**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A13-1103**

Jay Nygard,
Appellant,

vs.

Dennis Walsh,
Respondent.

**Filed February 3, 2014**
**Affirmed**
**Chutich, Judge**

Hennepin County District Court
File No. 27-CV-12-8821

Zorislav R. Leyderman, The Law Office of Zorislav R. Leyderman, Minneapolis, Minnesota (for appellant)

William L. Davidson, Eric J. Steinhoff, Lind, Jensen, Sullivan & Peterson, P.A., Minneapolis, Minnesota (for respondent)

Considered and decided by Rodenberg, Presiding Judge; Larkin, Judge; and Chutich, Judge.

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

**CHUTICH**, Judge

Appellant Jay Nygard challenges the dismissal of his claims for defamation, defamation per se, and negligence under Minnesota's law protecting public participation in government, known as the anti-Strategic Lawsuit Against Public Participation (anti-

SLAPP) law. *See* Minn. Stat. §§ 554.01–.05 (2012). He claims that the district court erred by finding that he did not meet the clear-and-convincing-evidence standard required by the statute and asserts that the district court abused its discretion by denying his motion for leave to conduct limited discovery. Because Nygard did not show, by the clear-and-convincing standard required by the anti-SLAPP statute, that a genuine issue of material fact exists concerning his claims of defamation, defamation per se, and negligence, we affirm the district court's dismissal with prejudice of these claims.

## FACTS

Appellant Jay Nygard and respondent Dennis Walsh live in the same neighborhood in Orono. On November 14, 2011, Walsh spoke at the Orono City Council meeting during the time reserved for citizen public comments. During a speech that lasted less than five minutes, Walsh cited alleged difficulties the neighborhood was having with Nygard, noted the level of taxes that Orono citizens pay to have a separate police department, and asked for a more responsive police force.

When describing the background underlying his request for more police attention, Walsh referenced a letter petition submitted to the mayor by a number of neighbors outlining issues with Nygard. He explained that neighbors hear Nygard's windmill, hear screaming and yelling from the Nygard home, and smell marijuana smoke in the alleyway. Walsh further stated that "in the past there's been a lot of issues, you know, violence issues where he's beat his son bloody. And he's had police issues called a number of times in his neighborhood just for that issue alone."

In addition, Walsh spoke of other issues that have "exacerbated the situation." He referenced the "windmill issue,"[1] in which "[Nygard] just thinks he can do whatever he want[s] to," and "the issue where he built a curb along the street and was told not to and everybody has just buried their head in the sand and just let him keep going." Walsh told the council how Nygard yells "at the top of his lungs in our neighborhood" that "nobody will . . . mess with me because I am Jay."

Walsh further explained that people in the neighborhood were worried about their safety. He noted that the police had not helped and that a police officer once told the neighbors, "[W]hy can't you just get along." Walsh concluded his remarks by asking the city for his neighborhood to receive "a little more attention" so "we don't have people's wives crying when they're listening to the screaming fests that are going on in the [Nygard] house."

Nygard filed a complaint in Hennepin County District Court against Walsh in April 2012 for defamation, defamation per se, and negligence for two of Walsh's statements at the Orono City Council Meeting in November 2011. In particular, Nygard took issue with the statements about him "beat[ing] his son bloody" and installing a curb along the street after he was told not to do so.

The following February, Walsh moved to dismiss the complaint under the anti-SLAPP statute. Minn. Stat. § 554.02 (2012). Nygard moved for leave to conduct limited discovery under the same statute in March 2013.

[1] The record shows that Nygard has been involved in a dispute with Orono concerning a wind turbine he erected on his property. *See City of Orono v. Nygard*, No. A12-0711 (Minn. App. Oct. 22, 2012).

In its May 2013 order, the district court granted Walsh's motion, finding that "Plaintiff has not proven his claims against Defendant by clear and convincing evidence" under the anti-SLAPP statute. Because the district court granted Walsh's motion, it determined that Nygard's motion for leave to conduct limited discovery was "moot." This appeal followed.

## D E C I S I O N

### I. Summary Judgment Under the Anti-SLAPP Statute

We review de novo a district court's grant of a motion to dismiss under the anti-SLAPP statute. *See Middle-Snake-Tamarac Rivers Watershed Dist. v. Stengrim*, 784 N.W.2d 834, 840–41 (Minn. 2010). Because both parties submitted additional evidence beyond the pleadings to the district court for consideration, and the district court considered the evidence, we review the case under the standard for summary judgment instead of the standard for a motion to dismiss on the pleadings. *See* Minn. R. Civ. P. 12.03. Although the district court was presented with a motion to dismiss instead of a motion for summary judgment, we review the case under the standard in which the case was actually decided by the district court. *Witzman v. Lehrman, Lehrman & Flom*, 601 N.W.2d 179, 185 (Minn. 1999).

When reviewing a grant of summary judgment, "we determine whether the district court properly applied the law and whether there are genuine issues of material fact that preclude summary judgment." *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010). Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with

the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03.

The anti-SLAPP statute states, "Lawful conduct or speech that is genuinely aimed in whole or in part at procuring favorable government action is immune from liability, unless the conduct or speech constitutes a tort or a violation of a person's constitutional rights." Minn. Stat. § 554.03 (2012). It applies "to any motion in a judicial proceeding to dispose of a judicial claim on the grounds that the claim materially relates to an act of the moving party that involves public participation." Minn. Stat. § 554.02, subd. 1. "Public participation" is defined as "speech or lawful conduct that is genuinely aimed in whole or in part at procuring favorable government action." Minn. Stat. § 554.01, subd. 6 (2012).

Our review of a motion to dismiss under the anti-SLAPP statute involves a two-step process. First, the moving party, Walsh, must demonstrate that the motion "materially relates to an act of the moving party that involves public participation." *Stengrim*, 784 N.W.2d at 841 (quotation omitted). Once this "minimal burden" is met, the burden shifts to the nonmoving party, Nygard, to demonstrate "by clear and convincing evidence that the acts at issue are not immune under Minn. Stat. § 554.03." *Id.*

### A. Public Participation

Nygard asserts that Walsh's statements "were not genuinely aimed at procuring favorable government action" because Orono already has a responsive police force and Walsh did not make clear what action he desired from the city council. Nygard further claims that Walsh's allegedly defamatory statements were "not integral" to any part of

the controversy, but were instead aimed at creating "ill-will" toward Nygard. He alleges that the district court erred by "consider[ing] Walsh's comments as a whole" instead of focusing on the specific statements that Nygard is alleging were defamatory.

Walsh responds that his purpose was to "obtain[] more attention from the police and city officials to deal with a disruptive neighbor." The record shows here that Walsh met his "minimal burden" of demonstrating that his speech met the public participation requirement.

Nygard is correct that a speech made to a government body is not automatically cloaked with immunity. Rather, Walsh "must make a threshold showing that the acts . . . are themselves public participation, i.e., 'speech . . . that is genuinely aimed in whole or in part at procuring favorable government action.'" *See id.* (quoting Minn. Stat. § 554.01, subd. 6). "[W]hether a communication is entitled to immunity under section 554.03 depends on the nature of the statement, the purpose of the statement, and the intended audience." *Freeman v. Swift*, 776 N.W.2d 485, 490 (Minn. App. 2009), *review denied* (Minn. Mar. 16, 2010). Where the statement has "no connection with [a] public project and controversy," no immunity exists. *See id.*

Applying these principles here, the record shows that Walsh's statements were genuinely aimed at procuring favorable government action–obtaining a more vigorous response from the police and city officials concerning a disruptive neighbor. Walsh detailed the concerns that neighbors had about Nygard's behavior to justify his request for greater police presence or attention from the city council. In making his plea to the city council, a government entity, he specifically referenced phone calls made to the city

that went unreturned and the city's inaction in enforcing ordinances before making a specific request for governmental action. Accordingly, the *Freeman* factors have been met.

### B. Clear-and-Convincing Evidence That Statements Are Not Immune

Under the anti-SLAPP statute, once Walsh meets this minimal burden to show that the challenged statements were made in the course of public participation, Nygard is required to produce clear-and-convincing evidence that the statements are not immune. *See Nexus v. Swift*, 785 N.W.2d 771, 780 (Minn. App. 2010). No immunity is available if a challenged statement is tortious. *See id.* at 780–81.

Nygard must show clear-and-convincing evidence supporting each element of each claim to avoid dismissal of that claim. *See Freeman*, 776 N.W.2d at 492. Nygard alleges that the district court deprived him of his right to a jury trial by improperly forcing him to prove his case at this early stage of the proceedings. We agree that ultimate determinations of fact are *not* required by the clear-and-convincing-evidence standard set forth in section 554.02, subdivision 2(3). *Nexus*, 785 N.W.2d at 782. "The test is merely whether, in light of [the] inferences and the view of evidence mandated by the standard for granting . . . summary judgment, the plaintiff has shown that the defendant's speech . . . was tortious or otherwise unlawful." *Id.*

"Clear and convincing evidence 'requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt.'" *Id.* at 781 (quoting *Weber v.*

*Anderson*, 269 N.W.2d 892, 895 (Minn. 1978)).[2] To survive this motion for summary judgment, Nygard must show that it is "highly probable" that Walsh's statements were defamatory. *See id.* at 783. Although Nygard bears this heightened burden, we view the facts in the light most favorable to Nygard and draw all reasonable inferences in his favor. *See id.* at 782.

**i. Defamation**

Nygard argues that Walsh defamed him by accusing him of having "violence issues where he's beat his son bloody" and "buil[ding] a curb" when he "was told not to." To be defamatory, a challenged statement must (1) be communicated to someone other than the plaintiff, (2) be false, and (3) have harmed the plaintiff's reputation. *Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910, 919 (Minn. 2009). Nygard's defamation claim fails to survive summary judgment because Nygard did not produce evidence sufficient to show by clear-and-convincing evidence that Walsh's comments are false or that they harmed Nygard's reputation.

*a. Falsehood*

Truth is a complete defense to a defamation claim. *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 255 (Minn. 1980). Where the facts are undisputed, the question of

[2] Walsh suggests that this appeal should be stayed pending the supreme court's ruling in *Leiendecker v. Asian Women United of Minnesota*, 834 N.W.2d 741 (Minn. App. 2013), *review granted* (Minn. Aug. 20, 2013). Nygard opposes a stay. *Leiendecker* involves the standard to be applied when a party defending against a motion to dismiss under the anti-SLAPP statute relies solely on the pleadings and proffers no additional evidence. *See* 834 N.W.2d at 749. Here, Nygard presented evidence in addition to his pleadings. Because the procedural posture of *Leiendecker* is different and the outcome may not be controlling here, we do not believe a stay is necessary.

truth may be decided as a matter of law. *LeDoux v. Nw. Publ'g, Inc.*, 521 N.W.2d 59, 67 (Minn. App. 1994), *review denied* (Minn. Nov. 16, 1994). In assessing the truth of allegedly tortious statements, the focus is "on the underlying implication of the statement" and not on "minor inaccuracies." *Nexus*, 785 N.W.2d at 784; *see McKee v. Laurion*, 825 N.W.2d 725, 730 (Minn. 2013) (explaining that minor inaccuracies cannot satisfy the element of falsity in a defamation claim).

A statement "will be considered substantially accurate if its gist or sting is true, that is, if it produces the same effect on the mind of the recipient which the precise truth would have produced." *Keuchle v. Life's Companion P.C.A., Inc.,* 653 N.W.2d 214, 219 (Minn. App. 2002), *review dismissed* (Minn. Jan. 21, 2003). A statement is only actionable if "no reasonable person could find" the allegedly defamatory statement as a "supportable interpretation[]" of the situation being described. *Hunter v. Hartman*, 545 N.W.2d 699, 705 (Minn. App. 1996) (quotations omitted), *review denied* (Minn. June 19, 1996).

Here, the "underlying implication[s]" of Walsh's statements are that (1) Nygard built a curb without permission and that (2) Nygard hit his son. *See Nexus*, 785 N.W.2d at 784. Concerning the curb, the record shows that Orono's City Code makes it a misdemeanor for anyone to "construct or reconstruct a . . . curb and gutter . . . in any road . . . in the city without a permit in writing from the city." Orono, Minn., City Code, § 18-106 (2012). The undisputed record also shows that Nygard reconstructed the curb in front of his house in September 2005; Nygard admitted that he did not have a permit when he did so; city officials discussed a need to remove the curb because it was in the

city's right of way; and, despite the expressed concerns of several neighbors, Nygard received a "Right of Way Encroaching Permit" in June 2012, almost seven years after he first constructed the curb. Nygard's assertion that no one specifically "told [him] not to" build the curb before he did so cannot create a genuine issue of material fact about the verity of Walsh's underlying statement that Nygard built a curb without obtaining an appropriate permit from the city.

Concerning Walsh's statement regarding Nygard hitting his son, the record shows that in late August 2007, the Orono Police Department investigated a report that Nygard hit his 14-year-old son. N.E., a long-time resident of the neighborhood, testified by deposition that he saw Nygard, in the front seat of his car, turn and take a full swing with his right arm at his son, who was in the back seat of the car. N.E. testified that the swing "connected with the kid" and that N.E. later saw the child bleeding. N.E. was apparently never interviewed by the police, who referred the case for domestic-assault charges and a child-protection investigation. No charges were ever filed, however.

Other police reports in the record show that police were called several other times to Nygard's property to respond to complaints of domestic disputes between Nygard and his son. In June 2004, police received five calls from neighborhood residents reporting that a father had been screaming at his 11-year-old son for about 45 minutes and expressing concern for the son's safety. Similarly, in October 2009, police investigated a complaint of a father and son yelling at one another in Nygard's garage; upon arrival, the investigating officer could hear "the yelling from the street." In May 2011, police

responded to another complaint regarding a verbal domestic dispute between Nygard and his son.

Nygard submitted affidavits from himself, his wife, and his son to deny that he ever struck his son. But, concerning the 2007 episode, Nygard admits that he swung his baseball cap attempting to make physical contact with his son, who was in the back seat of the car. Nygard claims that he was, "in fact, defending himself" when his son placed Nygard in a headlock while Nygard was driving. Because this statement admits that physical contact occurred in the car, it undermines Nygard's argument that Walsh's underlying allegation was tortious.

Nygard also cites the 2007 police report to argue that, even if he did hit his son, his son was not "bloody." Even assuming that Nygard's assertion is correct, however, this detail is not a major inaccuracy that undermines the truth of the underlying statement that Nygard hit his son.

Given this record, where an eyewitness saw Nygard take a full swing at his child and the child bleeding; where neighbors reported episodes of yelling that created concerns about the safety of Nygard's son; and where an investigating officer corroborated the yelling; Nygard's proffered evidence cannot create a genuine issue of material fact sufficient to withstand summary judgment. Even giving Nygard the benefit of all reasonable inferences, we conclude, as a matter of law, that he is unable to show that it is highly probable that Walsh's underlying statement that Nygard hit his son was false. *See Nexus*, 785 N.W.2d at 783–84.

*b. Harm to Reputation*

Nygard alleges that Walsh's statements "are certainly the types of statements that would tend to harm Nygard's reputation." He does not, however, present any evidence that his reputation was actually harmed by the statements. Nygard does allege that "he did not have a reputation for violence prior to Walsh's defamatory comments," but he offers no evidence that he had a reputation for violence *after* Walsh's statements. In fact, deposition testimony submitted showed that two witnesses who heard Walsh's comments that evening did not change their opinion of Nygard in any way following Walsh's remarks.

Given the heightened standard of clear-and-convincing evidence, Nygard's bare allegation that his reputation might have been damaged is not sufficient to create a genuine issue of material fact concerning the effect of Walsh's remarks. Because Nygard is unable to meet the clear-and-convincing-evidence standard on every element of defamation, the district court properly dismissed his suit under the anti-SLAPP statute.

**ii. Defamation Per Se**

Nygard further contends that Walsh should be liable for defamation per se because when Walsh accused Nygard of "beat[ing] his son bloody," Walsh accused him of committing the crimes of assault and domestic assault. He asserts that the district court erred in finding that a qualified privilege protected Walsh's statements.

Defamation per se occurs when one falsely accuses another of committing a crime. *Anderson v. Kammeier*, 262 N.W.2d 366, 371 (Minn. 1977). The focus is on whether a

reasonable person would understand the statement to be an accusation of criminal conduct. *Longbehn v. Schoenrock*, 727 N.W.2d 153, 159 (Minn. App. 2007).

Defamatory statements may be protected by qualified privilege, however, if they are made upon "proper occasion, from a proper motive, and based upon reasonable or probable cause." *Bauer v. State*, 511 N.W.2d 447, 449 (Minn. 1994). When these statements are made in good faith, the plaintiff must prove actual malice to recover for defamation. *Lewis v. Equitable Life Assurance Soc'y of the U.S.*, 389 N.W.2d 876, 889 (Minn. 1986). "Malice is defined as actual ill-will or a design causelessly and wantonly to injure plaintiff." *Bol v. Cole*, 561 N.W.2d 143, 150 (Minn. 1997) (quotations omitted).

Here, Walsh's statement that Nygard "beat his son bloody" could cause a reasonable person to think that Nygard committed the criminal acts of child abuse or domestic assault. The record also shows that Nygard has never been charged or convicted with the crime of domestic assault or child abuse for hitting his son.

Nevertheless, after carefully reviewing the record, we conclude that summary judgment is appropriate because Walsh's comments are entitled to a qualified privilege as a matter of law. First, these comments were made upon a "proper occasion" with a "proper motive." *See Bauer*, 511 N.W.2d at 449. The statements to which Nygard objects are examples given by Walsh in a speech intended to convince the city council that his neighborhood needs more attention from the Orono Police Department. In the context of the on-going neighborhood disputes and expressed concerns over noise, public safety, and the perception that Nygard was emboldened by the city's inability or reluctance to enforce its regulations, Walsh's comments were appropriately directed to

the city council. And asking for heightened police presence is a "proper motive" and reason for Walsh to give these specific examples. *See Bauer*, 511 N.W.2d at 449. The anti-SLAPP statute's purpose is to encourage citizens to participate in their government without fear of repercussion for their statements. *Marchant Inv. & Mgmt. Co., Inc. v. St. Anthony W. Neighborhood Org., Inc.*, 694 N.W.2d 92, 94–95 (Minn. App. 2005).

Second, the statements were also "based upon reasonable or probable cause." *See Bauer*, 511 N.W.2d at 449. As explained above, Nygard admits that he built the curb without first getting a written permit from the city, and a neighbor witnessed Nygard striking his son.

Because a qualified privilege applies to Walsh's statements, to survive summary judgment under the anti-SLAPP statute, Nygard must present clear-and-convincing evidence that Walsh made the statements with malice. *See Lewis*, 389 N.W.2d at 889; *Freeman*, 776 N.W.2d at 492. Nygard tries to satisfy this high standard by asserting that Walsh's speech generally "shows that Walsh has ill feelings towards and dislikes Nygard," Walsh used "exaggerated language," and the statements were published to a large audience.

These assertions alone do not suffice to create a jury question concerning actual malice under the heightened standard of clear-and-convincing evidence. Because Nygard has not produced clear-and-convincing evidence that Walsh made the statements with "actual ill-will or a design causelessly and wantonly to injure" Nygard, the district court properly dismissed this claim of defamation per se. *See Bol*, 561 N.W.2d at 150.

### iii. Negligence

Nygard further contends that "Walsh committed negligence through his false accusations." To prevail on a negligence claim, the "plaintiff must prove (1) the existence of a duty of care, (2) a breach of that duty, (3) an injury, and (4) that the breach of the duty of care was a proximate cause of the injury." *Domagala v. Rolland*, 805 N.W.2d 14, 22 (Minn. 2011). "Generally, a defendant's duty to a plaintiff is a threshold question because '[i]n the absence of a legal duty, the negligence claim fails.'" *Id.* (quoting *Gilbertson v. Leininger*, 599 N.W.2d 127, 130 (Minn. 1999)).

The district court properly dismissed Nygard's negligence claim because he offers no evidence or case law to establish that Walsh owed him a legal duty. Without establishing the threshold element of duty, Nygard's negligence claim fails. *See id.*

## II. Motion For Leave to Conduct Limited Discovery

Nygard contends that the district court's denial of his motion for limited discovery as "moot" was erroneous because "a motion for limited discovery under section 554.02 cannot be 'moot.'" He asserts that if he had been allowed to conduct limited discovery, he would have been able to depose Walsh and produce evidence of Walsh's malicious intent and reckless disregard for the truth. Nygard thus asserts that he showed "good cause" for the district court to allow discovery under Minnesota Statutes section 554.02, subdivision 2(1). Walsh counters that Nygard had ample opportunity to conduct discovery before discovery was suspended under section 554.02. After carefully considering the parties' arguments, we conclude that the district court did not abuse its broad discretion in denying Nygard's motion for leave to conduct limited discovery.

A district court has "wide discretion" in issuing discovery orders, and its ruling will not be disturbed "absent clear abuse of that discretion." *Horodenski v. Lyndale Green Townhome Ass'n*, 804 N.W.2d 366, 372 (Minn. App. 2011). The burden to show an abuse of discretion "is met only when it is clear that no reasonable person would agree [with] the trial court's" determination. *Patton v. Newmar Corp.*, 538 N.W.2d 116, 119 (Minn. 1995) (quotation omitted).

Section 554.02 states, "[D]iscovery must be suspended pending the final disposition of [a] motion [to dismiss], . . . provided that the court may, on motion and after a hearing and for good cause shown, order that specified and limited discovery be conducted." Minn. Stat. § 554.02, subd. 2(1); *see also Nexus*, 785 N.W.2d at 781 (reaffirming the district court's authority to order limited discovery under section 554.02). Given Nygard's ability to conduct discovery for many months after receiving notice in Walsh's answer that Walsh contended that he was immune from liability under the anti-SLAPP statute, and the statutory directive to protect parties moving for dismissal from discovery, we discern no abuse of discretion by the district court in denying Nygard's motion. Moreover, by ruling that Nygard's motion for limited discovery was moot, the district court implicitly determined that additional discovery could not cure the deficiencies in Nygard's case. We affirm the district court's denial of Nygard's motion.

**Affirmed.**