STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1908

Hong Chen, et al.,
Appellants,

vs.

Vincent C. Mar, et al.,
Respondents.

Filed May 31, 2011
Affirmed
Randall, Judge[*]

Ramsey County District Court
File No. 62-CV-09-12113

Delin Qu, St. Paul, Minnesota (attorney pro se and for appellant Chen)

Jodee K. McCallum, Michael G. Patiuk, Thompson, Coe, Cousins & Irons, LLP, St. Paul, Minnesota; and

John L. Ross (pro hac vice), Dallas, Texas (for respondents)

Considered and decided by Stoneburner, Presiding Judge; Ross, Judge; and Randall, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

RANDALL, Judge

This is an appeal from summary judgment dismissing appellants' tort claims for defamation, intentional misrepresentation, intentional infliction of emotional distress, and civil conspiracy. Appellants argue that the district court erred by (1) denying appellants' request for a continuance to conduct additional discovery, (2) entering summary judgment for respondents on all claims, (3) striking appellants' motion for leave to amend and supplement their complaint, and (4) awarding respondents costs. We affirm.

FACTS

Appellants Hong Chen and Delin Qu are married.[1] Chen was a performer of Chinese folk dance at the Chinese American Association of Minnesota's (CAAM) Chinese Dance Theater. Respondent Vincent C. Mar is a past president and current board member of CAAM. Qu applied for but was denied membership in CAAM and the Chinese American Business Association of Minnesota (CABAM). Mar allegedly pressured the CAAM Chinese Dance Theater to exclude Chen from a 2009 dance performance.

On November 12, 2009, Qu filed a complaint in district court on behalf of himself and Chen against Mar and 12 additional unnamed defendants. The complaint sought damages for defamation, intentional misrepresentation, intentional infliction of emotional distress, and civil conspiracy. The district court issued a scheduling order on January 14,

[1] We refer to the appellants collectively as "Qu" unless differentiation is necessary.

2010, identifying October 10, 2010, as the completion date for discovery. The parties each filed motions to disqualify opposing counsel, and the district court heard the motions on March 2, 2010, at which time the district court stayed all discovery. In an April 7, 2010 order, the district court denied both motions for disqualification and lifted the stay of discovery.

Mar deposed Qu on June 2, 2010, and deposed Chen on June 3, 2010. On June 23, 2010, Mar filed a motion for summary judgment. On July 9, 2010, Qu filed a motion for leave to amend and supplement the complaint to add a vicarious liability claim, to add CAAM as an entity defendant, and to name three of the twelve previously unnamed defendants. On July 16, 2010, Qu filed a memorandum opposing summary judgment with attached exhibits, including excerpts from the depositions of four CAAM members. Qu also filed a "Rule 56 Affidavit" purporting to seek a continuance to conduct additional discovery, alleging that Mar obstructed the discovery process.

On July 27, 2010, the district court denied Qu's request for a continuance and granted Mar's motion for summary judgment. On August 27, 2010, the district court issued an amended order striking Qu's motion to amend and supplement the complaint, dismissing the complaint with prejudice, and awarding statutory costs to Mar. The district court found that Qu "diligently pursued discovery" but that he did not identify the nature of the "critical evidence" yet to be found or demonstrate a good-faith belief or reasonable likelihood that additional material facts would be discovered. The district court also denied Qu's appeal of the court administrator's taxation of $7,267.95 in costs and disbursements, finding that the amount was reasonable. This appeal follows.

D E C I S I O N

I. Continuance

Qu argues that the district court erred by denying his request for a continuance to conduct additional discovery. Absent an abuse of discretion, the district court's decision whether to continue a summary-judgment proceeding to permit further discovery will not be reversed on appeal. *Cherne Contracting Corp. v. Wausau Ins. Cos.*, 572 N.W.2d 339, 346 (Minn. App. 1997), *review denied* (Minn. Feb. 19, 1998). This court stated in *Cherne* that a district court should grant a continuance only after considering whether the moving party has been diligent in their discovery and has a good-faith belief that material facts will be discovered, and when the district court believes that the additional discovery would not be used to engage merely in a "fishing expedition." *Id.* at 345-46.

Mar argues that Qu's request for a continuance was procedurally defective because Qu did not file a motion; rather, Qu argued to the district court that summary judgment should be denied because discovery was not complete and filed an affidavit indicating that more time was needed for discovery. A district court may grant or deny a continuance absent a formal motion. *Bixler v. J.C. Penney Co.*, 376 N.W.2d 209, 216 (Minn. 1985). The district court did not err by treating Qu's request as a motion for a continuance.

"[E]ven if the moving party was diligent in seeking discovery, when further discovery will not reveal material facts, the district court may deny the continuance motion." *QBE Ins. Corp. v. Twin Homes of French Ridge Homeowners Ass'n*, 778 N.W.2d 393, 400 (Minn. App. 2010). Here, the record supports the district court's

conclusion that, although he diligently pursued discovery, Qu did not demonstrate a good-faith belief or a reasonable likelihood that additional material facts would be discovered if the summary-judgment motion was continued. In the seven months from the commencement of discovery in January 2010 until the summary judgment hearing in July 2010, both Qu and Chen were deposed, and Qu deposed at least four witnesses, including Mar. Qu also served various subpoenas, requests, and correspondence in January, April, May, and June, and did not file motions to compel. Thus, the record reflects that Qu diligently pursued discovery.

Qu did not, however, identify the nature of the "critical evidence" that he had not yet obtained, and did not explain how that critical evidence would establish the existence of a material issue of fact. In his memorandum and affidavit opposing summary judgment, Qu states that he has "not been able to obtain certain critical evidence so far," and although he subsequently identified the information he sought as including "misrepresentations and defamatory statements made by defendant(s)," he does not specify the nature of the alleged misrepresentations or defamatory statements, who made the statements, or during what timeframe the statements were made. Vague allegations will not support a motion for a continuance to permit additional discovery. *See Lewis v. St. Cloud State Univ.*, 693 N.W.2d 466, 473-75 (Minn. App. 2005) (holding that "appellant was on a 'fishing expedition,' and the district court did not abuse its discretion by denying a continuance based on appellant's mere speculation that [evidence of respondent's liability for defamation] may exist"), *review denied* (Minn. June 14, 2005).

The district court did not err by denying Qu's motion for a continuance.

II. Summary Judgment

Qu next argues that the district court erred by granting Mar's motion for summary judgment. He alleges that there were issues of material fact remaining regarding each of his four tort claims. An appellate court reviews summary judgment to determine whether there are any genuine issues of material fact and whether the district court erred in applying the law. *Weeks v. Am. Family Mut. Ins. Co.*, 580 N.W.2d 24, 26 (Minn. 1998), *overruled on other grounds by Oanes v. Allstate Ins. Co.*, 617 N.W.2d 401 (Minn. 2000). "[T]he party resisting summary judgment must do more than rest on mere averments." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). A genuine issue for trial must be established by "substantial evidence." *Id.* at 69-70. The reviewing court "must view the evidence in the light most favorable to the party against whom judgment was granted." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

A. Defamation Claim

A defamation claim requires that the statement in question be false, be communicated to someone other than the plaintiff, and tend to harm the plaintiff's reputation in the community. *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 255 (Minn. 1980). Minnesota law requires that the defamatory statement be specifically articulated in the complaint. *Moreno v. Crookston Times Printing Co.*, 610 N.W.2d 321, 326 (Minn. 2000) (stating that "defamatory matter [must] be set out verbatim"); *see also Pope v. ESA Servs., Inc.*, 406 F.3d 1001, 1011 (8th Cir. 2005) (stating that plaintiff must, at a minimum, "allege who made the allegedly libelous statements, to whom they were made, and where" (quotation omitted)). Qu's complaint generally alleges that the

defendants attempted to damage Qu and Chen's reputations in the community. This does not satisfy the specificity requirement for a defamation claim.

Moreover, at the time of the summary-judgment hearing, the only defamatory statements alleged were statements allegedly made by Mar that Qu might "make trouble" or disturb community events, that Chen's involvement in a particular community event might lead to "chaotic things," and anonymous statements allegedly posted on a website regarding Chen possibly divorcing Qu, which had subsequently been deleted. References to a person making trouble are not actionable as defamation in Minnesota. *McGrath v. TCF Bank Sav., FSB*, 502 N.W.2d 801, 808 (Minn. App. 1993) (holding that the term "troublemaker" is not actionable as defamation because the term has subjective meaning and "lacks precision and specificity"), *modified in part on other grounds by* 509 N.W.2d 365 (Minn. 1993). Aside from one deposition, Qu did not present any other evidence about the Internet statements or who made them.

Because Qu did not plead defamation with sufficient specificity and the record does not contain evidence of defamatory statements, the district court did not err by granting Mar's motion for summary judgment on Qu's defamation claim.

B. Intentional-Misrepresentation Claim

An intentional-misrepresentation claim, also known as fraudulent misrepresentation, requires a plaintiff to demonstrate that a defendant:

> (1) made a representation (2) that was false (3) having to do with a past or present fact (4) that is material (5) and susceptible of knowledge (6) that the representor knows to be false or is asserted without knowing whether the fact is true or false (7) with the intent to induce the other person to act

> (8) and the person in fact is induced to act (9) in reliance on the representation (10) [and] that the plaintiff suffered damages (11) attributable to the misrepresentation.

M.H. v. Caritas Family Servs., 488 N.W.2d 282, 289 (Minn. 1992). A person can make a misrepresentation either "(1) by an affirmative statement that is itself false or (2) by concealing or not disclosing certain facts that render the facts that are disclosed misleading." *Id.* The circumstances constituting a claim of fraud must be pled with particularity. Minn. R. Civ. P. 9.02. Malice, intent, knowledge, and other conditions of mind may be pled generally. *Id.*

Qu claims that Mar advised him that he "would be welcome" in CAAM and designated an address for Qu to send his membership application and fee, but that his application and check were destroyed, stolen, or ignored. Qu also alleges that he is the only person in the history of either CAAM or CABAM to be excluded from those organizations, and he was humiliated when these organizations denied him membership. But the language of Qu's complaint does not plead fraud properly or with particularity. The record contains a copy of a membership application and a $10 check signed by Qu and paid to the order of CAAM, as well as copies of certified mail indicating that the mail was returned to sender. The record lacks evidence that Mar made knowingly false representations or that Qu or Chen suffered damages attributable to their reliance on those misrepresentations.

Qu did not plead intentional misrepresentation with sufficient particularity and the record does not contain evidence of fraud. The district court did not err by granting Mar's motion for summary judgment on Qu's intentional-misrepresentation claim.

C. Intentional-Infliction-of-Emotional-Distress Claim

To prove a claim of intentional infliction of emotional distress, a plaintiff must show that the defendant's conduct was (1) extreme and outrageous, (2) intentional or reckless, and (3) caused emotional distress (4) that was severe. *Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428, 438-39 (Minn. 1983). The plaintiff's standard of proof is a "high threshold," and for the defendant's conduct to be actionable it must be "so atrocious that it passes the boundaries of decency and is utterly intolerable to the civilized community." *Id.* at 439 (quotation omitted). The plaintiff must prove that his mental distress was so severe "that no reasonable [person] could be expected to endure it." *Id.* (citing Restatement (Second) of Torts 46 cmt. j (1965)). Intentional infliction of emotional distress is "sharply limited to cases involving particularly egregious facts." *Id.*

Qu argues that Mar's conduct, consisting of alleged defamatory statements and intentional misrepresentations, and the exclusion of Chen from the 2009 dance performance, was "extreme and outrageous." We conclude the record does not reflect conduct by the defendants that rises to a level that is "so atrocious that it passes the boundaries of decency and is utterly intolerable to the civilized community." *See id.* "General embarrassment, nervousness and depression are not in themselves a sufficient basis for a claim of intentional infliction of emotional distress." *Strauss v. Thorne*, 490 N.W.2d 908, 913 (Minn. App. 1992), *review denied* (Minn. Dec. 15, 1992). Qu argued to the district court that he and Chen suffered emotional distress "manifested by physical symptoms including headaches, stomachaches, nausea and sleeplessness" that affects internal organs, productivity, concentration, and companionship in their marriage. But

beyond Qu's testimony and arguments, no evidence of these physical symptoms appears in the record, and Qu testified at his deposition that he has not sought any medical treatment in relation to Mar's conduct. These claimed physical symptoms do not reach the level of severe emotional distress. *See, e.g.*, *Hubbard*, 330 N.W.2d at 440 (holding that allegations of depression, vomiting, stomach disorders, rash, and high blood pressure, without supporting medical evidence, were not sufficiently severe as a matter of law).

Because the record does not contain sufficient evidence of intentional infliction of emotional distress, the district court did not err by granting Mar's motion for summary judgment on Qu's claim of intentional infliction of emotional distress.

D. Civil-Conspiracy Claim

The elements of a civil-conspiracy claim are (1) a combination of two or more people (2) to commit an unlawful act or a lawful act by unlawful means. *Harding v. Ohio Cas. Ins. Co.*, 230 Minn. 327, 337, 41 N.W.2d 818, 824 (1950). A claim of civil conspiracy must be supported by an underlying tort. *D.A.B. v. Brown*, 570 N.W.2d 168, 172 (Minn. App. 1997) (citing *Harding*, 230 Minn. at 337, 41 N.W.2d at 824). "[S]ince in so-called civil conspiracy cases liability is predicated upon the tort committed by the conspirators and not upon the conspiracy, allegations of conspiracy do not change the nature of the cause of action." *Harding*, 230 Minn. at 338, 41 N.W.2d at 825. "Accurately speaking, there is no such thing as a civil action for conspiracy." *Id.* (quotation omitted).

No underlying tort claim exists. The district court did not err by granting Mar's motion for summary judgment on Qu's civil-conspiracy claim.

III. Leave to Amend

Qu next argues that the district court erred by striking appellants' motion for leave to amend and supplement their complaint. "The district court has broad discretion to grant or deny leave to amend a complaint, and its ruling will not be reversed absent a clear abuse of that discretion." *State v. Baxter*, 686 N.W.2d 846, 850 (Minn. App. 2004) (citing *Fabio*, 504 N.W.2d at 761). "[A] district court may properly deny an amendment to a complaint when the additional alleged claim cannot be maintained." *LaFee v. Winona Cnty.*, 655 N.W.2d 662, 668 (Minn. App. 2003), *review denied* (Minn. Mar. 27, 2003). And the district court should deny a motion to amend the complaint when the proposed claim cannot withstand summary judgment. *Rosenberg v. Heritage Renovations, LLC*, 685 N.W.2d 320, 332 (Minn. 2004).

Qu's proposed amended complaint added a vicarious liability claim, added CAAM as an entity defendant, and named three of the twelve previously unnamed defendants. These proposed amendments did not substantively change the original claims or the underlying facts. In its August 27, 2010 order, after granting summary judgment to Mar, the district court struck Qu's motion to amend and supplement the complaint. The district court did not err by striking Qu's motion for leave to amend and supplement the complaint.

IV. Costs and Disbursements

Qu next argues that the district court erred by awarding Mar statutory costs. The district court's award of costs and fees is reviewed under an abuse-of-discretion standard. *Lake Superior Ctr. Auth. v. Hammel, Green & Abrahamson, Inc.*, 715 N.W.2d 458, 482 (Minn. App. 2006), *review denied* (Minn. Aug. 23, 2006); *see also Peller v. Harris*, 464 N.W.2d 590, 594 (Minn. App. 1991) (review of costs awarded under Minn. Stat. § 549.04 (1988)). Generally, the award of costs and disbursements is governed by statute. *See* Minn. Stat. §§ 549.02 (costs) 549.04 (reasonable costs paid or incurred including fees and mileage) (2010).

The district court awarded costs and disbursements to Mar in its order dismissing the complaint with prejudice. Mar subsequently claimed $9,151.74 in costs and disbursements, and the court administrator allowed $7,267.95. Specifically, the court administrator allowed $200 in statutory costs under Minn. Stat. § 549.02, subd. 1 (2010); $320 for the court filing fee; $300 for motion fees; $40 for reproduction of exhibits used in the summary-judgment motion; $6,013.45 for deposition transcripts and videotaping for the depositions of Chen, Qu, and Mar, as well as an interpreter for the deposition of Chen; and $394.50 in other costs, including court records, copies, postage, parking, mileage, and legal research. The district court affirmed this amount, finding no evidence that the amount was unreasonable or unnecessary.

Qu does not contest the amount taxed. Rather, Qu argues that Mar illegally used CAAM resources to pay his counsel in violation of Minnesota law and CAAM's bylaws, and cites cases from other jurisdictions for the proposition that costs are not recoverable

by a person not a party to the litigation. These arguments have no basis in the record or Minnesota law. The district court properly awarded costs and disbursements to Mar and found the amount reasonable and necessary.[2]

Affirmed.

[2] In his reply brief to this court, Qu raises several new arguments regarding his challenge to the costs and disbursements awarded to Mar. Generally, issues not raised or argued in an appellant's brief are waived and cannot be revived in a reply brief. *McIntire v. State*, 458 N.W.2d 714, 717 n.2 (Minn. App. 1990), *review denied* (Minn. Sept. 28, 1990); *see also* Minn. R. Civ. App. P. 128.02, subd. 4 ("The reply brief must be confined to new matter raised in the brief of the respondent.") Thus, we decline to address these arguments.