

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0370**

Richard W Bandimere, et al.,
Respondents,

vs.

Anita Summerville,
Appellant,
A Summerville Realty Corporation d/b/a Summerville Realty Group,
Defendants.

**Filed May 10, 2021
Affirmed
Florey, Judge**

Hennepin County District Court
File No. 27-CV-18-6674

David J. McGee, Natalie R. Walz, Tomsche, Sonnesyn & Tomsche, P.A., Minneapolis,
Minnesota (for respondents)

Anita Summerville, St. Paul, Minnesota (pro se appellant)

Considered and decided by Jesson, Presiding Judge; Smith, Tracy M., Judge; and
Florey, Judge.

NONPRECEDENTIAL OPINION

FLOREY, Judge

In this appeal arising from a dispute over real-estate commissions, appellant challenges the district court's (1) denial of her motion to vacate an arbitration award; (2) denial of her motion to dismiss respondents' action to confirm the arbitration award;

and (3) denial, after a bench trial, of her defamation counterclaim against respondents. Appellant also asserts that the district court erred by quashing subpoenas, concluding she had been properly served, and partially denying her appellate in forma pauperis (IFP) application. We affirm.

FACTS

In 2016, appellant Anita Summerville, an agent and broker for defendant A Summerville Realty Corporation, was the listing broker for the sale of a house in Minneapolis. Nonparty John Hitchcock was initially an agent for the buyer; later, he became a mortgage consultant for the buyer to assist her with obtaining an FHA mortgage. Nonparty Linda Hitchcock became the buyer's agent for the sale. Both Hitchcocks were employed as agents by respondent NorthMetro Investments LLC, d/b/a Keller Williams Classic Realty. Respondent Richard W. Bandimere is the broker for this firm.

Negotiations over the sale became acrimonious following several rewrites of the purchase agreement. Appellant believed that John Hitchcock was acting unlawfully because he was representing the buyer as a mortgage consultant but participated in writing the purchase agreement; she believed Linda Hitchcock provided no services to the buyer that would have earned her a commission. After the sale closed, appellant refused to pay the promised commission to respondents, the supervising brokers.

In January 2017, respondents filed a request and agreement to arbitrate with the Minnesota Association of Realtors (MNARS). In April 2017, an arbitration panel rendered a decision in favor of respondents, but that decision was overturned on review, and the matter was referred for a new arbitration hearing. On September 8, 2017, a new arbitration

panel awarded respondents \$4,100 and attorney fees. Appellant filed a request for procedural review. On October 16, 2017, the review panel affirmed the arbitration award, and its decision was emailed to appellant on October 19, 2017. When appellant neither paid the judgment within the statutory 90 days nor appealed the decision, respondents began an enforcement action by serving appellant with a summons and complaint on March 20, 2018.

Appellant did not serve a timely response to the complaint. Nevertheless, in May 2018, the district court permitted appellant to serve and file an untimely answer, a defamation counterclaim, and, in July 2018, a motion to vacate the arbitration award. After a July 22, 2019 hearing, the district court denied appellant's motion to vacate the arbitration award as time-barred by statute and confirmed the arbitration award. We dismissed appellant's appeal from that decision as premature because of the outstanding defamation counterclaim. *Bandimere v. Summerville*, A18-1576 (Minn. App. Oct. 26, 2018) (order).

In preparation for trial on her defamation counterclaim, appellant attempted to subpoena panel members from both arbitration hearings and two MNARS staff attorneys. The district court quashed the subpoenas because (1) the witnesses were improperly served; (2) appellant sought testimony and documents that were privileged or confidential as part of the arbitration process; and (3) the documents and recordings of the hearing no longer existed.

On November 8, 2019, the district court held a court trial on the limited issue of whether respondents had defamed appellant during the arbitration hearings. Appellant testified that respondent Bandimere and the Hitchcocks had referred to her as a "liar,"

“conniving,” “manipulative,” “despicable,” “disgusting,” “revolting,” “controlling,” and “difficult.” Respondent and the Hitchcocks denied this, and the district court found their testimony more credible than appellant’s.

The district court issued its findings of fact, conclusions of law, and order for judgment on the defamation counterclaim on December 13, 2019. The district court concluded that appellant had not shown by a preponderance of the evidence that certain of these statements were made, and that the words “entrap,” “controlling,” and “difficult” were used to describe conduct, not appellant’s reputation. Second, the district court concluded that absolute privilege applied because the statements were relevant to the subject matter of the MNARS proceedings, a quasi-judicial proceeding. Finally, the district court concluded that any statements made were opinion and “do not contain facts that can be proven true or false.” The district court ordered judgment in favor of respondents. Appellant appealed to this court. She sought IFP status on appeal, which the district court granted but limited the obtainable transcripts to the July 22, 2019 hearing and the November 8, 2019 court trial.

DECISION

I. Appellant’s challenge to the arbitration award was time-barred.

A court has limited power to review an arbitration decision. *City of Richfield v. Law Enf’t Labor Servs., Inc.*, 923 N.W.2d 36, 41 (Minn. 2019). An arbitration award is presumed to be final and valid. *Wolfer v. Microboards Mfg., LLC*, 654 N.W.2d 360, 365 (Minn. App. 2002), *review denied* (Minn. Feb. 26, 2003). A court may modify, vacate, or correct an arbitration award on limited statutory grounds, including instances when it is

clear that the arbitrators have exceeded their powers. Minn. Stat. §§ 572B.23-24 (2020); see also *State, Office of the State Auditor v. Minn. Ass’n of Prof’l Emps.*, 504 N.W.2d 751, 754 (Minn. 1993).

A motion to vacate an arbitration award must be filed within 90 days after receipt of the notice of an arbitration award, or within 90 days after a movant knows that the award was procured by fraud, corruption, or other undue means. Minn. Stat. § 572B.23(b). “Failure to file an application to vacate an arbitration award within 90 days when the application is not predicated on fraud, corruption, or other undue means prevents judicial review of the award.” *Abd Alla v. Mourssi*, 680 N.W.2d 569, 573 (Minn. App. 2004); see *Hanson v. Larson*, 459 N.W.2d 339, 342 (Minn. App. 1990) (failure to move to vacate or modify an arbitration award within 90 days of the decision bars further action), *review denied* (Minn. Oct. 18, 1990); see also *Minn. Licensed Practical Nurses Ass’n v. Bemidji Clinic, Ltd.*, 352 N.W.2d 65, 67 (Minn. App. 1984) (“The 90-day time limit for seeking modification is to be strictly enforced.”).

Appellant was served with the summons and complaint in the arbitration enforcement action on March 20, 2018, six months after she was notified of the arbitration award. She did not move to challenge the award until she filed her untimely answer and counterclaim in May 2018, and only filed a motion specifically to vacate the award in July 2018. This is far outside the 90-day limitations period.

The district court concluded that it was without power to vacate the award because the statutory limitations period had run. We review a district court’s statutory interpretation de novo. *Hall v. City of Plainview*, 954 N.W.2d 254, 259 (Minn. 2021).

When the language of a statute is unambiguous, the plain language of the statute controls. *Id.* at 269. The language of the statute here is unambiguous—an action “must” be brought within 90 days of receipt of notice of the award or within 90 days of discovery that the award was predicated on fraud, corruption or other undue means. Minn. Stat. § 572B.23(b). The district court did not err by concluding that appellant’s challenge was time-barred and confirming the arbitration award.

II. The district court did not err by granting judgment in favor of respondents on appellant’s defamation claim.

Appellant challenges the district court’s judgment in favor of respondents on her defamation action, arguing that the district court was biased based on its credibility determinations, the evidence was inconsistent with the district court’s decision, and the district court improperly quashed witness subpoenas.

A. Bias

A judge acts in a biased fashion when “a reasonable examiner, with full knowledge of the facts and circumstances, would question the judge’s impartiality.” *State v. Reek*, 942 N.W.2d 148, 156 (Minn. 2020) (quotation omitted). “[N]either familiarity with a case nor prior adverse rulings demonstrate bias” *In re Enbridge Energy Ltd. P’ship*, 930 N.W.2d 12, 36 (Minn. App. 2019), *review denied* (Minn. Sept. 17, 2019). Nor does the “mere fact that a party declares a judge partial . . . generate a reasonable question as to the judge’s impartiality.” *Reek*, 942 N.W.2d at 156.

Ultimately, appellant is challenging the district court’s credibility determinations. A reviewing court gives “due regard . . . to the opportunity of the [district] court to judge

the credibility of the witnesses.” Minn. R. Civ. P. 52.01. Here, the district court made specific findings on why respondents’ witnesses’ testimony was more credible, based on demeanor, consistency of the testimony, and the fact that the testimony was “consistent with the formal manner in which MNARS arbitration proceedings are conducted.” Nothing in the record supports appellant’s contention that the district court did not give serious consideration to all witness testimony.

B. Defamation evidence

In order to prove a claim of defamation, a complainant must show (1) a false and defamatory statement made about the complainant; (2) an unprivileged publication to a third party; and (3) harm to the complainant’s reputation. *Weinberger v. Maplewood Review*, 668 N.W.2d 667, 673 (Minn. 2003). Appellant argues that the district court’s conclusion that she failed to sustain her burden of proof is inconsistent with the evidence. We disagree.

First, the district court found that respondents and the Hitchcocks had not made some of the statements, such as “liar,” “conniving,” “manipulative,” “despicable,” “disgusting,” and “revolting.” We review the district court’s findings for clear error. *In re Distribution of Attorney’s Fees Between Stowman Law Firm, P.A. and Peterson Law Firm*, 870 N.W.2d 755, 759 (Minn. 2015). We view the evidence in the light most favorable to the district court’s findings, and we will not conclude that a finding is clearly erroneous if there is reasonable evidence to support it. *Id.* “Due regard” is paid to the district court’s opportunity to judge the credibility of witnesses. Minn. R. Civ. P. 52.01. The district court found respondents’ witnesses to be more credible, based on “demeanor,” “the consistency

of their testimony,” and the fact that the forum for the testimony was a formal hearing conducted within set procedural limits. We defer to the district court’s credibility determinations and discern no clear error in the district court’s findings.

Second, the district court concluded that some of the statements, if defamatory, were protected by absolute privilege. A statement, even if defamatory, is protected by absolute privilege if it was (1) made by a judge, judicial officer, attorney or witness; (2) at a judicial or quasi-judicial proceeding; (3) when the statement is relevant to the subject matter of the litigation. *Mahoney & Hagberg v. Newgard*, 729 N.W.2d 302, 306 (Minn. 2007). Insofar as respondent stated that appellant attempted to “entrap” respondents and described her as “controlling and difficult” because of “continuously rewriting the purchase agreement,” these statements are absolutely privileged because they were made in the course of the arbitration hearings and related to the dispute before the arbitration panel.

Finally, the district court concluded that these same statements are opinions that cannot be proved true or false and, therefore, are not defamatory. *See McKee v. Laurion*, 825 N.W.2d 725, 733 (Minn. 2013) (stating that the First Amendment protects pure opinion statements, which cannot be proven true or false, from defamation claims). We agree.

Based on the district court’s findings and conclusions, appellant failed to sustain her burden of proving her defamation claim, and the district court did not err by issuing judgment in respondents’ favor.

C. Subpoenas

The district court has broad discretion in issuing discovery orders. *State v. Underdahl*, 767 N.W.2d 677, 684 (Minn. 2009). A district court’s decision to quash a

subpoena is reviewed for an abuse of discretion. *In re Disciplinary Action Against Coleman*, 793 N.W.2d 296, 303 (Minn. 2011). The rules of civil procedure require that service of a subpoena be made either by personal service upon the subpoenaed person or “by leaving a copy at the person’s usual place of abode with some person of suitable age and discretion.” Minn. R. Civ. P. 45.02(a).

The district court found that five of the subpoenas had not been served in compliance with Minn. R. Civ. P. 45.02(a); the witnesses were not personally served, and copies were left at their workplaces, not at their usual place of abode. Further, the district court concluded, citing *Matthis v. Kennedy*, 67 N.W.2d 413, 417 (Minn. 1954), that the arbitration panel members were protected by absolute privilege as part of a judicial or quasi-judicial proceeding. The district court reasoned that the arbitration panel members could not be compelled to testify about the arbitration proceeding under Minn. Stat. § 572B.14(d) (2020), which states that an arbitrator cannot testify or produce records regarding an arbitration proceeding, except in limited circumstances not applicable here. Finally, the district court noted that all information and recordings of arbitration hearings are destroyed following the completion of the hearing process.

The district court’s determination that the nonparty witnesses had not been properly served, could not be compelled to testify pursuant to Minn. Stat. § 572B.14(d), or were subject to absolute privilege is supported by the record and was not an abuse of discretion.

III. Service of process was sufficient to give the district court personal jurisdiction over appellant.

Before a court can exercise personal jurisdiction over a defendant, “the procedural requirement of service of summons must be satisfied.” *Omni Capital Int’l., Ltd. v. Rudolf, Wolff & Co.*, 484 U.S. 97, 104, 108 S. Ct. 404, 409 (1987). The defense of lack of personal jurisdiction is not waived by a party who simultaneously “invokes the court’s jurisdiction on the merits and asks the court to rule on a jurisdictional defense” unless “other circumstances clearly demonstrate the party’s acquiescence to the court’s jurisdiction.” *Shamrock Dev., Inc. v. Smith*, 754 N.W.2d 377, 381 (Minn. 2008) (quotation omitted). When a defendant challenges service of process, the plaintiff must submit evidence of proper service. *DeCook v. Olmsted Med. Ctr., Inc.*, 875 N.W.2d 263, 271 (Minn. 2016). Once that evidence is submitted, the defendant has the burden of showing that service was improper. *Id.* We review the effectiveness of service de novo, as a question of law. *Roehrdanz v. Brill*, 682 N.W.2d 626, 629 (Minn. 2004).

Personal service can be effected without physical acceptance of the summons. *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 606 (Minn. 2014). “If the process server and [the party to be served] are within speaking distance of each other, and such action is taken as to convince a reasonable person that personal service is being attempted, service cannot be avoided by physically refusing to accept the documents.” *Id.* (quotation omitted); see *Drews v. Federal Nat. Mortg. Ass’n*, 850 N.W.2d 738, 742 (Minn. App. 2014). This is in accord with a general philosophy of liberally interpreting the rules of civil procedure “to avoid defeating an action merely because of technical and formal defects which could not

reasonably have misled or prejudiced a defendant.” *DeCook*, 875 N.W.2d at 268 (quotation omitted).

The situation here is similar to that in *Drews*—appellant and the process server were within view of each other, appellant videotaped him but refused to open the door, and the process server taped the summons to appellant’s door. *See Drews*, 850 N.W.2d at 742 (concluding service of process was sufficient, when process server and recipient were within speaking distance of each other, process server explained he was serving documents, recipient refused to accept them, and documents were taped to the door of recipient’s house). The district court’s findings regarding service are not clearly erroneous and, therefore, that service was sufficient to give the district court jurisdiction over appellant.

IV. Appellant’s challenge to the partial denial of her IFP request is time-barred.

The rules of civil appellate procedure state that a party seeking to challenge a denial of a request for IFP status must do so by filing a motion with the court of appeals within 14 days of the district court’s filing of its order. Minn. R. Civ. App. P 109.02. Appellant failed to serve and file a motion with the court of appeals within 14 days and only raised the issue in her brief filed December 28, 2020. Appellant’s claim is time-barred.

Affirmed.