philip and David.

Philip's and David's action of proceeding to send the January 14 letter, even after being warned by Dehler that their allegations had no basis in fact, was not reasonable. Under these circumstances, the district court correctly ruled that the defense of qualified privilege does not apply.

Appellants also assert that their complaint letters were statements of opinion, or were substantially true, and as such they fail to establish a defamation claim. The determinations of whether statements are fact or opinion, and whether a statement is “substantially true” are questions of law. *See Hunter v. Hartman*, 545 N.W.2d 699, 707 (Minn. App. 1996), *review denied* (Minn. June 19, 1996); *Lund v. Chicago & NW Transp. Co.*, 467 N.W.2d 366, 369 (Minn. App. 1991) (stating that statements subject to multiple interpretations are not subject to defamation claim as a matter of law), *review denied* (Minn. June 19, 1991). While the letters are couched in somewhat equivocal terms and include language framed as statements of opinion, the overall gist of the letters is very accusatory—they both include allegations that Timothy committed multiple crimes. *See Longbehn v. Schoenrock*, 727 N.W.2d 153, 159 (Minn. App. 2007) (“It is sufficient if the words . . . would naturally and presumably be understood . . . to impute a charge of []a crime.”). Given the “broad context” that the district court was to consider in determining whether the statements were true, *Nexus*, 785 N.W.2d at 784, the district court did not err in concluding that the letters were not mere statements of opinion.

Finally, appellants seek to have the defamation claim against Eleanor dismissed because she did not directly publish any defamatory statement about Timothy, as only Philip and David signed the letters. To satisfy the publication element of a defamation claim, the “unprivileged publication” must be made to a third party. *Weinberger*, 668

N.W.2d 673. Philip and David acted as attorneys-in-fact for Eleanor by sending the letters to Ameriprise. “[A]ny action taken by [the attorney-in-fact] pursuant to the power of attorney binds the principal . . . in the same manner as though the action was taken by the principal[.]” Minn. Stat. § 523.13 (2010); see *Manion v. Jewel Tea Co.*, 135 Minn. 250, 253, 160 N.W. 767, 768 (1916) (holding principal liable for the torts of the agent, including defamation). The district court found that Eleanor has short-term memory loss, but the court also found that there was no evidence that Eleanor was incapacitated or a vulnerable adult in 2008 and early 2009 when the letters were sent to Ameriprise. Under these circumstances, the district court did not err by holding Eleanor, as well as Philip and David, legally responsible for defaming Timothy.

Attorney fees and damages

In his cross-appeal, Timothy argues that the district court erroneously (1) computed compensatory damages; (2) failed to award attorney fees on his defamation-per-se claim; and (3) ruled that the facts were insufficient to support an award of punitive damages on his defamation-per-se claim.

The district court awarded Timothy \$120,000 in damages for appellants’ defamation. When a statement is defamatory per se, “general damages are presumed, and a plaintiff may recover without any proof of actual harm.” *Longbehn*, 727 N.W.2d at 161. Because the presumption of damages in defamation-per-se cases permits the district court “little control . . . over the jury’s assessment of the appropriate amount of damages,” unproven damages “are limited to harm that would normally be assumed to flow from a defamatory publication of the nature involved.” *Id.* at 162 (quotation omitted). “Whether damages are adequate is addressed in the first instance to the

discretion of the [district] court,” and the district court’s decision will not be reversed “[e]xcept in the most unusual circumstances.” *Fitzer v. Bloom*, 253 N.W.2d 395, 404 (Minn. 1977).

Aaron Hasler offered expert testimony on damages. He stated that Timothy’s annual increase in client base “declined from 11 to 3 to 1” following Ameriprise’s mandatory posting of appellants’ claims against Timothy and that “his gross revenues declined by 34% in a year that the general securities market improved by more than 25%.” The district court declined to award damages based on Hasler’s measure of damages, the discounted cash-flow method, finding that Hasler relied on a reduction on the present value of Timothy’s business, but that he “did not tie any of the lost value to the events related to this case, thus the lost book value is too speculative.” Hasler based his opinion on the typical loss of a financial advisor from a customer complaint, not on the value of losses experienced by Timothy. Instead, the district court apparently relied on Timothy’s testimony about his actual lost business.

We uphold the district court’s damages determination as an exercise of its discretion. While the law permits recovery without proof of actual harm for defamation per se, the damages must relate to the harm in some fashion, which they did in this case. Timothy characterizes the district court’s determination as erroneous, claiming that the district court failed to consider that actual damages need not be proven in defamation-per-se cases. However, the district court’s findings do not show that it improperly applied the law, only that it refused to make a speculative award.

Timothy next asserts that the district court erroneously denied his request for attorney fees. Generally, attorney fees are recoverable only if authorized by a specific

contract or statute. *Schwickert, Inc. v. Winnebago Seniors, Ltd.*, 680 N.W.2d 79, 87 (Minn. 2004). Minnesota’s Uniform Declaratory Judgments Act permits the district court to award “supplemental relief” “whenever necessary or proper” and “costs as may seem equitable and just.” “A reviewing court will not reverse a district court’s award or denial of attorney fees absent an abuse of discretion.” *Soo Line R.R. Co v. Brown’s Crew Car of Wyoming*, 694 N.W.2d 109, 116 (Minn. App. 2005).

Timothy argues that he is entitled to attorney fees under an exception to the general prohibition against awarding attorney fees, because he is a third-party litigant in this matter. While Minnesota courts have permitted recovery of attorney fees when litigation with a third party was necessitated by the conduct of a tortfeasor, *see generally Paidar v. Hughes*, 615 N.W.2 276, 280-81 (Minn. 2000), Timothy is not a third party in this action. He asserted direct claims against appellants to establish that Eleanor’s transfer of funds to him was a gift and that appellants’ conduct constituted defamation per se. Therefore, the district court did not abuse its discretion by denying Timothy’s request for attorney fees.

Timothy further asserts that the district court erroneously found that he was not entitled to proceed with a claim for punitive damages and erroneously failed to hold a separate proceeding to make that determination. Punitive damages are permitted “only upon clear and convincing evidence that the acts of the defendant show deliberate disregard for the rights or safety of others.” Minn. Stat. § 549.20, subd. 1(a) (2010).

When a party seeks punitive damages in a civil matter, the district court shall

first determine whether compensatory damages are to be awarded. Evidence of the financial condition of the defendant and other evidence relevant only to punitive

damages is not admissible in that proceeding. After a determination has been made, the [district court] shall, in a separate proceeding, determine whether and in what amount punitive damages will be awarded.

Id., subd. 4 (2010).

Regarding whether to permit a punitive-damages claim, the district court stated that this was a “close case” but concluded that David’s and Philip’s conduct did show by clear-and-convincing evidence that “they acted with deliberate disregard for the rights of Timothy Jirak.” The court further stated that the facts “do not fit within the purpose of punitive damages, that being to punish the defendants, to deter repeat behavior and to deter others from engaging in similar conduct. . . . The situation arose from an interfamily dispute[.]”

Timothy makes two arguments with respect to punitive damages. First, he claims that the district court erred by failing to hold a separate proceeding to determine whether to grant punitive damages. A separate proceeding is required when “punitive damages are sought.” *Id.* While the plain language of Minn. Stat. § 549.20, subd. 4, requires the court to hold a separate proceeding to determine “whether and in what amount” punitive damages should be awarded, the record establishes that those issues were addressed during proceedings before the court, and the court determined that there was an insufficient factual basis to proceed with the claim. The court satisfied the hearing requirement.

Second, Timothy claims that the district court’s decision was incongruous with its other findings on appellants’ conduct, particularly those that supported the defamation claim. While some of the concepts may overlap as applied to given facts, a punitive-

damages claim requires deliberate disregard for the plaintiff's rights, while defamation is merely premised on publication of a false statement. *See Longbehn*, 727 N.W.2d at 162 (stating that while damages for defamation per se are presumed, "it does not necessarily follow that every defamation per se claim also warrants punitive damages" and whether to grant punitive damages must be decided "on a case-by-case basis"). Terming the letters sent by appellants to Ameriprise and others as "reckless" and "ill-considered," the district court concluded that they did not provide clear-and-convincing evidence of deliberate disregard for the rights of Timothy. As noted by the district court, the question was "close." Because the district court provided sound reasoning for its decision, we conclude that the court did not abuse its discretion in denying punitive damages in this case. *See id.* (reviewing a district court's punitive-damages decision for abuse of discretion).

Affirmed.