This opinion is nonprecedential except as provided by Minn.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
A22-0524

James David Stemm d/b/a Principle Personnel Group, plaintiff,
Appellant,

vs.

Casey Kraus, defendant,
Respondent,

Mari Kautzman, et al., plaintiffs,
Respondents,

vs.

James David Stemm, defendant and counterclaimant,
Appellant,

vs.

Casey Kraus, et al., counterclaim defendants,
Respondents.

Filed December 5, 2022
Affirmed
Segal, Chief Judge

Ramsey County District Court
File No. 62-CV-18-6090

George E. Antrim III, George E. Antrim III, PLLC, Minneapolis, Minnesota; and

Wayne R. Atkins (pro hac vice), Xander Law Group, P.A., Miami, Florida (for appellant)

Daniel J. Cragg, Vince C. Reuter, Anne St. Amant, Eckland & Blando LLP, Minneapolis, Minnesota (for respondents)

Considered and decided by Gaïtas, Presiding Judge; Segal, Chief Judge; and Jesson, Judge.

NONPRECEDENTIAL OPINION

SEGAL, Chief Judge

In this defamation case, appellant argues that the district court abused its discretion by excluding testimony from his expert witness and by giving a faulty jury instruction. Appellant also contends that 10 of the 18 statements found to be defamatory by the jury were published outside the statute of limitations period and that those claims are thus time-barred. Because the district court did not abuse its discretion and appellant's argument on the statute-of-limitations issue was forfeited, we affirm.

FACTS

Appellant James Stemm, on behalf of his temporary staffing company, contracted with respondent TempWorks Management Services, Inc. to provide management services to his company. TempWorks Management, however, abruptly terminated the contract before actually providing any services. Stemm's company brought a successful suit for damages due to breach of contract and obtained a money judgment that was paid by TempWorks Management.

Dissatisfied with the amount awarded as damages in the suit, Stemm began to post negative comments on LinkedIn and Twitter about TempWorks Management; its affiliated entities, respondents TempWorks Software, Inc. and ARA Inc., (collectively referred to as TempWorks); and respondents Mari Kautzman, TempWorks' chief operating officer, and David Dourgarian, its chief executive officer. Stemm also started a website called "Beware

of TempWorks!" and a Facebook page titled "TempWorks Staffing Software is Dishonest." He posted negative comments about respondents on these online platforms, claiming that they had committed crimes, lied under oath, been found guilty of defamation with malicious intent, and had been caught stealing client funds from an Internal Revenue Service (IRS) account. Respondents sued Stemm in September 2018, alleging that Stemm's online posts were defamatory.[1]

A number of the defamatory statements in Tempworks' suit arose out of Stemm's online posts concerning a lawsuit TempWorks had brought against one of its clients alleging that the client had engaged in fraud. TempWorks obtained a judgment in its favor in that case and an award of over $900,000 in damages. The online posts by Stemm related to efforts by TempWorks, after it had discovered the fraud, to retrieve funds TempWorks had deposited with the IRS to front employee-payroll taxes for the client; fronting such funds was one of the services provided by TempWorks. The IRS initially transferred the funds from the client's account to TempWorks' account, but later reversed that transfer. Stemm's online comments about the lawsuit included statements such as: "depositions reveal that TempWorks got caught stealing money from the IRS account of [the client] and transferring it into their account"; and "the depositions revealed that TempWorks' CEO directed the theft of his client's IRS account and had the money illegally transferred into his IRS account. He got caught and had to pay it back."

[1] Respondents amended their complaint twice. The second amended complaint was served in October 2019, a little over a year after the original complaint. That complaint added new defamation claims and included a claim for tortious interference with prospective economic advantage. The tortious-interference claim was dismissed prior to trial.

Stemm moved for partial summary judgment alleging, as relevant here, that 34 of the 35 remaining defamation claims asserted by respondents were barred by the statute of limitations. The district court granted Stemm's motion with regard to three statements but determined that the rest of respondents' claims were timely. Pursuant to a pretrial stipulation, respondents' claims were further limited to include only statements Stemm made alleging that respondents had been convicted of crimes or engaged in criminal behavior.

Following a five-day trial, the jury returned a verdict finding Stemm liable for four defamatory statements about Kautzman, seven statements about Dourgarian, and seven statements about TempWorks. The jury awarded damages in the amount of $20,000 per claim. Stemm moved for a new trial alleging that there were trial irregularities in the first trial, that the jury award was excessive, and that errors of law occurred at trial. The district court denied his motion.

DECISION

In his appeal, Stemm asserts that the district court: (1) abused its discretion in excluding his tax-law expert; (2) abused its discretion by providing an erroneous jury instruction; and (3) erred by allowing respondents' defamation claims to go before a jury because the statements were made outside the two-year statute of limitations for defamation claims. We address each in turn.

I. The district court did not abuse its discretion when it excluded testimony by Stemm's tax expert.

Stemm challenges the district court's decision to grant respondents' motion in limine to exclude testimony by his tax expert. We review a district court's exclusion of expert testimony for abuse of discretion. *State v. Griese*, 565 N.W.2d 419, 425 (Minn. 1997).

Stemm sought to have his tax expert opine at trial "that it is accurate to describe TempWorks' transfer, to its own employment tax account, of the employment tax funds of [its client], as stealing the tax funds of [the client]." The district court did not provide its reasoning for granting respondents' motion to exclude this testimony, but respondents argued to the district court that the testimony should be excluded because it constituted a legal opinion on one of the ultimate issues in the case—whether TempWorks "stole" tax money.

A district court may admit expert testimony if the expert's specialized knowledge will assist the fact-finder "to understand the evidence or to determine a fact in issue." Minn. R. Evid. 702. "The basic consideration in admitting expert testimony under Rule 702 is the helpfulness test—that is, whether the testimony will assist the [fact-finder] in resolving factual questions presented." *State v. Grecinger*, 569 N.W.2d 189, 195 (Minn. 1997). Under this test, expert testimony that provides an opinion on the ultimate legal issues in a case is deemed not helpful and is not allowed. *See State v. DeWald*, 463 N.W.2d 741, 744 (Minn. 1990) (explaining that expert testimony that "embraces legal conclusions or terms of art" is not admissible); *accord State v. Patzold*, 917 N.W.2d 798, 808 (Minn. App. 2018)

(stating that "ultimate conclusion testimony which embraces legal conclusions or terms of art is not considered helpful to the jury" (quotation omitted)), *rev. denied* (Minn. Nov. 27, 2018).

Here, respondents claimed that they were falsely accused of stealing money from a client's payroll tax account. Truth is a complete defense to a defamation claim. *Stuempges v. Parke, Davis & Co*., 297 N.W.2d 252, 255 (Minn. 1980). Thus, the tax expert's opinion that respondents in fact committed a crime by their actions constitutes an opinion on one of the ultimate legal issues in the case because the truth or falsity of the statement is dispositive of the question of whether it is defamatory. We therefore discern no abuse of discretion by the district court in excluding the tax expert's opinion.

II. The district court did not abuse its discretion by giving the tax-law instruction.

Stemm argues that the district court erred by providing the jury a tax-law instruction that materially misstated the law. We review challenges to jury instructions under an abuse-of-discretion standard. *Hilligoss v. Cargill, Inc*., 649 N.W.2d 142, 147 (Minn. 2002).

District courts generally have "considerable latitude" in choosing jury instructions. *Morlock v. St. Paul Guardian Ins. Co.*, 650 N.W.2d 154, 159 (Minn. 2002). But "a district court abuses its discretion if the jury instructions confuse, mislead, or materially misstate the law." *State v. Taylor*, 869 N.W.2d 1, 14-15 (Minn. 2015) (quotation omitted). Therefore, a new trial is required if the jury instruction was erroneous and such error was prejudicial to the respondent. *Lewis v. Equitable Life Assur. Soc'y. of the U.S.*, 389 N.W.2d 876, 885 (Minn. 1986).

The jury instruction at issue here reads as follows, with the objected-to portion shown in italics:

> Generally, once money is paid into the account of a taxpayer, by whatever party, those funds are the property of the taxpayer and only the taxpayer is authorized to claim or receive a refund, or return of those funds. However, certain exceptions exist to this general rule, which include: *when a tax payment is made on behalf of a taxpayer but such taxpayer commits fraud against the payor of the tax payment related to the existence of employees*, when the funds are transferred under protest to clear a tax lien on a property transaction, or where the third party transmitted the funds through administrative error.

(Emphasis added.) Stemm objects that the italicized language is not in any of the jury-instruction guides or caselaw but is taken instead from an IRS Action on Decision. *In Re Chicago, Milwaukee, St. Paul & Pac. R.R. Co. v. United States*, 1970 WL 23227 (IRS AOD Nov. 16, 1970). In that case, a taxpayer-employer requested a refund when they were defrauded by an employee who was collecting wages on behalf of himself and a fictitious employee. *Id.* at *1. In the Action on Decision, the IRS decided not to appeal the federal district court's determination that the payroll taxes withheld by the employer for the fictional taxpayer should be treated as an overpayment and that the employer was thereby entitled to a refund. *Id.* at *2; *see Chicago, Milwaukee, St. Paul & Pac. R.R. Co. v. United States*, 1970 WL 414 (N.D. Ill. Sept. 25, 1970).

Stemm argues that the Action on Decision does not support the idea that there is an exception to the general rule that an employer cannot request a refund of taxes once withheld. But that is what the federal district court decided. In that case, the employer paid payroll taxes to the IRS on behalf of an employee who did not in fact exist. *Chicago,*

Milwaukee, 1970 WL 414, at *1. The district court determined that the employer was entitled to a refund for the payroll taxes and the IRS did not appeal that outcome. *Id.* at *2; *Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 1970 WL 23227, at *2. In this regard, we note that Stemm's own tax expert was not of the opinion that this case misstated the law, only that it should be accorded little weight given its narrow nature.

Stemm also argues that the instruction confused the jury as to the relevant legal principle to apply. This court must consider jury instructions as a whole and review them "to determine whether they misstate or confuse a principle of law applicable to the case." *Domagala v. Rolland*, 787 N.W.2d 662, 671 (Minn. App. 2010) (quotation omitted), *aff'd*, 805 N.W.2d 14 (Minn. 2011). Here, there is no indication that this instruction confused the jury. In *Domagala*, the case cited by Stemm to support his claim, the district court gave conflicting instructions, and the jury asked a question reflecting its confusion about this conflict. *Id.* at 671-72. Here, there were no contradictions in the instructions and the jury asked no questions of the court.

Finally, a new trial is not required, even if a jury instruction is erroneous, unless such error was prejudicial to Stemm. *Lewis*, 389 N.W.2d at 885. A jury instruction is prejudicial if a more accurate instruction would have changed the outcome in the case. *George v. Est. of Baker*, 724 N.W.2d 1, 10 (Minn. 2006). A jury instruction is not prejudicial if there is ample evidence to support the jury's findings. *Lewis*, 389 N.W.2d at 885.

Stemm argues that he was prejudiced by the jury instruction because it gave the jury the impression that TempWorks acted pursuant to a lawful exception when it sought to

have the funds transferred from the client's payroll tax account to TempWorks' account. But the objected-to language in the jury instruction only addresses fraud "related to the existence of employees." Here, as Stemm argues in his brief to this court, the fraud alleged by TempWorks against the client was that the client overstated invoices, not that the client created fictitious employees. Thus, it does not appear that the exception is even applicable to the facts in this case. This greatly reduces the risk of prejudice.

The jury here had a full opportunity to hear the testimony of the witnesses and the parties' attorneys addressed this issue at closing arguments. In addition, we note that the jury found liability on some statements claiming theft of the tax funds, but not all. Consequently, we are not persuaded that the objected-to language was prejudicial. We therefore reject Stemm's argument that he is entitled to a reversal of the verdict and a new trial based on the jury instruction.

III. Stemm forfeited his statute-of-limitations argument by not raising it before the district court.

Stemm argues that the district court erred when it failed to apply the two-year statute of limitations to the defamatory statements asserted in respondents' second amended complaint because the new allegations did not relate back to the original complaint. Respondents contend that Stemm's statute-of-limitations argument was forfeited because it is a new legal theory raised for the first time on appeal. Respondents also contend that the statute-of-limitations argument is moot under Minnesota Rule of Civil Appellate Procedure 103.04 because it did not affect the final judgment.

Stemm brought a motion for partial summary judgment before the district court on the issue of the statute of limitations, but that argument was premised on the single-publication rule to the effect that the statute of limitations begins to run when a statement is first made, even if the statement is republished at a later time. *See, e.g.*, *Church of Scientology of Minn. v. Minn. State Med. Ass'n Found.*, 264 N.W.2d 152, 155 (Minn. 1978). Under that rule, republications of the same statement in a magazine, or other mass media, will not trigger the running of a new statute of limitations. *Id.* The district court rejected Stemm's argument that the single-publication rule was applicable under the facts presented in this case. The court reasoned that the single-publication rule did not apply because the challenged statements were published on different online forums and differed enough in wording that they did not constitute a republication under the rule.

Stemm now puts forward a different theory to support his argument that the new allegations asserted in the second amended complaint are barred by the statute of limitations. He asserts, for the first time on this appeal, that the new allegations are time-barred because they do not relate back to the original complaint, which was served over a year before the second amended complaint. Under Minn. R. Civ. P. 15.03, if a claim or defense asserted in an amended pleading "arose out of the conduct, transaction or occurrence set forth . . . in the original pleading, the amendment relates back to the date of the original pleading." Stemm argues that, since the district court ruled that the new allegations in the second amended complaint were different enough from the statements in the original complaint such that the single-publication rule did not apply, the statements cannot relate back to the original complaint. He thus maintains that any of the new

statements in the second amended complaint made more than two years before service of the second amended complaint should have been dismissed as time-barred.

Respondents maintain, however, that because Stemm failed to assert this theory before the district court, he forfeited it and we should decline to review the issue. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (holding that a party cannot "obtain review by raising the same general issue litigated below but under a different theory"); *Crowley v. Meyer*, 897 N.W.2d 288, 293 (Minn. 2017) (quoting this aspect of *Thiele*). We agree. Here, Stemm failed to assert the relation-back theory before the district court. We thus conclude that Stemm failed to preserve this argument for appeal, and we decline to review it. Because we decline review on this basis, we need not address respondents' mootness argument.

Affirmed.