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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1887**

Hollis J. Larson,
Appellant,

vs.

The Minnesota Department of Human Services, et al.,
Respondents.

**Filed May 21, 2018
Affirmed
Florey, Judge**

Carlton County District Court
File No. 09-CV-17-512

Hollis J. Larson, Moose Lake, Minnesota (pro se appellant)

Lori Swanson, Attorney General, Janine Kimble, Assistant Attorney General, St. Paul,
Minnesota (for respondents)

Considered and decided by Florey, Presiding Judge; Larkin, Judge; and Bratvold,
Judge.

UNPUBLISHED OPINION

FLOREY, Judge

Appellant challenges the dismissal of his complaint against Minnesota Sex Offender Program (MSOP) employees and the Minnesota Department of Human Services (DHS), asserting that the district court erred by: (1) dismissing his defamation claims on grounds of absolute and qualified privilege, and alternatively ruling that the allegedly defamatory

statements, which were for libel but not slander, were not published; (2) holding that Minn. Stat. § 144.651 (2016) does not create a private right of action; (3) dismissing his claims for intentional and negligent infliction of emotional distress for failure to plead the requisite level of distress; and (4) dismissing all of his claims with prejudice. We affirm.

FACTS

In January 2017, appellant Hollis J. Larson filed a complaint against respondents MSOP, DHS, and 15 DHS employees in their individual and official capacities, alleging defamation generally, slander per se, libel, negligent retention and supervision of employees, negligence under Minn. Stat. § 144.651, vicarious liability, and intentional and negligent infliction of emotional distress.

In an amended complaint filed in April 2017 (hereinafter complaint), Larson, who has been civilly committed to MSOP, admitted that on three separate occasions he threatened the lives of MSOP employees, but alleged that his threats were misquoted in incident reports contained in his MSOP file. The complaint also alleged that, on a fourth occasion, Larson jumped through a door and made statements to MSOP employees and that the employees then falsely quoted his statements as threats to kill everyone. Larson attached incident reports generated in response to his behavior as exhibits to his original complaint and referred to them throughout the amended complaint.

Larson alleged the defamation caused MSOP employees to treat him with discourtesy, contempt, and exaggerated security measures, and that he was moved from his general-population unit to an isolation unit as a result of at least one of the reports. The complaint further alleged the defamation had exacerbated all of Larson's existing mental

illnesses, including major depression, generalized anxiety disorder, and avoidant-personality disorder. Finally, Larson alleged that he experienced frequent insomnia, recurrent nightmares, panic attacks, suicidal thoughts, and self-isolation, and that as a direct result of the defamation, he “suffered and will continue to suffer great pain of mind and body, severe and permanent emotional distress, physical manifestations of emotional distress, embarrassment, loss of self-esteem, humiliation, and psychological injuries.”

Respondents moved to dismiss the complaint, arguing they are immune from defamation claims based on theories of absolute and qualified privilege. Respondents also argued they are statutorily immune from claims of negligent hiring, retention, and supervision. Alternatively, respondents argued Larson failed to state claims of negligent hiring, retention, and supervision because such claims require physical injury, and Larson only alleged emotional distress. With respect to Larson’s negligence claim, which cited Minn. Stat. § 144.651, respondents argued that the statute creates no private right of action. Respondents argued that plaintiff’s vicarious-liability claim required an underlying tort, which Larson failed to establish because his other claims failed. Finally, respondents argued that Larson’s claims for intentional and negligent infliction of emotional distress should be dismissed because Larson did not allege appropriate damages to support the claims.

The district court granted the motion to dismiss, reasoning that respondents were

required as part of their job duties to keep internal records of incidents such as those at issue Therefore, [respondents] are absolutely immune to defamation claims by [Larson] as they were acting in the course and scope of their employment

by observing and creating reports about [Larson's] conduct in MSOP.

The district court also noted that, even if respondents were not immune, Larson's claims did not meet the criteria to be considered libelous, and Larson had not alleged verbal statements to support a count of slander.

The district court concluded that respondents were statutorily immune from claims of negligent hiring, retention, and supervision. The district court also concluded that Larson's negligence claim citing Minn. Stat. § 144.651 failed for lack of a private right of action, and that there could be no claim for vicarious liability because Larson had no viable underlying torts. Finally, the district court concluded that Larson's claims for intentional and negligent infliction of emotional distress were not supported by sufficient facts. Larson appeals.

D E C I S I O N

Larson contends that the district court erred in dismissing his complaint pursuant to Minn. R. Civ. P. 12.02(e) for failure to state a claim upon which relief can be granted. "On review of a Rule 12 dismissal, [appellate courts] will not uphold the dismissal if it is possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded." *Wiegand v. Walser Auto. Grps., Inc.*, 683 N.W.2d 807, 811 (Minn. 2004) (quotation omitted). Our review is de novo, and we consider only the facts alleged in the complaint, accepting those facts as true and construing all reasonable inferences in favor of the nonmoving party. *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 229 (Minn. 2008).

I. Defamation

“In order for a statement to be considered defamatory it must be communicated to someone other than the plaintiff, it must be false, and it must tend to harm the plaintiff’s reputation and to lower him in the estimation of the community.” *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 255 (Minn. 1980).

A. Absolute Privilege

Larson contends that the district court erred by concluding respondents were absolutely immune from defamation claims by virtue of their public duties. The applicability of absolute privilege is a question of law, which we review de novo. *Minke v. City of Minneapolis*, 845 N.W.2d 179, 182 (Minn. 2014). “Whether an executive officer is absolutely immune from defamation liability depends on many factors, including the nature of the function assigned to the officer and the relationship of the statements to the performance of that function.” *Carradine v. State*, 511 N.W.2d 733, 736 (Minn. 1994).

In *Carradine*, the supreme court held that a police officer was immune from allegedly defamatory statements made in an arrest report because writing reports is closely related to the performance of an officer’s duties, and because protecting an officer from civil liability ensures an officer will fearlessly perform his duty and better serve the public. *Id.* at 735-36. The supreme court focused on the following facts: (1) creating accurate reports is a key part of a police officer’s job; (2) police reports are useful to both department superiors and legal counsel in making decisions; (3) police reports play a significant role at trial, helping to refresh an officer’s recollection and providing material useful for cross-

examination; and (4) possible defamation liability may deter an officer from preparing a detailed report.

Similarly, the reports generated by MSOP employees are closely related to the performance of the employees' duties. It is clear from the exhibits attached to Larson's complaint that MSOP employees routinely generate reports in connection with disruptive behavior. The reports show that after each incident, MSOP staff prepare summaries that include detailed descriptions of dialogue, actions, and MSOP responses. The reports record MSOP employees' contemporaneous observations and are useful in MSOP decision-making. Drawing upon the supreme court's reasoning in *Carradine*, if MSOP employees were exposed to civil liability for potentially defamatory statements in their reports, they would be deterred from recording their complete and truthful impressions, which would undermine their ability to perform their executive duties. Because generating accurate and thorough reports is closely related to the performance of respondents' duties, we conclude that the district court did not err when it dismissed Larson's claims on absolute-privilege grounds.

Larson argues that the statements in respondents' reports are not privileged because they were not made within the scope of respondents' employment. He asserts that the statements were malicious and willfully false and that respondents were not required to make *false* reports as part of their duties. "[I]n the case of a communication recognized as absolutely privileged even the presence of express malice does not destroy the privilege." *Matthis v. Kennedy*, 243 Minn. 219, 223, 67 N.W.2d 413, 417 (1954). Larson's argument that the statements were malicious and willfully false addresses qualified privilege rather

than absolute privilege. “[A]bsolute privilege means that immunity is given even for intentionally false statements, coupled with malice, while a qualified or conditional privilege grants immunity only if the privilege is not abused and defamatory statements are publicized in good faith and without malice.” *Zutz v. Nelson*, 788 N.W.2d 58, 62 (Minn. 2010) (quotation omitted). Although absolute privilege is a sufficient ground for affirming the district court’s dismissal, in the interest of thorough review we next consider the district court’s ruling that the statements in respondents’ reports were protected by qualified privilege.

B. Qualified Privilege

“Qualified privilege applies when a court determines that statements made in particular contexts or on certain occasions should be encouraged despite the risk that the statements might be defamatory.” *Bol v. Cole*, 561 N.W.2d 143, 149 (Minn. 1997) (quotation omitted). Whether a qualified privilege exists is a question of law, which we review de novo. *Id.*

In determining whether a qualified privilege exists, we examine whether the allegedly defamatory statements were made “upon a proper occasion, from a proper motive, and based upon reasonable or probable cause.” *Bauer v. State*, 511 N.W.2d 447, 449 (Minn. 1994). Larson argues that the statements were not made within respondents’ scope of employment because respondents’ employment does not require generating false reports. This argument appears to be directed at whether or not respondents’ statements were properly motivated and made upon a proper occasion.

The evidence in the complaint establishes that respondents' statements were made upon a proper occasion and from a proper motive. The statements were made in routinely generated reports, which is a proper occasion, and for the purpose of recording respondents' observations during the incidents in question, which is a proper motive. *Cf. Bol*, 561 N.W.2d at 149 (concluding that the release of requested documents recording firsthand communication was a proper occasion, and concern for patient's safety was proper motive.). Next, we consider whether MSOP employees had reasonable grounds to make the statements in the reports.

"Reasonable grounds can exist if a person has valid reasons for believing a statement, even though the statement later proves to be false." *Elstrom v. Indep. Sch. Dist. No. 270*, 533 N.W.2d 51, 55 (Minn. App. 1995), *review denied* (Minn. July 27, 1995). Here, respondents' written statements were made based on their recollections of recent events. This provided reasonable grounds for respondents to believe the statements were accurate. *See Keuchle v. Life's Companion P.C.A., Inc.*, 653 N.W.2d 214, 220 (Minn. App. 2002) (noting a defendant "cannot simply rely on accusations . . . or on second-hand hearsay with no identified source" as reasonable grounds), *review dismissed* (Minn. Jan. 21, 2003); *Brooks v. Doherty, Rumble & Butler*, 481 N.W.2d 120, 125-26 (Minn. App. 1992) (concluding reasonable grounds existed when a company relied on evidence it believed to be true), *review denied* (Minn. Apr. 29, 1992). Because the statements were made upon a proper occasion, from a proper motive, and upon reasonable grounds, we conclude the statements were qualifiedly privileged.

“To defeat this qualified privilege, the plaintiff must prove actual malice. Actual malice means what it says: ill-will and improper motive or wishing wantonly and without cause to injure the plaintiff.” *Bauer*, 511 N.W.2d at 449. “Malice can be shown by extrinsic evidence of personal spite, as well as by intrinsic evidence such as the exaggerated language of the libel, the character of the language used, the mode and extent of the publication, and other matters in excess of the privilege.” *Bol*, 561 N.W.2d at 150 (quotation omitted). Larson argues that exaggerated language is evidence of malice, but his complaint alleged no facts to support his malice allegation. In fact, as discussed in the next section, what Larson alleges to be malicious exaggeration is substantially similar to what he claims he actually said.

Because the statements were made upon a proper occasion, from a proper motive, and based on reasonable grounds, and because Larson provides no evidence of actual malice, we discern no error in the district court’s dismissal of Larson’s defamation claim based on qualified privilege.

C. Truth

Even if we were to reach the merits of Larson’s defamation claim, the claim would be defeated by the fact that the complaint’s description of Larson’s actual statements are substantially similar to those written in respondents’ reports. Truth is a complete defense to a defamation action, and “true statements, however disparaging, are not actionable.” *Stuempges*, 297 N.W.2d at 255. If a statement is true in substance, minor inaccuracies of expression or detail are immaterial. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517, 111 S. Ct. 2419, 2433 (1991); *see also Clancy v. Daily News Corp.*, 202 Minn. 1, 11,

277 N.W. 264, 269 (1938) (characterizing the question of truth as “[w]hether the publications were substantially true”). A statement is substantially true if it would have the same effect on the mind of the reader or listener as that which the pleaded truth would have produced. *Masson*, 501 U.S. at 517, 111 S. Ct. at 2433.

Larson’s complaint alleged that on July 5, 2016, Larson said to MSOP employees that they “better hope I never get out of here. You better go down to the Capitol and beg them not to let Larson out, ’cuz if I get out, I’ll be to see you.” The complaint alleged that an employee’s report “deliberately, sadistically, and maliciously, fabricated and misquoted [his] statement into: ‘Y’all mother f---rs better hope I never get out of here, I’m coming after all of you. Don’t let Hollis Larson out or it’s going to be a bloodbath.’”

Larson’s complaint alleged that on July 15, 2016, he told an employee of MSOP he was “authorized by law and justified to use deadly force in the defense of, and against violations of, his constitutional rights and that [the employee] and his family would suffer consequences for such if and when [he] ever got out of the MSOP and that the statement was not a threat, but a blood oath.” The complaint alleged that the employee then wrote a report that “deliberately, sadistically, and maliciously, fabricated and misquoted [his] statement into: ‘I will use deadly force! I will kill you and your family! That’s not a threat! That’s a blood oath!’”

Larson’s complaint alleged that on November 1, 2016, he “told [one respondent] that if either [of two other respondents] ‘came onto the unit, bad things would happen to them.’” The complaint alleged that two respondents wrote reports indicating Larson had

said “I want everyone to know that those two f---ing c---s better not come on this unit or I will kill them.”

Finally, Larson’s complaint alleged that on November 2, 2016, he “in a fit of rage and in protest of yet another deliberately false accusation . . . jumped through a half-door . . . and pounded on the staff office door and made statements regarding the repeated lying and fabrication of MSOP employees in their incident reports.” It alleged that one respondent falsely wrote in a report that Larson said he was “going to kill everyone,” and “come and get me motherf---rs, I will kill you.” The complaint does not specify what Larson claims he actually said in his fit of rage.

“As a general rule, the truth or falsity of a statement is a question for the jury.” *McKee v. Laurion*, 825 N.W.2d 725, 730 (Minn. 2013). However, in *McKee* the supreme court analyzed whether or not six statements presented genuine issues of material fact on the issue of falsity, even assuming they were said exactly as plaintiff alleged. *Id.* at 730-31. The supreme court concluded that, even though there may have been minor discrepancies between the statements published by defendant and the statements plaintiff alleged were said, those differences were not substantial enough to constitute falsity. *Id.* We similarly conclude that, even assuming each of Larson’s statements was as he alleged in his complaint, the reports were substantially similar to Larson’s alleged statements and were therefore not false.

The reports reflect respondents’ recollections of threatening behavior, which the complaint admits occurred. The statements in the reports would have the same effect on the mind of the listener as the statements the complaint claims as true. In sum, because

Larson's complaint did not allege sufficient falsity to support a defamation claim, we affirm the district court's dismissal.

D. Dismissal of Slander Claims

Larson contends that it was error for the district court to interpret his disparate claims as libel claims, because he alleged multiple claims of slander in his complaint. Slander involves spoken defamation, whereas libel refers to published written words. *Larson v. R.B. Wrigley Co.*, 183 Minn. 28, 29, 235 N.W.2d 393, 394 (1931). Larson points to numerous separate instances in his complaint that he claims alleged slander. However, each instance is merely a conclusory statement unsupported by a factual allegation. "A conclusory, unsupported assertion is neither a well-pleaded fact nor is it evidence and, therefore, it cannot make out a prima facie case." *DeCook v. Olmsted Med. Ctr., Inc.*, 875 N.W.2d 263, 276 n.5 (Minn. 2016). Because slander requires verbal statements, Larson was required to allege spoken defamation to support this allegation. He did not do so. It was therefore proper for the district court to not consider these conclusory claims.

We do not discern any error by the district court. Furthermore, because respondents are immune from Larson's defamation claims and because respondents' statements were substantially true, any error would be immaterial.¹

¹ Larson also contends that the district court erred when it ruled the reports in his MSOP file were not sufficiently communicated to third parties so as to constitute defamation. The district court did not reach the merits of Larson's defamation claims because it concluded respondents were immune. However, it did note that Larson's statements were not defamatory because the reports in his MSOP file did "not constitute statements made to a member of the public or third party." Because we agree that respondents are immune from Larson's defamation claim, and because Larson did not allege falsity adequate to support

II. Emotional Distress

Larson contends that the district court erred by finding that he did not allege enough facts to sustain his claims for intentional and negligent infliction of emotional distress. To sustain a claim for intentional infliction of emotional distress, Larson must show that (1) the complained-of conduct was extreme and outrageous; (2) the conduct was intentional and reckless; (3) the conduct caused him emotional distress; and (4) the emotional distress was severe. *Stead-Bowers v. Langley*, 636 N.W.2d 334, 342 (Minn. App. 2001), *review denied* (Minn. Feb. 19, 2002). Intentional infliction of emotional distress applies when conduct is so “extreme and outrageous, so atrocious that it passes the boundaries of decency and is utterly intolerable to the civilized community.” *Id.* at 342 (quotation omitted). Larson argues that the complaint established a claim for intentional infliction of emotional distress by alleging that respondents maliciously fabricated statements that could lead to criminal charges against him. Larson argues that this is reckless conduct that caused severe depression, contemplation of suicide, an eating disorder, and other physical injuries.

Although Larson did allege that respondents’ conduct was intentional and reckless, he did not support this allegation with any facts. As with his argument regarding actual malice above, the absence of facts to support a conclusion of recklessness is fatal to Larson’s claim. *See DeCook*, 875 N.W.2d at 276 n.5. (“A conclusory, unsupported assertion is neither a well-pleaded fact nor is it evidence and, therefore, it cannot make out a prima facie case.”); *see also Connelly v. Nw. Publ’ns, Inc.*, 448 N.W.2d 901, 903 (Minn.

his defamation claim, we decline to consider whether the reports were adequately communicated so as to constitute defamation.

App. 1989) (applying a standard for actual malice based on recklessness), *review denied* (Minn. Feb. 21, 1990).

Also, Larson's complaint does not allege sufficient facts to establish severe emotional distress. "The standard is high. If a reasonable person could be expected to endure the distress, the law does not intervene." *Elstrom*, 533 N.W.2d at 57; *see also Bohdan v. Alltool Mfg., Co.*, 411 N.W.2d 902, 908 (Minn. App. 1987) ("Even if severe emotional distress exists, the defendant may escape liability if the distress is exaggerated in comparison to what a reasonable person would experience under the circumstances"), *review denied* (Minn. Nov. 13, 1987). In *Elstrom*, this court noted that a plaintiff's claim that she suffered insomnia, crying spells, fear, and depression did not state a valid claim. 533 N.W.2d at 57.

Finally, because the statements Larson alleges as defamatory are substantially similar to the statements Larson admitted to in his complaint, we cannot conclude the alleged defamation was unendurable. Because a reasonable person would not be subjected to severe emotional distress by the exaggeration alleged as defamatory, Larson's claim fails. *See Cafferty v. Garcia's of Scottsdale, Inc.*, 375 N.W.2d 850, 853 (Minn. App. 1985) ("If the claimed distress is of the type that people commonly encounter and endure in their lives, then the claim should not even be submitted to the jury.").

To sustain a claim for negligent infliction of emotional distress, Larson must show that he "(1) was within a zone of danger of physical impact; (2) reasonably feared for [his] own safety; and (3) suffered severe emotional distress with attendant physical manifestations." *Stead-Bowers*, 636 N.W.2d at 343 (Minn. App. 2001). "The zone of

danger requirement may be replaced by an intentional tort such as defamation” *Oslin v. State*, 543 N.W.2d 408, 417 (Minn. App. 1996) *review denied* (Minn. Apr. 1, 1996). A negligent-infliction-of-emotional-distress claim fails when the defamation claim it is based on fails. *See id.* (dismissing claim based on defamation because defamation claims failed); *see also Elstrom*, 533 N.W.2d at 57 (“Elstrom’s negligent infliction of emotional distress action fails along with the defamation claim.”).

Larson argues that he has established a claim for negligent infliction of emotional distress because his complaint alleged he was within a zone of danger of physical impact. He further argues that he received the physical injury of arrhythmia and an eating disorder. He argues that this shows he created a genuine issue of fact regarding whether he suffered a physical injury or threat of physical injury. Alternatively, he argues that mental anguish is a physical injury because mental anguish relates to the nervous system, which is part of his person.

Emotional distress alone is not sufficient to show a physical injury. *See Leanon v. Washington Cty.*, 397 N.W.2d 867, 875 (Minn. 1986) (Concluding that weight loss, depression, anger, fear, and bitterness were insufficient to show physical injury). Larson’s complaint alleged no facts that, if true, would support a finding that he was in a zone of danger of physical impact as the result of the alleged defamation. Because Larson’s underlying defamation claim fails, and because Larson has not alleged sufficient facts to support his claims of intentional and negligent infliction of emotional distress, we affirm the district court’s dismissal of those claims.

III. Negligence

Larson contends that the district court erred when it concluded there was no private right of action under Minn. Stat. § 144.651. Section 144.651, subdivisions 5 and 6 provide: “Patients and residents have the right to be treated with courtesy and respect for their individuality by employees of or persons providing service in a health care facility” and that “[p]atients and residents shall have the right to appropriate medical and personal care based on individual needs.” However, “Minnesota Statutes section 144.651 does not create a private cause of action.” *Favors v. Kneisel*, 902 N.W.2d 92, 94 (Minn. App. 2017) (affirming district court’s dismissal of a complaint because there was no private right of action to sue DHS employees under Minn. Stat. § 144.651). Larson argues that the citation in his complaint to Minn. Stat. § 144.651 was meant to inform the district court of certain statutory obligations and to illustrate respondents’ level of negligence, but should not be construed as making a claim based on Minn. Stat. § 144.651. To the extent that Larson’s claim citing Minn. Stat. § 144.651 is not based on statute, we interpret it as realleging his claims for emotional distress, which were properly dismissed.

IV. Negligent Hiring and Retention

Larson’s complaint alleged that respondents MSOP and DHS were guilty of negligent hiring and retention because individual employees were unfit to serve in their positions based on their negligent conduct. The district court dismissed Larson’s claim for negligent hiring and retention, concluding “[a]lthough [Larson] does not sufficiently allege *actual physical* injury as required to sustain a negligent hiring or retention claim, this is of no moment, as [respondents] DHS and MSOP are again entitled to immunity from such

claims,” relying on the Minnesota Tort Claims Act. Respondents contend that Larson did not adequately appeal this conclusion.

Larson’s reply brief argues that he adequately appealed the district court’s dismissal of his negligent hiring, retention, and supervision claim, citing portions of his initial brief discussing negligent infliction of emotional distress. Between paragraphs discussing Larson’s emotional-distress claim is the isolated sentence: “The district court erred as a matter of law and fact and abused its discretion when ruling that [Larson] ‘does not sufficiently allege *actual physical injury*’ to sustain his negligent hiring and retention claims and that ‘DHS and MSOP are again entitled to [statutory] immunity from such claims.’” Larson makes no further mention of the negligent hiring and retention claim. “An assignment of error based on mere assertion and not supported by any argument or authorities in appellant’s brief is waived and will not be considered on appeal unless prejudicial error is obvious on mere inspection.” *Modern Recycling, Inc.*, 558 N.W.2d at 772 (quotation omitted). Larson’s single sentence asserting error did not serve to adequately appeal the district court’s dismissal of his negligent hiring and retention claims.

V. Dismissal with Prejudice

Larson contends that the district court erred when it dismissed his complaint with prejudice. We review a district court’s decision to dismiss a complaint with prejudice for an abuse of discretion. *Mercer v. Andersen*, 715 N.W.2d 114, 120 (Minn. App. 2006). “Where a complaint fails to state a claim upon which relief can be granted for purposes of Rule 12.02(e) of the Minnesota Rules of Civil Procedure, dismissal with prejudice and on

the merits is appropriate.” *Martens v. Minnesota Min. & Mfg. Co.*, 616 N.W.2d 732, 735 (Minn. 2000).

Larson argues that the district court’s dismissal of his complaint, combined with the fact that two judges recused themselves from his case, indicates bias against him as a pro se appellant. He does not support this contention with facts, but rather speculates that this is due to some agreement between MSOP, the county, and the public defender’s office. Again, Larson makes mere assertions of error without supporting facts, authorities, or arguments. His assignment of error is therefore forfeited, and we discern no abuse of discretion by the district court. *See Modern Recycling, Inc.*, 558 N.W.2d at 772 (an argument based on mere assertion of error is forfeited on appeal).

Affirmed.