STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0753

Ashlee Kay Sames,
Appellant,

vs.

Scott County, et al.,
Respondents.

Filed April 8, 2019
Affirmed in part, reversed in part, and remanded
Florey, Judge

Scott County District Court
File No. 70-CV-17-892

Matthew J. Schaap, Robert B. Bauer, Daugherty, Molenda, Solfest, Hills & Bauer, P.A., Apple Valley, Minnesota (for appellant)

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Considered and decided by Connolly, Presiding Judge; Bjorkman, Judge; and Florey, Judge.

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

FLOREY, Judge

Appellant Ashlee Kay Sames[1] appeals the district court's grant of judgment as a matter of law (JMOL) dismissing her defamation per se claim. By notice of related appeal,

[1] Appellant refers to the appellant and cross-respondent in this case.

respondents Kenneth Dvorak, Lynette Ancel, and Scott County[2] argue that the district court erred by denying their JMOL motion on other grounds, and denying their summary-judgment motion. We affirm in part, reverse in part, and remand.

FACTS

I. Appellant's Employment at Scott County

Appellant was hired by respondent Scott County as a 9-1-1 dispatcher in October 2007. She was promoted to dispatch supervisor in September 2010. As a supervisor, appellant was responsible for supervising staff, equipment, and the day-to-day operations in the dispatch center, as well as ensuring that emergency first-responders were sent to the appropriate locations for medical, fire, and police matters. Appellant also took on the role of training new dispatchers, and in early 2010, she became certified as a crisis negotiator. While appellant was not considered "a perfect employee," overall she received positive performance reviews during her time at Scott County.

Respondent Ancel was also hired as a Scott County dispatcher in 2007, and promoted to dispatch supervisor in 2010. Appellant and Ancel worked together as supervisors for approximately three or four years.

At the time appellant was promoted to dispatch supervisor, she reported to Lori Adamietz, who was the "PSAP coordinator," or, in other words, the dispatch center's manager.[3] Some dispatchers perceived Adamietz's management style as "authoritative."

[2] Respondents refers to the respondents and cross-appellants in this case.

[3] Adamietz testified that PSAP stands for Public Safety Answering Point. "[A]ny entity that answers 911 is considered a PSAP."

During Adamietz's time as PSAP coordinator, employee morale at the dispatch center was low. The dispatchers' union expressed concerns about the management style and the number of internal-affairs investigations initiated by managers against employees. The union described the investigations as "a witch hunt." A psychologist was brought in to conduct an assessment of the dispatch center and to address workplace issues raised by staff. At trial, appellant conceded that she also had "an authoritative management style," that employees perceived her as "this really harsh supervisor" who "was difficult to work with," and that other supervisors told her she was "too hard" on the dispatchers.

In May 2015, respondent Dvorak joined the dispatch center as a co-PSAP coordinator, in anticipation of Adamietz's retirement. Shortly thereafter, he became the sole PSAP coordinator. Dvorak was aware of staff's concern with management. Appellant testified at trial that, "when [Dvorak] first came into the dispatch center in his new role, he met with employees and he talked to them and did a lot of listening, listening to them and getting their prospective [sic] on things. And there was a lot of airing of complaints, or airing dirty laundry to him from the dispatchers." Appellant testified that Dvorak's new role came as a surprise to everyone and that she was initially frustrated because there was no advance notice that he would become the sole PSAP coordinator.

Shortly after Dvorak took over as PSAP coordinator, he assigned appellant the role of assistant PSAP coordinator. In June 2015, Dvorak and appellant met to discuss her new role and his plans for the center. Appellant testified at trial that Dvorak told her "he wanted to build [her] resume [so] that [she] could find employment anywhere and [she] could tell people that [she] was second in command at Scott [C]ounty, number two at Scott County."

She testified that she felt "blindsided" by the meeting and that the discussion made her feel unappreciated as a supervisor.

During their meeting, Dvorak tasked appellant with two assignments. He instructed her to create an awards system for staff and to meet with a couple of staff members with whom appellant had concerns. The purpose of the meetings was to strengthen her relationship with employees. Thereafter, Dvorak left for vacation.

On July 1, 2015, appellant submitted a letter of resignation. Dvorak was still on vacation. When Dvorak received notice of appellant's resignation, he called her to ask her to reconsider her decision. Appellant testified that Dvorak "seemed really angry with [her]" and told her that her resignation "was going to mess up his plan." Appellant completed her last day at Scott County in mid-July 2015. At the time appellant resigned, she had not completed the tasks assigned to her by Dvorak.

Following her resignation from Scott County, appellant obtained employment as a 9-1-1 call taker for Ramsey County, where she continues to work today, now as a public-safety dispatcher. Prior to obtaining employment at Ramsey County, however, appellant applied for and was declined a position with the City of Edina. Appellant alleges that defamatory statements made by Dvorak and Ancel to the City of Edina during the application process are the reason she was declined employment. The alleged defamatory statements are the basis of this suit.

II. Appellant's Application with the City of Edina

In the fall of 2015, appellant applied to work as a dispatcher in the City of Edina. It was a lengthy application process, which spanned a few months and involved multiple interviews. As part of the application process, appellant was required to participate in a background investigation. Sergeant Kevin Rofidal of the Edina Police Department, who was responsible for conducting appellant's background investigation, testified at trial that the purpose of the background investigation is to determine whether an applicant is qualified. He explained, "We try to put the good and the bad in there and we keep it as neutral as possible in terms of what we are seeing and what we are finding."

Sergeant Rofidal testified that applicants are asked to sign and complete a release form authorizing his department to conduct the background investigation. He explained that the release form is important because it allows the people that he interviews to be "very candid" with him about the qualifications of the candidate. He explained, "[O]ne of the first things that I do when I meet with someone . . . is I hand them a copy of the release just to let them know that . . . the candidate has signed off on this. . . . We want to know ever[y] single thing about this person. . . . [W]e take this very serious[ly]." Sergeant Rofidal further testified that his usual practice was *not* to speak with human resources (HR) about a candidate, but rather, interview "the people that work next to [the applicants]." He testified, "[M]y first call is not to HR. My first call is to the agency and who was the supervisor that I can talk to. And then I set out from there."

After obtaining background information, Sergeant Rofidal was required to "write up" a summary of the applicant and deliver the written report to the deputy chief. He testified that "there is nobody else involved in the chain of command that sees that background." At trial, Sergeant Rofidal testified that, after he completed a background investigation, the city would determine whether to invite the applicant to participate in a psychological evaluation. Sergeant Rofidal was not involved in making any hiring decisions.

As part of Sergeant Rofidal's background investigation on appellant, he both met with Dvorak in Dvorak's closed office, and spoke with Ancel over the phone. Sergeant Rofidal testified that he knew Ancel from when she was dispatching for the City of Edina, although he had not spoken to her in the past 20 years. Ancel testified that it was not one of her job duties at Scott County to provide reviews of former employees. Dvorak, however, testified that both he and Ancel were acting within the scope of their employment when they met with Sergeant Rofidal and provided feedback on appellant's work.

Sergeant Rofidal testified that he did not record his conversations with respondents, but that he took notes during the meetings and did his best to accurately transcribe their comments. He also testified that he believed respondents were being truthful and candid with him, and that, despite some of respondents' remarks, which could have been perceived as negative feedback, he believed appellant met the qualifications for the dispatcher position.

Sergeant Rofidal's completed background investigation included any military, criminal, education, and work history of appellant, as well as summaries of remarks from appellant's past and present employers, from appellant's landlords, family members, and references. The City of Edina extended a conditional offer to appellant, and invited her to participate in a psychological evaluation.

Appellant testified that, during the psychological evaluation, the psychologist confronted her with statements that were made about her and included in the background investigation summary. Appellant described the statements as inaccurate, negative, and hostile. She testified that she felt "flustered" and "blindsided" by the statements and that she had "no doubt" that they negatively impacted her psychological evaluation and test scores.

At trial, the psychologist, Dr. Norma Elizabeth Dilorenzo testified that it was her practice to "always check in about anything that was of question in a background [summary]." She explained that her purpose in doing so is to "hear the other sides [sic] story and how they present it, if there was something additional that perhaps was not included in the background . . . [b]ecause [she] know[s] that [it] is a compilation of information also."

Dr. Dilorenzo described appellant's reaction to the statements as defensive and emotional. She testified that "[d]efensiveness is never a quality that we are looking for in someone because it makes it harder for people to get along and do the job," and that she does not tend to see "a lot of emotion in people's [sic] interviews." Dr. Dilorenzo testified that appellant "actually apologized for coming across the table at her."

The psychological evaluation concluded with a recommendation that the City of Edina not hire appellant. Dr. Dilorenzo testified that there was a "multitude of factors that went into making [the] recommendation," and that her recommendation is not necessarily dispositive of whether a candidate is offered employment. Dr. Dilorenzo also denied that the statements she confronted appellant with during the psychological evaluation would have significantly tainted appellant's overall performance. In January 2016, appellant was informed by the Edina Police Department that she was not selected for the position.

Appellant filed a complaint in district court against respondents, alleging defamation and respondeat superior, and seeking both damages and injunctive relief. In her complaint, appellant alleged that the following statements in the background investigation summary, attributed to Dvorak, were defamatory:

> i) Dvorak had to coach [appellant] in a number of areas, including clearing the air with those with whom she had difficulty getting along, but that she "could not do that;"
> ii) [Appellant] should not have been a supervisor;
> iii) [Appellant's] dispatching skills were questionable;
> iv) [Appellant] did not have the ability to adapt to changing environments; and
> v) [Appellant's] problem solving skills were weaker than most in the dispatch center.

Appellant alleged that the following statements in the background-investigation summary, attributed to Ancel, were defamatory:

> i) [Appellant] would "stab you in the back every time there was a chance;"
> ii) [Appellant] lacked "common sense;"
> iii) [Appellant] was not a good dispatcher or lead;
> iv) [Appellant] "did not get the dispatching piece;"
> v) [Appellant] was the "protected child" of the previous PSAP manager, and
> vi) [Appellant] did not hold herself accountable for small errors but was quick to point these out to other dispatchers.

Respondents filed a motion for summary judgment, arguing that the statements (1) were either nonactionable opinions or "true and accurate reflections" of appellant's work; (2) were "protected by qualified privilege;" and (3) "cannot be shown to have caused any actual damage to [appellant]." The district court denied respondents' summary-judgment motion, and the case proceeded to a jury trial.

At trial, appellant called several witnesses to testify, including Adamietz (her former supervisor at Scott County), several officers she worked with at Scott County, Sergeant Rofidal of Edina, Dr. Dilorenzo, Dvorak, and Ancel. Appellant also testified on her own behalf. At the close of appellant's case-in-chief, respondents moved for JMOL, arguing (1) a qualified privilege applied to the statements made by respondents and there was no evidence of malice to defeat the privilege and (2) there was no evidence of harm to appellant's reputation.

The district court granted respondents' JMOL motion on the basis of there being insufficient evidence of harm to appellant's reputation. The court stated that, because there was no testimony from anyone who made the decision to not hire appellant, whether there was actually any harm to appellant's reputation was "speculative." The district court stated:

> [H]arm to reputation is one of the parts or elements of a defamatory statement. I just don't see, I understand counsel's argument as to how it can lead to, either does show harm or tends to show harm to the reputation, but I just don't see, based on the testimony we have, that it's enough to go to the jury. So, I'm going to grant the motion.

The district court also stated that it "would grant the . . . qualified privilege to Dvorak," but found that, whether the privilege extended to Ancel, "as well as the malice issue," were questions for the jury.

A few days later, the district court issued its written order for judgment. The order granted respondents' JMOL motion "on the issue of whether [appellant] suffered harm to her reputation," but denied the motion "on the issue of whether the statements were made with malice." The district court awarded respondents costs and disbursements in the amount of $2,848.85.[4] This appeal followed.

D E C I S I O N

Appellant challenges the district court's grant of JMOL dismissing her defamation per se claim. A district court's grant of JMOL is a question of law that we review de novo. *Longbehn v. Schoenrock*, 727 N.W.2d 153, 159 (Minn. App. 2007). We view the evidence in the light most favorable to the nonmoving party. *Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910, 919 (Minn. 2009).

Minnesota Rule of Civil Procedure 50.01(a) provides:

> If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may decide the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

Judgment as a matter of law is inappropriate if reasonable jurors could draw different conclusions from the record. *Bahr*, 766 N.W.2d at 919. A district court's authority to grant

[4] Judgment is stayed pending the outcome of this appeal.

JMOL "is to be exercised cautiously and sparingly." *Usher v. Allstate Ins. Co.*, 218 N.W.2d 201, 205 (Minn. 1974).

A claim of defamation requires the plaintiff to 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*, 766 N.W.2d at 919-20 (quotations omitted); *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 255 (Minn. 1980). "The purpose of a defamation action is to compensate a private citizen for wrongful injury to his or her reputation." *Longbehn*, 727 N.W.2d at 160.

If the statement "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). In cases of defamation per se, harm to one's reputation is presumed. *See Richie v. Paramount Pictures Corp.*, 544 N.W.2d 21, 25 (Minn. 1996); *Schlieman v. Gannett Minn. Broad., Inc.*, 637 N.W.2d 297, 307 (Minn. App. 2001) ("'Defamatory per se' means that damages are presumed and thus recoverable without proof of actual harm to reputation."), *review denied* (Minn. Mar. 19, 2002). The statements, however, "must be peculiarly harmful to the person in his business" and "the remarks must relate to the person in his professional capacity." *Anderson v. Kammeier*, 262 N.W.2d 366, 372 (Minn. 1977). "General disparagement is insufficient." *Id.*

I. Reputational harm

Appellant argues that, because her "claim is one covered by rules applicable to claims for defamation per se," the district court "erred when it required proof of reputational harm in a case that does not require it." Respondents, on the other hand, argue that appellant was required to demonstrate reputational harm, and because "there was no legally sufficient evidentiary basis for a reasonable juror to find that [appellant] suffered harm to her reputation," the district court properly entered JMOL in their favor.

Because harm to one's reputation is presumed in cases of defamation per se, the district court's order, finding that there was "no legally sufficient evidentiary basis for a reasonable jury to find for [appellant] on the issue of whether she suffered harm to her reputation," is a misstatement of the law. But, before reputational harm is presumed, a plaintiff must still establish all of the requisite elements: (1) the statement was communicated to someone other than the plaintiff; (2) the statement was false; and (3) the statement "affects the plaintiff in his business, trade, profession, office or calling." *Bahr*, 766 N.W.2d at 919-20 (quotation omitted); *see also Schlieman*, 637 N.W.2d at 307 ("'[D]efamatory per se' defines a rule of damages, not of defamatory meaning."). As such, on remand, appellant must show, and a factfinder must determine whether, the statements "that relate to [appellant's] business, trade, or professional conduct are, in fact, defamatory." *Schlieman*, 637 N.W.2d at 307; *see also* Restatement (Second) of Torts § 615(2) (1977) (stating "the jury determines whether spoken language imputes to another conduct, characteristics or a condition incompatible with the proper conduct of his business, trade, profession or office").

We conclude that the district court erred by granting JMOL on the basis of there being insufficient evidence of harm to appellant's reputation, and reverse, in part, the district court's order on this ground. We note that, on remand, the scope of appellant's defamation claim is limited to the allegedly defamatory statements in the complaint. *See Benson v. Nw. Airlines, Inc.*, 561 N.W.2d 530, 538 (Minn. App. 1997), *review denied* (Minn. June 11, 1997).

II. Qualified privilege

There are two types of privileges that defend against a defamation claim: (1) absolute privilege and (2) qualified privilege. *Minke v. City of Minneapolis*, 845 N.W.2d 179, 182 (Minn. 2014). The privileges exist because "statements made in particular contexts or on certain occasions should be encouraged despite the risk that the statements might be defamatory." *Id.* (quotation omitted). An absolute privilege protects a defendant against liability for even "intentionally false statements, coupled with malice." *Id.* (quotation omitted). On the other hand, a qualified privilege protects against liability "only if the defamatory statements are publicized in good faith and without malice." *Id.* (quotation omitted). In the present case, the only privilege in dispute is qualified privilege. We review de novo the question of whether a privilege applies. *Kuelbs v. Williams*, 609 N.W.2d 10, 16 (Minn. App. 2000), *review denied* (Minn. June 27, 2000); *see also Bahr*, 766 N.W.2d at 920.

In order to be protected by a qualified privilege, "[a] statement must be made in good faith and must be made upon a proper occasion, from a proper motive, and must be based upon reasonable or probable cause." *Bol v. Cole*, 561 N.W.2d 143, 149 (Minn. 1997) (quotation omitted). "In the context of employment recommendations, the law generally recognizes a qualified privilege between former and prospective employers as long as the statements are made in good faith and for a legitimate purpose." *Lewis v. Equitable Life*

Assurance Soc'y of the U.S., 389 N.W.2d 876, 889 (Minn. 1986); *Stuempges*, 297 N.W.2d at 257. "Qualified privilege, which has been the rule for more than a hundred years, allows Minnesota law enforcement agencies both to conduct searching background investigations and to respond—with candor that is not false and malicious—to those conducted by others." *Minke*, 845 N.W.2d at 184. The plaintiff has the burden to show malice. *Bahr*, 766 N.W.2d at 920.

"Malice is defined as actual ill-will or a design causelessly and wantonly to injure plaintiff." *Bol*, 561 N.W.2d at 150 (quotation omitted). Malice cannot be shown from the fact that the statement was false nor can it be implied from the statement itself. *Id.* A plaintiff can demonstrate malice "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 publication, and other matters in excess of the privilege." *Id.* (quotation omitted).

Respondents argue that the district court erred when it concluded that they were not entitled to JMOL on the basis of a qualified privilege. Respondents contend that "[appellant] does not dispute that a qualified privilege applie[d] to Dvorak," and argues "[t]here is no sufficient evidentiary basis to create a jury question on the issue of actual malice with respect to [him]." Respondents contend that the privilege also applied to Ancel, who was acting in the scope of her employment when she made the statements, and there is "no evidence of actual malice on her part" either.

Appellant argues that the privilege is not available to Ancel because she did not present any evidence that the privilege applied to her, and that whether Dvorak's statements were made with malice is a question for the jury. She argues that Dvorak was "upset with [her] for leaving her job with Scott County" and the evidence "indicates that [he] made the accused statements based on ill will towards [her]."

The district court erred by concluding that a qualified privilege did not entitle Dvorak to JMOL. All of the statements by Dvorak were made in the context of a legitimate employment investigation. Dvorak made the statements, at Sergeant Rofidal's request, in his closed office, to only Sergeant Rofidal. As appellant's supervisor at the time appellant resigned from Scott County, Dvorak was well suited to provide feedback on appellant's qualities and capabilities. Further, Sergeant Rofidal testified that, because his department "want[s] to know ever[y] single thing" about an applicant, his standard practice is to provide interviewees with a signed release form indicating the applicant's consent to disclose feedback.

Other than evidence that Dvorak may have been disappointed, or even frustrated, with the timing of appellant's resignation, there is insufficient proof of personal spite. Indeed, Dvorak also shared with Sergeant Rofidal positive attributes of appellant and explained that, "because the agency gave little direction or training," appellant's shortcomings were not necessarily her fault.

Therefore, we affirm, on other grounds, the district court's grant of JMOL for Dvorak based on a qualified privilege and the lack of any evidence to support a claim that his statements were made with malice. *See Country Club Oil Co. v. Lee*, 58 N.W.2d 247, 250-51 (Minn. 1953) (stating that, because "[i]t is the function of this court to review the judicial acts of the trial court and not its judicial opinions," if the defendant was entitled to judgment as a matter of law "for any reason, the trial court must be sustained even though it announced a different reason" in granting the motion).

Qualified privilege may extend to Ancel's statements as well. Ancel made the statements while acting within the scope of her employment and at the request of Sergeant Rofidal. However, whether any or all of Ancel's statements were made with malice, which would effectively defeat the privilege, is a question for the jury. *See Bol*, 561 N.W.2d at 150 (stating that personal spite, exaggerated language, and the character of the language used are all indicia of malice). We, therefore, reverse the district court's grant of JMOL for Ancel, and remand to the district court for trial on the question of whether Ancel made her statements with malice.[5]

III. Nonactionable opinions

Respondents also argue that the district court erred when it failed to dismiss on summary judgment appellant's defamation claim because the statements were nonactionable opinions.[6]

"As a threshold matter, we must determine whether the district court's denial of summary judgment is within our scope of review, since matters outside the scope of review are not properly considered by appellate courts." *Schmitz v. Rinke, Noonan, Smoley, Deter, Colombo, Wiant, Von Koriff & Hobbs, Ltd.*, 783 N.W.2d 733, *review denied* (Minn. Sept.

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[5] We reiterate that, on remand, appellant is limited to challenging the statements listed in her complaint. *See Benson*, 561 N.W.2d at 538.

[6] Because we affirm the district court's grant of JMOL for Dvorak on the basis of a qualified privilege, effectively dismissing the case against him, we decline to address whether the district court erred by denying summary judgment in his favor.

21, 2010). Minnesota Rule of Civil Appellate Procedure 103.04 provides that an appellate court has the authority to review orders "affecting" the judgment being appealed; *see also Bahr*, 766 N.W.2d at 918.

In *Bahr*, the supreme court explained that a "district court's conclusion at the summary judgment stage that there was a genuine dispute of fact becomes moot once the jury reaches a verdict on that issue." *Bahr*, 766 N.W.2d at 919. The supreme court held that, "[w]here a trial has been held and the parties have been given a full and fair opportunity to litigate their claims," the district court's denial of summary judgment based on its finding of material disputed facts is outside an appellate court's scope of review. *Id.* at 918. This is because such a denial "cannot be viewed as affecting the judgment." *Id.* In *Schmitz*, we further explained that "because the scope of review precludes consideration of whether the evidence was sufficient to create a fact issue, our review is limited to whether the district court erred in its application of the law." 783 N.W.2d at 745 (citing *Bahr*, 766 N.W.2d at 918).

Citing to rule 103.04, respondents appear to characterize the district court's denial of summary judgment as one based on a question of law. However, our review of the record and the district court's order suggest that the denial was based, rather, on the existence of material disputed facts. Indeed, the district court found that "genuine issues of material fact exist," and "[a]ccordingly, summary judgment is inappropriate."

While the denial of summary judgment based on the existence of genuine issues of material fact is generally beyond the scope of appellate review, we conclude this case is distinguishable. Because the district court granted JMOL after appellant rested her case, the respondents were not "given a full and fair opportunity to litigate their claims," nor were the material-fact disputes ever addressed by the jury. *Bahr*, 766 N.W.2d at 918-19; *Schmitz*, 783 N.W.2d at 744. The district court's denial of summary judgment is within our scope of review.

Next, we turn to the question of whether the district court erred in denying respondents' summary-judgment motion. *See Schmitz*, 783 N.W.2d at 744. Summary judgment is appropriate if the moving party "shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Minn. R. Civ. P. 56.01. "A material fact is one that will affect the outcome or result of a case." *Laska v. Anoka County*, 696 N.W.2d 133, 140 (Minn. App. 2005), *review denied* (Minn. Aug. 16, 2005). There is no genuine issue of material fact "if the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *Carlson v. SALA Architects, Inc.*, 732 N.W.2d 324, 327 (Minn. App. 2007) (quotation omitted), *review denied* (Minn. Aug. 21, 2007). "If there is any doubt as to the existence of a genuine issue of material fact, that doubt must be resolved in favor of finding that a fact issue exists." *Jonathan v. Kvaal*, 403 N.W.2d 256, 259 (Minn. App. 1987), *review denied* (Minn. May 20, 1987).

"The First Amendment protects statements of pure opinion from defamation claims." *McKee v. Laurion*, 825 N.W.2d 725, 733 (Minn. 2013). "Only statements that present or imply the existence of fact that can be proven true or false are actionable under state defamation law." *Schlieman*, 637 N.W.2d at 308; *see also McKee*, 825 N.W.2d at 733 ("Referring to someone as 'a real tool' falls into the category of pure opinion because the term 'real tool' cannot be reasonably interpreted as stating a fact and it cannot be proven true or false.). "Whether a remark can be reasonably interpreted as stating actual facts must be inferred from the political, literary, and social context in which the statement was made." *Huyen v. Driscoll*, 479 N.W.2d 76, 80 (Minn. App. 1991); *review denied* (Minn. Feb. 10, 1992).

"[I]f it is plain that the speaker is expressing a 'subjective view, an interpretation, a theory, conjecture, or surmise,' rather than claiming to be in possession of 'objectively verifiable facts,' the statement is not actionable." *Schlieman*, 637 N.W.2d at 308 (quotations omitted); *see also Huyen*, 479 N.W.2d at 81 ("Since the statements cannot be proven true or false, they are absolutely protected."). Further, if an opinion amounts to "mere vituperation and abuse" or "rhetorical hyperbole," there is no basis for a defamation action. *McKee*, 825 N.W.2d at 733 (quotations omitted).

Factors considered by appellate courts to determine whether a statement implies actual facts that can be proven false include: "(1) the statement's precision and specificity; (2) the statement's verifiability; (3) the social and literary context in which the statement was made; and (4) the statement's public context." *Hunt v. Univ. of Minn.*, 465 N.W.2d 88, 93 (Minn. App. 1991); *Lee v. Metro. Airport Comm'n*, 428 N.W.2d 815, 821 (Minn. App. 1988) (concluding that the coworkers' statements referring to the plaintiff as a "fluffy," a "bitch," and "flirtatious" were, as a matter of law, "too imprecise in nature to be actionable defamatory statements.").

The district court denied respondents' summary-judgment motion, finding that genuine issues of material fact existed as to: (1) "whether the statements made by [respondents] were true and accurate"; (2) "whether the statements were made in good faith and without malice"; and (3) "whether the statements were made within the course and scope of employment, and whether [appellant's] reputation suffered damage as a result of the statements made." Thus, while the district court did not directly address whether Ancel's remarks were nonactionable statements of opinion, nor was the matter extensively briefed by the parties in district court, we, nevertheless, conclude that respondents did not meet their burden at the summary-judgment stage to show there were no material-fact disputes on this particular issue.

At the summary-judgment stage, the district court "may not weigh the evidence or make factual determinations" nor "assess, evaluate, or determine credibility of the evidence." *SALA Architects, Inc.*, 732 N.W.2d at 327 (quotation omitted). Because reasonable jurors might have drawn different conclusions about whether Ancel's statements were, indeed, facts that could be proven true or false, summary judgment would have been improper. *See Ariola v. City of Stillwater*, 889 N.W.2d 340, 353 (Minn. App. 2017) (explaining that because summary judgment is a "blunt instrument . . . [it] is inappropriate when reasonable persons might draw different conclusions from the evidence presented") (quotation omitted), *review denied* (Minn. Apr. 18, 2017).

In sum, we affirm in part, reverse in part, and remand for a new trial. We reverse, in part, the district court's grant of JMOL on the basis of there being insufficient evidence of harm to appellant's reputation. However, we affirm, on other grounds, the district court's grant of JMOL for Dvorak. Dvorak was entitled to JMOL based on a qualified privilege and the lack of any evidence to support a claim that his statements were made with malice. We also affirm the district court's denial of summary judgment.

We remand for trial to determine whether Ancel made her statements with malice, thereby defeating a qualified privilege. We reiterate that, on remand, the scope of appellant's claim is limited to the allegedly defamatory statements in the complaint and that harm to appellant's reputation is presumed only if appellant first shows the alleged statements constitute defamation per se.

Affirmed in part, reversed in part, and remanded.