STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1014

Kevin Holler, et al.,
Appellants,

vs.

Hennepin County, et al.,
Respondents.

Filed February 3, 2014
Reversed and remanded
Ross, Judge

Hennepin County District Court
File No. 27-CV-12-19807

Patrick T. Tierney, Caitlin A. Talarico, Collins, Buckley, Sauntry & Haugh, P.L.L.P., St. Paul, Minnesota (for appellants)

Michael O. Freeman, Hennepin County Attorney, Paul R. Hannah, Assistant County Attorney, Rebecca Stark Holschuh, Assistant County Attorney, Minneapolis, Minnesota (for respondents)

Considered and decided by Halbrooks, Presiding Judge; Peterson, Judge; and Ross, Judge.

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

ROSS, Judge

Real property owners Kevin and Valerie Holler did not want to sell land that the Hennepin County Board of Commissioners wanted the county to acquire for a new

library. After two county commissioners commented publicly and critically about the Hollers' alleged negotiation tactics, and the board then passed a resolution blaming the Hollers for the failed library project, the Hollers sued the county and the commissioners for defamation. The district court dismissed the Hollers' complaint, reasoning that the complaint failed to identify any particularized false and reputation-damaging statements of fact. We reverse because the complaint alleges that the commissioners made multiple statements that, taken as a whole, a factfinder could find to be a reputation-damaging, false declaration that the Hollers engaged in "manipulation of [the] process" by offering their property for sale, effectively luring the county to buy adjacent property, then receiving a fair-market offer from the county to buy their property and then, rather than being "partners with us on building a new library," they "all of a sudden . . . [took] the property off the market" and demanded that the county pay "one million [dollars] for the . . . property."

FACTS

Kevin and Valerie Holler are appealing the district court's grant of the respondents' motion to dismiss on the pleadings, so for our review we accept as true the factual allegations in their complaint. *Sipe v. STS Mfg., Inc.*, 834 N.W.2d 683, 686 (Minn. 2013).

According to the complaint, Hennepin County approved a plan in April 2008 to construct a new library in Minneapolis. The plan did not specify a location. The county sent letters to various land owners in June 2008 indicating that it might want to purchase their property. Kevin and Valerie Holler received one of the letters. The Hollers had

listed their property for sale in early 2007. But by August 2007, almost a year before the county sent them the letter, they had already taken the property off the market and informed the Minneapolis zoning inspector of their intent to occupy it. They had not acted on their intention by June 2008, and they did not respond to the county's letter.

Despite having received no response from the Hollers indicating their interest to sell their property to the county (or to anyone else), in December 2008, the county began purchasing lots adjacent to the Hollers' property. That same month or the next, again without hearing from the Hollers that they were interested in selling, the county board passed a resolution declaring the county's intent to purchase the Hollers' property. The Hollers learned of that resolution in January 2009, and they immediately asked the county to remove their property from it. They told the county that they had decided back in early 2007 not to sell the property, and they suggested other sites for the proposed library.

The Hollers allege that Hennepin County commissioners Mike Opat and Mark Stenglein then attacked them publicly, publishing defamatory comments critical of their supposed negotiation tactics. The complaint identifies three statements. The first is found in an article published by the Dolan Media Newswire on October 27, 2010, which recounts an interview with Stenglein under the headline, *$12 Million Webber Park Library Project in North Minneapolis Is Overdue*. The complaint cites part of Stenglein's comments:

> Mark Stenglein, third district commissioner, said Wednesday that Valerie Holler "had a sign on her house, a 'for sale' sign, as big as the IDS building, in 2007."

> "[S]o all of a sudden we want to buy the house and she takes the property off the market," Stenglein said, noting that the Hollers had balloons and flags around the "for sale" sign.

The complaint next identifies a January 1, 2012 article published by Camden Community News. In an article entitled, *Q&A on Status of Webber Library*, Opat reportedly stated the following:

> [W]ith the Holler rental property posted for sale in 2007, the County purchased the other sites necessary for an ideal, state-of-the-art library to be built on the Parkway. Only after those purchases did the Hollers actively oppose the sale of their rental property and commercial building.
>
> Pursuant to that property's availability, the County purchased the four nearby properties and met several times with the Hollers, attempting to purchase their rental property. Our staff reported to us that they would only sell for one million or more, then insisted that the property was no longer for sale.
>
> But we will not agree to build in a sub-par location due to a single property owner—not after successfully acquiring four nearby parcels, and especially not after the remaining property was once listed for sale.
>
> We will not pay one million [dollars] for the rental property that's needed. We will wait and hope that its owners, who once had the property for sale, will accept fair-market value and allow the community to move forward on this important project. Despite their manipulation of this process, the Hollers are long-time residents in our community and I hope they will one day be partners with us on building a new library.

The final allegedly defamatory statement was a Hennepin County resolution that scrapped the construction of the new library altogether. The resolution, offered by Stenglein and Opat on May 22, 2012, blamed the Hollers for the project's failure:

> **WHEREAS,** in 2007 the County Board voted to create Capital Project 0030322, the New North Minneapolis (Webber Park) Library, which would replace the existing Webber Library with a new, green, state-of-the-art facility; and
>
> **WHEREAS,** County staff subsequently assembled portions of a site for the new Library adjacent to Victory Memorial Drive, which would optimize the beauty of the parkway and leverage the improvements made by the Victory Memorial Drive Task Force; and
>
> **WHEREAS,** the portion of the proposed library site at 1423 45th Ave N., [the Hollers' property,] was listed for sale in 2007; and
>
> **WHEREAS,** when County staff sought to negotiate a sale of the 45th Ave N. property, the owners stated that the property was no longer for sale and they were not interested in selling . . . .

Based on these statements, the Hollers sued Hennepin County and Opat and Stenglein for defamation. The county and commissioners moved to dismiss the complaint on the pleadings, asserting that the Hollers had failed to state a claim on which relief could be granted. The district court agreed and dismissed the case, deeming the statements to be nondefamatory as a matter of law.

The Hollers appeal.

D E C I S I O N

Kevin and Valerie Holler maintain that the district court erred by dismissing their defamation complaint for failure to state a claim on which relief can be granted. Minn. R. Civ. P. 12.02(e). We accept the factual allegations in the complaint as true and draw all inferences in favor of the Hollers as the nonmoving parties. *See Hebert v. City of Fifty*

Lakes, 744 N.W.2d 226, 229 (Minn. 2008). We then decide, de novo, whether the complaint sets forth a legally sufficient claim for defamation. *Id.*

To survive a motion to dismiss, the Hollers' complaint had to identify allegedly defamatory statements that were communicated to a third party, that are false, and that tend to harm their reputation or lower them in the community's estimation. *See Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 255 (Minn. 1980). The Hollers contend that their complaint adequately pleads all elements. The county and commissioners concede that the statements were communicated to a third party but challenge the other elements. They also contend that the statements are protected by legislative privilege.

Statements False?

Unless a statement is capable of being proven false, it cannot support a defamation suit. This includes opinions, which sometimes imply provably false statements. We believe this accurately states the law despite some confusion in our caselaw, which has included the occasional mistaken assertion that only statements of facts, but not opinions, are actionable under Minnesota's defamation law regardless of whether the complainant is a public official. *Compare Bradley v. Hubbard Broad., Inc.*, 471 N.W.2d 670, 674 (Minn. App. 1991) ("Defamation actions arising from communications . . . are analyzed under Minnesota common law, which makes no distinction between statements of 'fact' and 'opinion.'"), *review denied* (Minn. Aug. 2, 1991), *and Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21, 110 S. Ct. 2695, 2707 (1990) ("We are not persuaded that, in addition to these protections, an additional separate constitutional privilege for 'opinion'

is required to ensure the freedom of expression guaranteed by the First Amendment."), *with Hunt v. Univ. of Minn.*, 465 N.W.2d 88, 93–94 (Minn. App. 1991) (declaring that *Milkovich* narrowed, but did not abolish, the supposed constitutional protection of opinions) *and Lund v. Chicago & Nw. Transp. Co.*, 467 N.W.2d 366, 369 (Minn. App. 1991) (citing and repeating *Hunt*), *review denied* (Minn. June 19, 1991); *but see also Weissman v. Sri Lanka Curry House, Inc.*, 469 N.W.2d 471, 473 (Minn. App. 1991) (declaring that "Minnesota common law makes no distinction between 'fact' and 'opinion'" and adding in a footnote, "We recognize that this analysis differs from that of the majority in *Lund*").

Defamation can stem only from false statements. *Stuempges*, 297 N.W.2d at 255. Because we accept the facts in the complaint as true, we review whether a statement is false as a question of law, de novo. *LeDoux v. Nw. Publ'g, Inc.*, 521 N.W.2d 59, 67 (Minn. App. 1994), *review denied* (Minn. Nov. 16, 1994). Even a literally false statement avoids defamation if it is "substantially accurate." *See Jadwin v. Minneapolis Star & Tribune Co.*, 390 N.W.2d 437, 441 (Minn. App. 1986). We compare the "gist" and the "sting" that an inaccurate statement produces with the "effect on the mind of the recipient which the precise truth would have produced" to determine whether it is substantially accurate. *Id.* (quotation omitted). A statement also is not defamatory if it reflects a "supportable interpretation" of an ambiguous underlying situation. *Hunter v. Hartman*, 545 N.W.2d 699, 707 (Minn. App. 1996), *review denied* (Minn. June 19, 1996).

The district court parsed the language of the allegedly defamatory statements here, and, assessing sentences in isolation, determined that the statements were mostly

nonactionable opinions, rhetoric, or hyperbole. To the extent the statements might be actionable declarations whose truthfulness can be measured, the district court also held that the county's and commissioners' particularized factual statements are actually true or substantially accurate. But we believe that the district court overlooked the allegedly defamatory representations considered in context. And we also are convinced that the truthfulness question is not so sure that it escapes jury scrutiny.

In context, Stenglein's statement that Mrs. Holler "had a sign on her house, a 'for sale' sign, as big as the IDS building, in 2007" is indeed hyperbole, but the hyperbole includes a factual inference when coupled with the next line of the article: "[S]o all of a sudden we want to buy the house and she takes the property off the market." Although the meaning of suddenness is subjective, the representation that the Hollers took the property off the market "all of a sudden" is an opinion that imbeds a fact. The jury could interpret the hyperbolic, opinionated sentences together as saying that the Hollers enthusiastically and openly sought to sell their house but then instantly removed it from the market as soon as the county indicated it wanted to buy it. If the Hollers' allegations about their conduct are true, a jury could interpret the commissioner's representation to be false.

Opat added to Stenglein's narrative by asserting, "[W]ith the Holler rental property posted for sale in 2007, the County purchased the other sites necessary for an ideal, state-of-the-art library to be built on the Parkway. Only after those purchases did the Hollers actively oppose the sale of their rental property and commercial building." In context, a jury could interpret the statement as saying that the county purchased adjoining

property for the library relying on the Hollers' property being on the market, and that "[o]nly after those purchases" did the Hollers remove their property from the market. But the complaint alleges a different story. According to the complaint, the Hollers took their property off the market by August 2007, before the county had revealed its interest in building a library near the Holler property. The county did not even approve its plan to construct the new library until April 2008 and it made no land purchases until December 2008. A jury might reasonably deem the declaration that the Hollers opposed the sale of their property "[o]nly after those purchases" to be false.

Opat's next line emphasizes the county's supposed reliance on the Hollers' actions, declaring, "Pursuant to that property's availability, the County purchased the four nearby properties and met several times with the Hollers, attempting to purchase their rental property." This says that the county bought the other properties "*pursuant to*," in other words, in reliance on, the Hollers' property's supposed "availability," even though, according to the complaint, the Hollers' property had not in fact been "available" for more than a year. The sentence further could be read to say that the county "met several times" with the Hollers to buy their property while it was still "available" for sale. Again, under this reasonable interpretation the statement would be untrue if factual representations in the complaint are true.

Opat's next line furthers the point: "Our staff reported to us that they would only sell for one million or more, then insisted that the property was no longer for sale." The "then" in this sentence informs the reader of the supposed sequence. A reasonable juror could read Opat's statement as declaring that *after* the county relied on the Hollers'

property being for sale when it made its purchases and later sent staff to meet with the Hollers to buy their still-available property, the Hollers demanded $1 million and "*then* insisted" it was no longer on the market. In context with the overall dispute and Opat's other statements, a reasonable juror could interpret this to mean that the Hollers claimed to have taken the property off the market only after the county made its other purchases and only after county personnel met with the Hollers to buy their still-available property. But the complaint alleges that the Hollers had removed the property from the market many months before either of those events and that they had even written a post-resolution letter to the county stating that their property was not available. A jury might reasonably find the statements to be false.

The next statement in Opat's article appears to be true only when read out of context. He asserted, "But we will not agree to build in a sub-par location due to a single property owner—not after successfully acquiring four nearby parcels, and especially not after the remaining property was once listed for sale." The line "once listed for sale" is arguably accurate only because it ambiguously omits *when* the property was "listed for sale" in relation to the other events. The problem is, the sentence comes in context with multiple others that have already asserted, arguably, that the property had still been "listed for sale" while the county was buying other properties and negotiating with the Hollers. So a reasonable overall interpretation of Opat's statements therefore removes the ambiguity and leaves the sentence open for a jury to determine its truthfulness.

A reasonable jury interpreting Stenglein's and Opat's statements overall and in context could find them untrue. The resolution that these two commissioners then

introduced seems on its face accurately to say that the Hollers put their property on the market "in 2007." But again, in context, it too may be read only to further the allegedly falsely described sequence of events. It first states that the county decided "in 2007" to build a new library; then it says that the county purchased nearby property for the library; then it says the Hollers put their property on the market; then it declares that "when County staff sought to negotiate a sale of the [Holler] property, the owners stated that the property was no longer for sale and they were not interested in selling." Again, according to the complaint, the Hollers had already taken their property off the market before the county purchased any other property and long before anyone from the county attempted to negotiate a purchase. And when jurors would be considering whether the resolution implies a false statement, they would have in mind its context with the earlier statements made by the same two commissioners who proposed it. These statements, construed on our assumption of an accurate complaint, do not necessarily reflect mere "supportable interpretations" of the truth. *See Hunter*, 545 N.W.2d at 707. We do not say that these and the other statements are false necessarily, we say only that a jury could reasonably deem them so.

Statements Defamatory?

Our next issue is whether the Hollers identified statements that a jury could find to have actually defamed them. *See Stuempges*, 297 N.W.2d at 255. The initial question of whether a statement is capable of conveying a defamatory meaning is a question of law that we review de novo. *Schlieman v. Gannett Minn. Broad., Inc.*, 637 N.W.2d 297, 307 (Minn. App. 2001). A statement is defamatory if it harms a person's reputation and

lowers him or her in the estimation of the community. *Stuempges*, 297 N.W.2d at 255. Published statements fall into three categories: plainly defamatory, plainly not defamatory, and arguably defamatory or not defamatory. *Toney v. WCCO Television, Midwest Cable & Satellite, Inc.*, 85 F.3d 383, 386 (8th Cir. 1996) (citing *Church of Scientology of Minn. v. Minn. State Med. Ass'n Found.*, 264 N.W.2d 152, 155 (Minn. 1978)). Whether a statement is defamatory depends on how ordinary people would interpret the language in light of the circumstances. *Gadach v. Benton Cnty. Co-Op. Ass'n*, 236 Minn. 507, 510, 53 N.W.2d 230, 232 (1952). If the statement could potentially harm the plaintiffs' reputations or subject them to ridicule or hate, a jury sitting as factfinder should decide whether the statement was in fact defamatory. *See Church of Scientology*, 264 N.W.2d at 155.

Under that standard, we disagree with the district court's conclusion that Opat's and Stenglein's statements were incapable of conveying a defamatory meaning. Indeed, we think the public declarations might be read specifically as *intending* to damage the Hollers' reputation to shame them into selling their property. After identifying them by name, and while denouncing the Hollers' decision not to sell as "manipulation" that would deprive "our community" of a "site[] necessary for an ideal, state-of-the-art library," Opat publicly urged, "I hope they will one day be partners with us [i]n building a new library." The full conclusion carries the apparently disparaging tone:

> We will wait and hope that its owners, who once had the property for sale, will accept fair-market value and allow the community to move forward on this important project. Despite their manipulation of this process, the Hollers are

> long-time residents in our community and I hope they will one day be partners with us on building a new library.

Ordinary members of the community reading Stenglein's and Opat's accounts could conclude, as it at least *appears* the declarants wanted them to conclude, that the Hollers are *not* now partners with the community, but rather, they are opportunistic manipulators who acted to take unfair advantage of "us"—the *real* community members. This seems to be precisely the sort of statement that could potentially harm the Hollers' reputations or subject them to ridicule or hate or diminished community esteem. A jury, rather than the district court, must therefore decide whether the statements were in fact defamatory.

This leaves only the issue of privilege. The district court did not decide the privilege issue. We generally do not decide issues not addressed by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). The issue also was not adequately briefed in the parties' arguments to this court. We therefore do not address it and leave it to the district court on remand.

Because the Hollers have sufficiently pleaded the elements of defamation, we reverse the district court's dismissal and remand the case for further proceedings.

Reversed and remanded.