IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOSEPH BARRACO, AN INDIVIDUAL; AND JERRY PALUHA, AN INDIVIDUAL,
Appellants,
vs.
KENYATTA ROBINSON, AN INDIVIDUAL,
Respondent.

No. 72566-COA

FILED

APR 26 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Joseph Barraco and Jerry Paluha appeal from final judgment following a bench trial in a tort action. Eighth Judicial District Court, Clark County; Timothy C. Williams, Judge.

Kenyatta Robinson asserted multiple claims against appellants Barraco and Paluha—including defamation and intentional interference with contractual relations—in connection with false statements appellants allegedly made about her, as well as appellants' supposed efforts to get her fired from her job as a Community Association Manager with the homeowners' association (HOA) at Allure Las Vegas, a high-rise residential complex.[1] The case proceeded to a bench trial, after which the district court entered judgment in favor of Robinson on her defamation and intentional-interference claims.

In its written decision and order, the district court listed what it considered to be 14 separate defamatory statements made by Paluha and 8 separate defamatory statements made by Barraco. Generally, the statements identified impugned Robinson's chastity by accusing her of

[1]We do not recount the facts except as necessary to our disposition.

engaging in polygamy and having an affair and a child with an HOA board member, and otherwise accused her of stealing and abusing her position with Allure HOA for her own personal gain. The district court concluded that the statements amounted to defamation per se, and it awarded Robinson $50,000 in presumed damages and $100,000 in punitive damages against each of the appellants individually. The district court additionally awarded $31,500 in compensatory damages against both appellants on the intentional-interference claim, resulting in a total award of $331,500.

On appeal, appellants argue that the theory of defamation per se relied upon by the district court to presume and award compensatory damages—imputing unchastity to a woman—violates equal protection. Appellants additionally argue that reversal is warranted on grounds that Robinson failed to prove any actual damage to her reputation, that some of their allegedly defamatory statements constituted mere opinion or hyperbole, and that substantial evidence did not support the district court's verdict on the intentional-interference claim.[2]

We first consider appellants' contention that the doctrine of defamation per se applied by the district court violates equal protection

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[2]We note that appellants identify additional issues in the section of their opening brief entitled "Statement of Issues on Appeal," specifically that Robinson failed to present any evidence at trial showing that appellants acted in concert and that the district court erred when it awarded punitive damages. However, appellants fail to address those issues with any argument or citations to relevant authority in the body of their brief, and thus we decline to consider them. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (noting that appellate courts need not consider issues not cogently argued or supported by relevant authority).

because it is an impermissible gender-based classification.[3] Robinson correctly argues that appellants have waived the issue because they failed to raise it below. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal."). Moreover, a question exists as to whether the appellants possess legal standing to make this challenge when the rule at issue is one that targets the unchastity of women, while the appellants are men, and overturning the rule to the extent that it applies only to women would not entitle the appellants to any relief. *See Elley v. Stephens*, 104 Nev. 413, 416, 760 P.2d 768, 770 (1988) (noting that "a requirement of standing is that the litigant personally suffer injury that can be fairly traced to the allegedly unconstitutional [law] and which would be redressed by invalidating the [law]").

That said, we note that the Supreme Court of Nevada has reformulated the unchastity category of defamation per se as statements "imputing serious sexual misconduct." *K-Mart Corp. v. Washington*, 109 Nev. 1180, 1192, 866 P.2d 274, 282 (1993) (citing *Carey v. Piphus*, 435 U.S. 247, 262 n.18 (1978)), *receded from on other grounds by Pope v. Motel 6*, 121 Nev. 307, 114 P.3d 277 (2005). Because imputations of unchastity to both men and women can satisfy the new standard, appellants' argument on this point is without merit. *See City of Fairbanks v. Rice*, 20 P.3d 1097, 1107 (Alaska 2000) (affirming lower court's determination that "allegations of marital infidelity [against a man] were allegations of serious sexual

[3]The district court applied the rule stated in *Branda v. Sanford* that "imputations of unchastity in a woman" constitute defamation per se. 97 Nev. 643, 646, 637 P.2d 1223, 1225 (1981).

misconduct" amounting to defamation per se); *Irving v. Austin*, 741 N.E.2d 931, 935 (Ohio Ct. App. 2000) (noting that an accusation against a man that he fathered a child with a woman out of wedlock would constitute "such serious sexual misconduct" as "would be defamatory without proof of special damage").

Next, we consider appellants' contention that Robinson failed to prove any actual damage to her reputation and that she was required to show that appellants' statements were actually believed by others before she could recover presumed damages. Robinson counters that she only had to prove that appellants' statements tended to affect her professional reputation, not that they actually did. We agree with Robinson.

A plaintiff asserting defamation must show "(1) a false and defamatory statement of fact by the defendant concerning the plaintiff; (2) an unprivileged publication to a third person; (3) fault, amounting to at least negligence; and (4) actual or presumed damages."[4] *Pope*, 121 Nev. at 315, 114 P.3d at 282. "A statement is defamatory when, under any reasonable definition, such charges would *tend* to lower the subject in the estimation of the community and to excite derogatory opinions against him and to hold him up to contempt." *PETA v. Bobby Berosini, Ltd.*, 111 Nev. 615, 619 n.2, 895 P.2d 1269, 1272 n.2 (1995) (emphasis added) (internal quotation marks and citation omitted), *overruled on other grounds by City of Las Vegas Downtown Redev. Agency v. Hecht*, 113 Nev. 644, 940 P.2d 134 (1997). Moreover, "[g]eneral damages are presumed upon proof of the defamation alone" when the statements at issue "would tend to injure the plaintiff' in

[4]Appellants do not dispute that all of the defamatory statements the district court identified were published to third persons, nor do they address fault.

such a manner traditionally categorized as defamation per se. *See Bongiovi*, 122 Nev. at 577, 138 P.3d at 448 (internal quotation marks omitted). This is so "because of the impossibility of affixing an exact monetary amount for present and future injury to the plaintiff's reputation, wounded feelings and humiliation, loss of business, and any consequential physical illness or pain." *Id.* (internal quotation marks omitted). Nevertheless, awards of presumed damages "must still be supported by competent evidence but not necessarily of the kind that assigns an actual dollar value to the injury." *Id.* (internal quotation marks omitted). When determining whether such awards are excessive, this court "look[s] to how offensive the slanderous remark was, whether it was believed, how widely it was disseminated, and the plaintiff's prominence and professional standing in the community." *Id.* at 577-78, 138 P.3d at 448.

Here, Robinson did not have to prove that anyone believed appellants' statements or that they actually lowered her reputation in order to recover presumed damages. Nevada caselaw makes clear that statements must only *tend* to have a particular type of impact to constitute defamation per se, and to the extent there is any ambiguity in that inquiry, it becomes a question a fact on which this court defers to the district court. *See Branda*, 97 Nev. at 646, 637 P.2d at 1225-26. Moreover, even though the question of whether the statements were believed is relevant to determining whether the damages awarded were excessive, appellants do not actually argue that the damages were excessive; instead, they argue only that Robinson was required to show that someone actually believed appellants' statements in order to recover any damages at all. Appellants fail to address any of the other excessiveness factors from *Bongiovi*, including how offensive the statements were, how widely they were

disseminated, or Robinson's professional standing in the community. Accordingly, we decline to conduct an excessiveness analysis. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) ("Issues not raised in an appellant's opening brief are deemed waived."); *Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38 (noting that this court need not consider claims that are not cogently argued or supported by relevant authority).

Next, we consider whether appellants' statements constituted mere opinion or rhetorical hyperbole. Appellants broadly contend that multiple statements the district court recited in its decision were nonactionable on this ground, but they specifically challenge only their statements that Robinson did not know what she was doing in her job.

Only statements of fact—not those of opinion—are actionable under a theory of defamation. *Nev. Indep. Broad. Corp.*, 99 Nev. at 410, 664 P.2d at 341. In determining whether a statement constitutes one of fact or opinion, this court looks to "whether a reasonable person would be likely to understand the remark as an expression of the source's opinion or as a statement of existing fact." *Id.* at 410, 664 P.2d at 342. Generally, this inquiry constitutes a question of law, but if the statement is ambiguous, "the issue must be left to the [fact-finder]'s determination." *Id.* Similar to statements of opinion, exaggerated or generalized statements amounting to "mere rhetorical hyperbole," as well as true statements, do not constitute actionable defamation. *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 715, 57 P.3d 82, 88 (2002) (quoting *Wellman v. Fox*, 108 Nev. 83, 88, 825 P.2d 208, 211 (1992)).

Here, we agree with appellants that a reasonable person would understand their statements regarding Robinson not knowing what she was

doing were generalized, subjective opinions about her job performance incapable of objective verification, and thus those statements did not constitute actionable defamation. *See Perfect Choice Exteriors, LLC v. Better Bus. Bureau of Central Ill., Inc.*, 99 N.E.3d 541, 550 (Ill. App. Ct. 2018) ("A general opinion that someone's job performance is unsatisfactory is not actionable absent some express or clearly implied reference to particular facts that purportedly support the opinion, such as performance reviews or other specific factual criteria used to measure the claimant's job performance." (internal quotation marks omitted)). However, the district court found that Barraco further stated not only that Robinson did not know what she was doing, but also that everyone in the room at a particular budget meeting agreed. This additional statement regarding everyone else's opinion was objectively verifiable, and the district court noted testimony that several people in the room rose their hands and claimed that the statement was not true. Accordingly, this statement presents a closer call, and we decline to disturb the district court's conclusion that the statement was false and defamatory. *See Nev. Indep. Broad. Corp.*, 99 Nev. at 413, 664 P.2d at 343 ("Whether a statement is false is generally a question for the [fact-finder]."). Nevertheless, because appellants fail to specifically challenge any other statements (and because their challenge to the statements imputing unchastity to Robinson fails), we conclude that they were not prejudiced and that any error in mischaracterizing these isolated statements as factual assertions is therefore not fatal to the judgment. *See Cook v. Sunrise Hosp. & Med. Ctr., LLC*, 124 Nev. 997, 1005, 194 P.3d 1214, 1219 (2008) ("[R]eversal of the district court's judgment is not warranted unless the error was prejudicial.").

Finally, we consider whether substantial evidence supported the district court's verdict on Robinson's intentional-interference claim. Appellants argue that no evidence adduced at trial showed that they had knowledge of Robinson's contract with her employer; that they intentionally acted to disrupt that contract; that they actually disrupted the contract; or that Robinson suffered a specific amount of resulting damage.

This court will affirm the verdict in a civil case if it is supported by substantial evidence. *Clark Cty. Sch. Dist. v. Payo*, 133 Nev. 626, 636, 403 P.3d 1270, 1278 (2017). When considering whether substantial evidence supported a verdict, this court "must assume that the [fact-finder] believed all the evidence favorable to [the prevailing party] and drew all reasonable inferences in his [or her] favor." *Id.* Substantial evidence is "that which a reasonable mind might accept as adequate to support a conclusion." *Id.* at 636, 403 P.3d at 1278-79.

To prevail on a claim of intentional interference with contractual relations, "[the] plaintiff must establish: (1) a valid and existing contract; (2) the defendant's knowledge of the contract; (3) intentional acts intended or designed to disrupt the contractual relationship; (4) actual disruption of the contract; and (5) resulting damage." *J.J. Indus., LLC v. Bennett*, 119 Nev. 269, 274, 71 P.3d 1264, 1267 (2003). To prove knowledge, "the plaintiff must demonstrate that the defendant knew of the existing contract, or at the very least, establish facts from which the existence of the contract can reasonably be inferred." *Id.* (internal quotation marks omitted). To prove intent, the plaintiff must show that the defendant acted with the specific motive or purpose of interfering with the contract. *Id.* at 275, 71 P.3d at 1268.

Appellants do not dispute that Robinson met the first element, and we conclude that their arguments with respect to the second, third, and fourth elements are without merit. Substantial evidence supports the conclusion that appellants knew of Robinson's contractual employment arrangement with FirstService Residential and Allure HOA, and also that they intended to disrupt that arrangement, at least partially via the defamatory statements identified by the district court. Moreover, substantial evidence supports the conclusion that Robinson's contract was actually disrupted and that she suffered resulting damage because she and an HOA board member both testified that her bonuses would have been double in three consecutive years if not for appellants' accusations against her.

However, we note that the district court did not identify any specific facts supporting the amount of damages it awarded—$31,500—and the record on appeal does not contain any evidence to substantiate that amount. *See Mort Wallin of Lake Tahoe, Inc. v. Commercial Cabinet Co.*, 105 Nev. 855, 857, 784 P.2d 954, 955 (1989) (noting that claimants must prove both the fact and the amount of damages and that "there must be an evidentiary basis for determining a reasonably accurate amount of damages"). Nevertheless, it appears that appellants have failed to provide us with all of the documents that the district court had before it when it considered the award, including, for example, a copy of the employment agreement that was entered into evidence below as Exhibit 59 and appeared to have described how Robinson was to be compensated. Without the ability to review all of the documents that the district court was able to consider, we cannot conclude that the district court erred. Appellants bore the burden to provide an adequate record on appeal, and this court presumes that the

missing exhibits support the district court's award of damages. *See Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007) (noting that "appellants are responsible for making an adequate appellate record" and that "[w]hen an appellant fails to include necessary documentation in the record, we necessarily presume that the missing portion supports the district court's decision"); *see also* NRAP 10(b)(2) ("If exhibits cannot be copied to be included in the appendix, the parties may request transmittal of the original exhibits to the clerk of the Supreme Court under Rule 30(d).").[5]

Based on the foregoing, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Hon. Timothy C. Williams, District Judge
Adams Law Group
Mushkin Cica Coppedge
Eighth District Court Clerk

[5]We decline to consider appellants' argument that the First Amendment and the litigation privilege precluded Robinson from receiving damages; they fail to cogently argue the point or cite any relevant authority in support. *See Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38.