STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2141

Patrick Longbehn,
Appellant,

vs.

Robin Schoenrock,
Respondent.

Filed August 3, 2010
Reversed and remanded
Johnson, Judge

Carlton County District Court
File No. 09-C5-01-000681

Thomas M. Skare, Cloquet, Minnesota (for appellant)

James W. Balmer, Falsani, Balmer, Peterson, Quinn & Beyer, Duluth, Minnesota (for respondent)

Considered and decided by Larkin, Presiding Judge; Johnson, Judge; and Stauber, Judge.

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

JOHNSON, Judge

Robin Schoenrock defamed Patrick Longbehn by referring to him as "Pat the Pedophile." Yet to be determined is the amount of general damages for which Schoenrock is liable. That issue was submitted in May 2009 to a Carlton County jury,

which concluded that Longbehn is not entitled to any general damages. On appeal, Longbehn argues that he should be given a new trial because the jury instructions and the special-verdict form erroneously required him to prove that he actually was harmed by Schoenrock's defamatory statement. We agree and, therefore, reverse the district court's denial of Longbehn's motion for a new trial and remand for a new trial on the amount of general damages.

FACTS

This is the third appeal in this case, which arises from an oral statement made by Schoenrock in January 2001, in which he referred to Longbehn as "Pat the Pedophile." Longbehn was 34 years old at the time and was romantically involved with an 18-year-old woman. Longbehn was employed by the Moose Lake Police Department as a full-time police officer, but the police department terminated his employment a few weeks later. When Longbehn inquired into the reason for his termination, he was told that the decision was made in part because he had lost credibility in the community. Longbehn later was hired by the Minnesota Department of Corrections, but he was terminated from that position before completing his training because he assaulted his girlfriend, who was a coworker. Shortly thereafter, Longbehn sought treatment at a psychiatric facility. *See generally Longbehn v. Schoenrock*, 727 N.W.2d 153, 157 (Minn. App. 2007) (*Longbehn II*); *Longbehn v. City of Moose Lake*, No. A04-1214, 2005 WL 1153625, at *1 (Minn. App. May 17, 2005) (*Longbehn I*).

Longbehn commenced this action against Schoenrock and two other defendants in May 2001. Longbehn's defamation claim against Schoenrock first went to trial in August

2003, but the district court dismissed it with prejudice without submitting it to the jury. On Longbehn's appeal, this court reversed the dismissal of Longbehn's defamation claim against Schoenrock and remanded the case to the district court for a new trial. *Longbehn I*, 2005 WL 1153625, at *10-11.

The case was tried for a second time in October and November of 2005. The jury found in favor of Longbehn on the defamation claim and awarded him damages, including $230,000 for past and future harm to reputation, mental distress, humiliation, and embarrassment; $3,000 for future health care expenses; and $90,000 for past and future wage loss. *Longbehn II*, 727 N.W.2d at 158. In November 2005, Schoenrock moved for judgment as a matter of law. In April 2006, the district court granted Schoenrock's motion. The district court concluded, among other things, that Schoenrock's statement was not defamatory *per se*. The district court also concluded that the evidence was insufficient to support the award of general damages because Longbehn did not prove that Schoenrock's statement caused those damages. On Longbehn's appeal, this court concluded that Schoenrock's statement was defamatory *per se*. *Id.* at 159. We also concluded that Longbehn could recover general damages without proving that the defamatory statement caused him actual harm. *Id.* at 161. But we further concluded that the jury's award of "general damages far exceeds the amount of past and future harm to appellant's reputation, mental distress, humiliation, and embarrassment that would normally flow from a publication of this kind." *Id.* at 163. Accordingly, we reversed the district court's entry of judgment as a matter of law in favor of Schoenrock and remanded for a new trial on the issue of general damages. *Id.*

The case went to trial for a third time in May 2009. The jury returned a special-verdict form as follows:

> 1. Did the Plaintiff suffer harm to his reputation and standing in the community from the Defendant's use of the defamatory nickname on the one isolated occasion?
>
> Answer: Yes _____ No __x__
>
> 2. Did the Plaintiff suffer mental distress from the Defendant's use of the defamatory nickname on the one isolated occasion?
>
> Answer: Yes _____ No __x__
>
> 3. Did the Plaintiff suffer humiliation from the Defendant's use of the defamatory nickname on the one isolated occasion?
>
> Answer: Yes _____ No __x__
>
> 4. Did the Plaintiff suffer embarrassment from the Defendant's use of the defamatory nickname on the one isolated occasion?
>
> Answer: Yes _____ No __x__
>
> If your answers to any of the above were "Yes," then answer Question 5.
>
> 5. What amount of money will fairly and adequately compensate the Plaintiff for damages caused by the Defendant's use of the defamatory nickname on the one isolated occasion:
>
> a. Harm to his reputation and standing in the community? $ _____
>
> b. Mental distress $ _____

c. Humiliation $ _____

d. Embarrassment $ _____

Because the jury answered each of the first four interrogatories in the negative, it did not answer the fifth interrogatory. Consistent with the jury's special verdict, the district court entered judgment in favor of Schoenrock. In June 2009, Longbehn moved for judgment as a matter of law or, in the alternative, a new trial. In August 2009, the district court denied Longbehn's motion. Longbehn appeals.

D E C I S I O N

Longbehn raises several issues on appeal. We construe his appellate brief to make three general arguments. All of Longbehn's arguments implicate rule 59.01 of the Minnesota Rules of Civil Procedure, which "establishes the causes for which a court may grant a new trial and limits the grounds for a new trial to those causes." *Clifford v. Geritom Med., Inc.*, 681 N.W.2d 680, 686 (Minn. 2004). One potential ground for a new trial is "[e]rrors of law occurring at the trial." Minn. R. Civ. P. 59.01(f). Paragraph (f) of rule 59.01 permits a new trial if a district court erred in its instructions to the jury or in its verdict form, *Halla Nursery, Inc. v. Baumann-Furrie & Co.*, 454 N.W.2d 905, 910-11 (Minn. 1990), or in its rulings on the admissibility of evidence, *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 46 (Minn. 1997). We apply an abuse-of-discretion standard of review to a district court's denial of a motion for a new trial. *Halla Nursery*, 454 N.W.2d at 910.

I. Motion for New Trial

Longbehn first argues that the district court erred by denying his alternative motion for a new trial on the ground that the jury instructions and special-verdict form improperly required the jury to find actual harm before awarding him general damages.

A district court "has broad discretion both in writing jury instructions and in framing special verdict questions." *Dang v. St. Paul Ramsey Med. Ctr.*, 490 N.W.2d 653, 658 (Minn. App. 1992), *review denied* (Minn. Dec. 15, 1992). A district court does not commit error if its instructions "fairly and correctly state the applicable law." *Hilligoss v. Cargill, Inc.*, 649 N.W.2d 142, 147 (Minn. 2002). But a district court abuses its discretion if its instructions materially misstate the applicable law. *Rowe v. Munye*, 702 N.W.2d 729, 735 (Minn. 2005); *Youngquist v. Western Nat'l Mut. Ins. Co.*, 716 N.W.2d 383, 385-86 (Minn. App. 2006). We apply an abuse-of-discretion standard of review to a district court's jury instructions. *Hilligoss*, 649 N.W.2d at 147.

In this case, the challenged portion of the jury instructions is as follows:

> A person is liable for the general harm *which results from* the defamatory statement.
>
> Your duty as a jury is to determine the amount of damages, if any, *that the plaintiff sustained by* the defendant's use of that nickname. In making your decisions, the court has determined as a matter of law that, number one, the defendant used the offensive nickname on one isolated occasion.
>
> Number two, at the time he did so the plaintiff was commonly known in the Moose Lake community by this derogatory name.

> Number three, the defendant's use of the nickname was not a substantial factor in bringing about the plaintiff's termination by the Moose Lake Police Department.
>
> And number four, that the defendant's use of the nickname did not cause the plaintiff any loss of prospective employment and cannot be viewed as a legal cause of any difficulty the plaintiff may encounter in trying to obtain future employment.
>
> There are presumed damages in defamation cases, and this is defamation per se. The only question for you to decide, then, as you see on the special interrogatories, is the amount of money the plaintiff is entitled to recover or receive for:
>
> One, harm to his reputation and standing in the community.
>
> Two, mental distress.
>
> Three, humiliation.
>
> Four, embarrassment.
>
> No evidence of actual harm is required.
>
> In your assessment of the general damages, you may consider the character of the plaintiff, the plaintiff's general standing and reputation in the community, the character of the defamatory publication, the extent of dissemination by the defendant, and the extent and duration of the defendant's publication.
>
> *A party asking for damages must prove the nature, extent, duration and consequences of his harm*. You must must not decide damages based on speculation or guess.

(Emphasis added.) In addition, each of the first four interrogatories of the special-verdict form asked whether Longbehn "suffer[ed]" some form of harm "from the Defendant's use of the defamatory nickname."

Longbehn contends that the district court's instructions and verdict form are inconsistent with this court's prior opinion, in which we held, "When a statement is defamatory per se, as is the case here, . . . general damages are presumed, and thus *a plaintiff may recover without any proof that the defamatory publication caused him or her actual harm*." *Longbehn II*, 727 N.W.2d at 160 (emphasis added). We explained in our prior opinion that, "because respondent's statement is defamatory per se, general damages are presumed and appellant may recover without any proof of actual harm." *Id.* at 161. We further stated that, despite "the absence of proof," general damages may be recovered based on the jury's assessment of the "harm that 'would normally be assumed to flow from a defamatory publication of the nature involved.'" *Id.* at 162 (quoting Restatement (Second) of Torts § 621 cmt. a (1977)). Our prior opinion in *Longbehn II* is consistent with *Becker v. Alloy Hardfacing & Eng'g Co.*, 401 N.W.2d 655 (Minn. 1987), in which the supreme court reaffirmed the rule "that where a defendant commits libel per se, general . . . damages are recoverable without proof of actual damages." *Id.* at 661. In *Becker*, the supreme court declined to "overrule long-established precedent" and instead "reaffirm[ed] the rule that where a defendant's statements are defamatory per se, general damages are presumed." *Id.*

Longbehn is correct. The district court's jury instructions are erroneous because, where highlighted above, they required Longbehn to prove that he actually suffered harm because of Schoenrock's defamatory statement. The interrogatories of the special-verdict form are erroneous because they asked the jury whether Longbehn "suffer[ed]" harm "from the Defendant's use of the defamatory nickname." Accordingly, the district court

erred by denying Longbehn's motion for a new trial on this ground. On remand, the district court shall revise its instructions. The district court also shall not include the first, second, third, and fourth interrogatories in its special-verdict form; rather, the special-verdict form shall include only interrogatory number 5 and its subparts.

II. Other Instructions Issues

Longbehn also argues that the district court erred by including certain factual statements in the jury instructions and the special-verdict form. Our resolution of the issue discussed above in part I is sufficient to resolve this appeal. Nonetheless, because we are remanding for a new trial, and because the case already has been tried three times, we will analyze the additional issues raised by Longbehn's appeal in the hope that our analysis will help bring this case to its conclusion. *See In re Estate of Vittorio*, 546 N.W.2d 751, 756 (Minn. App. 1996) (recognizing that, for judicial economy, court of appeals may address issues that will arise on remand).

Longbehn asserts two additional errors in the jury instructions and the special-verdict form. First, Longbehn argues that the district court erred by "incorporat[ing] factual determinations of the court in its instructions to the jury." Longbehn refers to the portion of the district court's jury instructions that is excerpted above, specifically, the four enumerated sentences in the second, third, fourth, and fifth paragraphs. When Longbehn objected to that language, the district court responded by stating that it was applying the law of the case as provided in *Longbehn II*.

The doctrine of law of the case "is founded upon a policy which requires that issues once fully litigated be set at rest." *Lange v. Nelson-Ryan Flight Serv., Inc.*, 263

Minn. 152, 156, 116 N.W.2d 266, 269 (1962). The doctrine applies if an appellate court has ruled on a legal issue and remanded the case for further proceedings, in which event "[t]he issue decided becomes the 'law of the case' and may not be relitigated in the trial court or re-examined in a second appeal." *Sylvester Bros. Dev. Co. v. Great Cent. Ins. Co.*, 503 N.W.2d 793, 795 (Minn. App. 1993), *review denied* (Minn. Sept. 30, 1993). The law-of-the-case doctrine does not apply to purely factual issues. Rather, it applies only to legal issues, including legal conclusions arising from the application of law to a particular set of facts. *See Dean Van Horn Consulting Assocs., Inc. v. Wold*, 395 N.W.2d 405, 408 (Minn. App. 1986) (holding that prior opinion did "not establish the law of the case because the reasonableness of a restrictive covenant clause is a question of fact"); *see also Hudson v. Wakefield*, 711 S.W.2d 628, 630 (Tex. 1986) (stating that the law-of-the-case doctrine "only applies to questions of law and does not apply to questions of fact").

In *Longbehn II*, this court resolved various legal issues, which may not be relitigated. *See* 727 N.W.2d at 163. But to the extent that the district court's jury instructions recited facts that were taken from our prior opinion, the district court erred. Those factual statements were included in our prior opinion to give context to our discussion of the legal issues that followed; the factual statements were not intended to reflect the resolution of legal issues. A jury instruction "should not assume the existence of facts in controversy, or lay too much emphasis on particular facts or the testimony of particular witnesses." *Barnes v. Northwest Airlines, Inc.*, 233 Minn. 410, 421, 47

N.W.2d 180, 187 (1951). In this case, the district court should not have relied on the law-of-the-case doctrine to constrain the jury's factfinding role.

Second, Longbehn argues that the district court erred by including the phrase, "on the one isolated occasion," in each of the first four interrogatories. We fully recognize that "[d]rafting special verdict forms is a matter within a [district] court's sound discretion," *Domtar, Inc. v. Niagara Fire Ins. Co.*, 563 N.W.2d 724, 734 (Minn. 1997), but we see no justification for including that phrase in the interrogatories of the special-verdict form. The phrase is argumentative and tends to unfairly minimize Schoenrock's conduct and its consequences. "A court, through its instruction, is not authorized to give prominence to and emphasize particular facts disclosed by the evidence, thus singling out elements or views upon the controversy which were proper for argument and discussion by counsel . . . ." *Barnes*, 233 Minn. at 420, 47 N.W.2d at 187. In this case, the district court should not have repeatedly included the phrase "on the one isolated occasion" in the special-verdict form.

III. Evidentiary Issues

Longbehn last argues that the district court erred in its rulings on three evidentiary issues. "The admission of evidence rests within the broad discretion of the [district] court and its ruling will not be disturbed unless it is based on an erroneous view of the law or constitutes an abuse of discretion." *Kroning*, 567 N.W.2d at 45-46 (quotation omitted). Again, our resolution of the issue discussed above in part I is sufficient to resolve this appeal, but we will analyze the evidentiary issues raised by Longbehn to assist the district court on remand. *See Vittorio*, 546 N.W.2d at 756.

A. Admission of Reputation Evidence

Longbehn first argues that the district court erred by admitting evidence offered by Schoenrock concerning Longbehn's reputation. Longbehn has identified three witnesses who provided testimony of this type: Robin Schoenrock, Sandy Schoenrock, and Dale Heaton. He contends that the district court should have excluded the evidence for three reasons: lack of relevance, lack of foundation, and hearsay.

First, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Minn. R. Evid. 401. "Evidence that is not relevant is not admissible." *State v. Jenkins*, 782 N.W.2d 211, 230 (Minn. 2010); *see* Minn. R. Evid. 402. One leading commentator has explained that evidence of a plaintiff's pre-existing reputation is highly probative in a defamation case:

> The plaintiff's own existing reputation is of course central to the estimate of damages . . . .
>
> . . . . If the defamation plaintiff already has a bad reputation on the topic involved in the defamation, her damages are at least arguably less than if she enjoyed a good reputation or no reputation at all. Consequently, evidence of the plaintiff's reputation prior to publication of defamatory material is highly relevant in most cases to show that damages should be limited.

Dan B. Dobbs, *The Law of Torts* § 422, at 1190 (2000). Minnesota caselaw is consistent with this view: "The bad character of a plaintiff in a libel action may be shown in mitigation of damages" by presenting evidence of the plaintiff's "general reputation in that respect in the community in which he lives." *Lydiard v. Daily News Co.*, 110 Minn.

140, 145, 124 N.W. 985, 987 (1910); *see also Krulic v. Petcoff*, 122 Minn. 517, 519-20, 142 N.W. 897, 898 (1913). Thus, Schoenrock's evidence concerning Longbehn's reputation is relevant to the jury's consideration of Longbehn's request for general damages.

Second, if "evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion." Minn. R. Evid. 405(a). Longbehn's contention that Schoenrock's reputation evidence lacks foundation appears to be based on the second-hand nature of the facts to which the witnesses testified. A foundation must be laid showing that each witness is familiar with "the common repute of such plaintiff in the local community." *Krulic*, 122 Minn. at 520, 142 N.W. at 898. It appears that Schoenrock's witnesses had personal knowledge of the facts to which they testified, namely, Longbehn's pre-existing reputation in the community, even if they did not possess personal knowledge of the facts or reasons underlying that reputation. *See* Minn. R. Evid. 602. Thus, Schoenrock's evidence concerning Longbehn's reputation is not necessarily inadmissible for lack of foundation.

Third, as a general rule, an out-of-court statement is considered hearsay and is inadmissible to prove the truth of the matter asserted. Minn. R. Evid. 801, 802. But the rules of evidence make an exception for hearsay evidence concerning the "[r]eputation of a person's character among associates or in the community." Minn. R. Evid. 803(21). Thus, Schoenrock's evidence concerning Longbehn's reputation is not inadmissible hearsay.

B. Admission of Department of Corrections Letter

Longbehn next argues that the district court erred by admitting into evidence a copy of a January 2002 letter from the Department of Corrections to Longbehn stating the reasons for the termination of his employment. Longbehn contends that the district court should have excluded the letter on the grounds of lack of relevance and lack of foundation.

In response to Longbehn's relevance objection at trial, Schoenrock stated that the letter was relevant to the reasons why Longbehn was hospitalized. Longbehn's testimony implied that he sought treatment because of Schoenrock's defamatory statement; Schoenrock sought to prove that Longbehn sought treatment because he had lost his job. The district court overruled the objection because it determined that the letter was relevant. Longbehn has not demonstrated that the district court abused its discretion in overruling the objection.

Longbehn also argues that the district court erred by admitting the letter because Schoenrock failed to lay the proper foundation for its admission under the business-record exception to the hearsay rule. *See* Minn. R. Evid. 803(6). But Longbehn failed to assert such an objection to the exhibit. Thus, the argument has been forfeited.

C. Exclusion of Medical Records

Longbehn last argues that the district court erred by excluding from evidence a copy of his medical records. At trial, Schoenrock objected to the exhibit on the ground that the records are not relevant to the issue of general damages. The district court sustained the objection. Longbehn contends that the medical records are relevant to the

reason for his hospitalization. Longbehn has not demonstrated that the district court abused its discretion in sustaining the objection in light of the purposes of general damages. In addition, Longbehn acknowledged that statements in the medical records about the reason for his hospitalization are based on his own statements to the treating medical professionals, and Longbehn was not prevented from testifying about the reason for his hospitalization. Furthermore, the deposition of Longbehn's treating physician, which addressed the same issue, was admitted into evidence. Thus, Longbehn cannot demonstrate that he was prejudiced by any error in excluding this exhibit.

In sum, for the reasons stated in part I of this opinion, we reverse the judgment of the district court and remand the case to the district court for a new trial on the amount of general damages.

Reversed and remanded.