IN THE SUPREME COURT OF THE STATE OF NEVADA

RENEE BOUSQUET,
Appellant,
vs.
FREHNER CONSTRUCTION COMPANY, INC., A NEVADA CORPORATION,
Respondent.

No. 42386

FILED

JUN 15 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order granting summary judgment in favor of the defendant in a defamation case. Eighth Judicial District Court, Clark County; Kathy A. Hardcastle, Judge.

Appellant Renee Bousquet was seriously injured while working on a construction project at the U.S. Army base in Hawthorne, Nevada. At the time of his injury, Bousquet, a union member, was a paving foreman employed by Frehner Construction and was covered by a collective bargaining agreement between Frehner and the Operating Engineers Local 3 Union. Bousquet was taken to Mt. Grant Hospital in Hawthorne. The hospital performed a number of tests including x-rays, a CBC, and a UA illegal drug screen. When the drug screen came back positive for amphetamines, a hospital nurse informed Bousquet and Frehner's safety officer, Joe Adams, of the results.

Bousquet denied taking illegal drugs and demanded a blood test to rule out illegal drug use. Frehner's safety officer approved the test. The hospital conducted a blood draw and sent the sample to an outside laboratory for analysis. The blood test was negative for illegal drugs.

The "master agreement" between Frehner and the union provides specific guidelines that an employer must follow in regard to

employee confidentiality for drug and alcohol testing. The hospital forwarded Bousquet's medical information to Employers Insurance Company of Nevada (EICON), Frehner's workers' compensation insurance carrier. As a result, EICON denied coverage for Bousquet's injuries. Bousquet's private insurance carrier also denied coverage because it believed that the injury was an on-the-job injury that should be covered by workers' compensation. As a result, Bousquet was unable to pay for medical services, which exacerbated his injuries and delayed his recovery.

In May 2000, Frehner informed Bousquet that his employment would be terminated due to the failed UA drug screen. However, after Bousquet noted that the blood test was negative, Frehner allowed him to continue working while it reviewed the results. Ultimately, Frehner terminated Bousquet on June 7, 2000, citing the failed drug screen and his inability to perform his job duties following the accident. After a meeting between Frehner and the union, Bousquet was advised that if he could get a medical release and report to work, Frehner would reinstate him. After that meeting, Frehner requested a hearing with EICON, and EICON reversed its earlier decision to deny Bousquet workers' compensation benefits.

Bousquet filed the present action on May 4, 2001, alleging that the hospital and Frehner failed to follow proper procedures in conducting the drug test, and as a result, the hospital transmitted the faulty results of the UA drug screen to EICON. In addition, Bousquet claimed that as a result of Frehner's actions, he suffered ridicule, humiliation, and was otherwise publicly defamed by the communication of the faulty test results. Following discovery, Frehner filed a motion for summary judgment, arguing that the positive drug test was not a false

and defamatory statement, that the communication was privileged, that there must be fault amounting to negligence, and that Bousquet did not suffer damages. After a hearing, the district court issued an order granting Frehner's motion for summary judgment. Bousquet appealed.

This court reviews a summary judgment de novo.[1] The purpose of summary judgment is to avoid litigation when a party can make the appropriate showing that no genuine issues of material fact remain for trial, and the moving party is entitled to judgment as a matter of law.[2] On a motion for summary judgment, all reasonable inferences from the pleadings and proof must be construed in a light most favorable to the nonmoving party.[3] A genuine issue of fact exists when the evidence, in the form of pleadings and supporting affidavits, if any, is such that a reasonable juror could return a verdict in favor of the nonmoving party.[4]

To overcome a motion for summary judgment in a defamation action, the plaintiff must make a prima facie showing that (1) the defendant made a false and defamatory statement concerning the plaintiff, (2) it was an unprivileged publication to a third party, (3) fault,

---

[1]Sahara Gaming v. Culinary Workers, 115 Nev. 212, 214, 984 P.2d 164, 165, (1999) (quoting Bulbman, Inc. v. Nevada Bell, 108 Nev. 105, 110, 825 P.2d 588, 591 (1992)).

[2]NRCP 56(c); Bulbman, 108 Nev. at 110, 825 P.2d at 591.

[3]Bulbman, 108 Nev. at 110, 825 P.2d at 591.

[4]Id. (citing Valley Bank v. Marble, 105 Nev. 366, 367, 775 P.2d 1278, 1279 (1989) and Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)).

amounting to at least negligence, and (4) actual or presumed damages.[5] Thus, in a defamation action, the defendant is entitled to summary judgment when he or she can negate any one of the above elements.[6]

The question of whether a given statement is defamatory is generally a question of law for the judge; however, if the statement is open to different interpretations, one of which is defamatory, resolution of the resulting ambiguity remains a question of fact for a jury.[7] When reviewing allegedly defamatory statements, each statement should be reviewed in its entirety and within context to determine whether it is susceptible of a defamatory meaning.[8]

---

[5]Wynn v. Smith, 117 Nev. 6, 10-11, 16 P.3d 424, 427 (2001) (citing Chowdhry v. NLVH, Inc., 109 Nev. 478, 483, 851 P.2d 459, 462 (1993)). Four types of defamatory statements are considered so likely to cause serious injury to reputation and result in pecuniary loss that they are considered slander per se and damages may be presumed. See K-Mart Corporation v. Washington, 109 Nev. 1180, 1192, 866 P.2d 274, 282 (1993) (The four types of defamatory statements include statements regarding a person's (1) fitness for trade or business, (2) the imputation of a crime, (3) imputing serious sexual misconduct, and (4) statements of a loathsome disease).

[6]Harrington v. Syufy Enters., 113 Nev. 246, 248, 931 P.2d 1378, 1380 (1997) (citing Perez v. Las Vegas Medical Center, 107 Nev. 1, 4, 805 P.2d 589, 590-91 (1991)).

[7]Lubin v. Kunin, 117 Nev. 107, 111-12, 17 P.3d 422, 425-26 (2001) (citing Posadas v. City of Reno, 109 Nev. 448, 453, 851 P.2d 438, (1993) (quoting Branda v. Sanford, 97 Nev. 643, 646, 637 P.2d 1223, 1225-26 (1981)).

[8]Lubin, 117 Nev. at 111, 17 P.3d at 425 (quoting Chowdhry, 109 Nev. at 484, 851 P.2d at 463).

We conclude that the district court properly granted Frehner's motion for summary judgment because Bousquet did not make a prima facie showing to support his defamation claim. As this court has noted, a statement of fact is not defamatory when it is absolutely true or substantially true.[9] In this case, Bousquet did in fact undergo a UA drug screen performed by Mt. Grant hospital. The results of that test showed a positive result for the presence of illegal drugs. Therefore, we conclude that any statements by the hospital that the results of that test were positive were not defamatory.

Bousquet argues that because Frehner had a duty under the master agreement to maintain confidentiality, it was responsible when its safety office ordered the tests and allowed the hospital to transmit the results to EICON as part of Bousquet's medical records. We conclude that any issues arising under the master agreement were fully resolved by the arbitration award concerning the collective bargaining agreement. In addition, because Bousquet failed to submit an affidavit or other evidence to demonstrate that the safety officer, and not the doctor, ordered the test, we conclude that there was insufficient evidence to support Bousquet's claim.

Bousquet next argues that Frehner's failure to notify EICON that the hospital conducted multiple tests with conflicting results made Frehner negligently responsible for the hospital's publication. We conclude that Bousquet's argument is unpersuasive. Bousquet failed to produce any evidence to show that Frehner knew about the secondary test

---

[9]Pegasus v. Reno Newspapers, Inc., 118 Nev. 706, 717, 57 P.3d 82, 90 (2002).

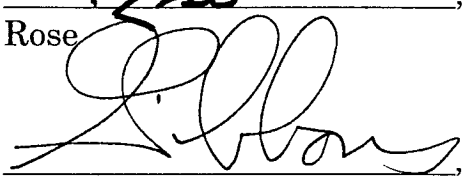
results before the hospital transmitted his file to EICON. Bousquet also ignores the fact that he signed a consent form permitting the hospital to forward his medical records to EICON.

Finally, Bousquet argues that subsequent statements by Frehner employees that were made in front of Dennis Arglebeen, a friend of Bousquet's that he brought with him to a meeting regarding the reasons for his termination, defamed him. At that meeting Shag Matson a Frehner employee, stated, "I seen it 40 times, and 40 times, the tests are accurate and you're always guilty." We conclude that this statement was not defamatory when viewed within the context in which it was made. Bousquet admitted that he brought Arglebeen to the meeting because Arglebeen had knowledge of the applicable union guidelines Frehner was supposed to follow. Presumably then, Arglebeen was aware that the reason for the meeting was that Frehner intended to fire Bousquet because of the positive drug screen. Therefore, we conclude that Matson's statement was not a defamatory publication to a third party.

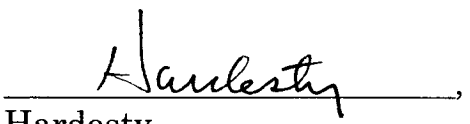
Accordingly we,

ORDER the judgment of the district court AFFIRMED.

_____, J.
Rose



_____, J.
Gibbons



_____, J.
Hardesty

cc: Hon. Kathy A. Hardcastle, District Judge
Timothy P. Post
Peel Brimley LLP
Clark County Clerk