

STATE OF MINNESOTA

DISTRICT COURT

HENNEPIN COUNTY

FOURTH JUDICIAL DISTRICT

Jerry L. Moore,

File No. 27-CV-09-17778
The Honorable Denise D. Reilly

Plaintiff,

vs.

**MEMORANDUM OF *AMICUS*
CURIAE MINNESOTA PRO
CHAPTER OF THE SOCIETY OF
PROFESSIONAL JOURNALISTS**

John Hoff a/k/a/ Johnny Northside,

Defendant.

Introduction

In this civil lawsuit, a jury returned a special verdict that defendant John Hoff's statement about plaintiff Jerry Moore was not false, but that Hoff nevertheless had intentionally interfered with Moore's employment contract and prospective employment advantage, awarding Moore \$35,000 for loss of contractual benefits and \$25,000 for "emotional distress or actual harm to reputation."

The dispute involves a statement published on Hoff's online blog. Outside the context of online publications, Minnesota courts long have held that merely providing truthful information cannot provide the basis for an action for tortious interference with contract or with prospective economic advantage, and both federal and state courts have rejected attempts by plaintiffs to evade the requirements of defamation law when the claim essentially is a defamation claim. Because a ruling on this issue could affect its members, the Minnesota Pro Chapter of the Society of Professional Journalists ("MN-SPJ") seeks leave of court to participate as *amicus curiae* in connection with defendant's post-trial motions.¹

¹ No party authored this memorandum in whole or in part. No person other than the *amicus* made a monetary contribution to the preparation or submission of this memorandum.

Argument

I. The Court Should Allow the Minnesota Pro Chapter of the Society of Professional Journalists to Participate as *Amicus Curiae*.

Rule 129 of the Minnesota Rules of Appellate Procedure provides for submission of briefs *amicus curiae*. Such briefs can “broaden the discussion of important points of law” in pending cases, “inform the court of facts or matters of law that may have escaped its consideration,” and “point out to the court practical or legal consequences of a particular decision beyond those involved in the case pending before the court.” D. Herr & S. Hanson, APPELLATE RULES ANNOTATED §§129.1 & 129.3, p. 650 (2009).

Although less common, *amicus* briefs can serve the same purposes in the district courts.

The Society of Professional Journalists, a voluntary, non-profit organization, was founded as Sigma Delta Chi in 1909. It is the largest and oldest organization of journalists in the United States, representing every branch and rank of print and broadcast journalism, and for more than a century has been dedicated to perpetuating a free press. The Minnesota Pro Chapter has become one of the nation’s largest and most active professional chapters since its founding in 1956.

The work of the Society’s members centers upon written and broadcast journalism, and increasingly appears online. A legal rule that exposes journalists and anyone else who communicates on the internet to risks of liability for tortious interference based on truthful statements or on a different standard than defamation could impair the free flow of information and vigorous debate on public issues. MN-SPJ has a significant continuing interest in ensuring that Minnesota courts at every level do not

apply such a rule. Statements appearing online should have the same level of protection as other means of mass communication. MN-SPJ has a public interest in assisting this court in analyzing the tradition of legal protections for such speech.

Accordingly, MN-SPJ respectfully moves this court to grant it leave to participate in this action as *amicus curiae*.

II. The Court Should Reject Tortious Interference Liability based upon Providing Truthful Information.

In *Glass Service Co., Inc. v. State Farm Mut. Auto. Ins. Co.*, 530 N.W.2d 867, 871 (Minn. App. 1995), the Minnesota Court of Appeals affirmed summary judgment in favor of the defendant, an insurance company that provided truthful information to its insureds, and rejected the tortious interference claims of the plaintiff, a company that repaired windshields. The court expressly invoked the RESTATEMENT (SECOND) OF TORTS, §772 cmt. b (1979) (no liability for interference on part of one who merely gives truthful information to another). The Eighth Circuit has applied *Glass Service* as settled Minnesota law. *Fox Sports Net North, LLC v. Minnesota Twins Partnership*, 319 F.3d 329, 337 (8th Cir. 2003.) This court should rule the same way – particularly when the alleged tortious interference arises from an allegedly defamatory statement.

III. When the Claim is Essentially a Defamation Claim, the Court Should Apply the Law of Defamation even if the Plaintiff Labels his Claim One for “Tortious Interference.”

A. Plaintiff Cannot Recast his Defamation Claim as a Claim for Tortious Interference with Contact or with Prospective Employment Advantage.

Courts do not allow plaintiffs to evade the requirements of libel law by presenting their claims under a different legal label. Injuries to reputation are defamation-type damages, for which plaintiffs must prove the elements of a defamation claim regardless of

how the claim is labeled. See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 57 (1988); *Mt. Hood Polaris, Inc. v. Martino (In re Gardner)*, 563 F.3d 981, 992 (9th Cir. 2009) (“[W]hen a claim of tortious interference with business relationships is brought as a result of constitutionally-protected speech, the claim is subject to the same First Amendment requirements that govern actions for defamation.”); *Beverly Hills Foodland, Inc. v. United Food and Commercial Workers Union, Local 655*, 39 F.3d 191, 196 (8th Cir. 1994) (“At the outset we note the malice standard required for actionable defamation claims during labor disputes must equally be met for a tortious interference claim based on the same conduct or statements. This is only logical as *a plaintiff may not avoid the protection afforded by the Constitution and federal labor law merely by the use of creative pleading.*” (emphasis added)); *Johnson v. Columbia Broadcasting System, Inc.*, Court File No. CIV-3-95-624, Order filed June 24, 1997, at 4 (D. Minn. 1997) (plaintiff “must satisfy the defamation standard to establish his claim for tortious interference”) (copy attached as Exhibit A); see also *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (First Amendment applies to claims for tortious interference with business relations).

The same result applies as a matter of state common law, as the Minnesota Supreme Court established decades ago:

It seems to us that, regardless of what the suit is labeled, the thing done to cause any damage to [plaintiff] eventually stems from and grew out of the defamation. Business interests may be impaired by false statements about the plaintiff which, because they adversely affect his reputation in the community, induce third persons not to enter into business relationships with him. We feel that this phase of the matter has crystallized into the law of defamation and is governed by the special rules which have developed in that field.

Wild v. Rarig, 302 Minn. 419, 447, 234 N.W.2d 775, 793 (1975). That court and others have applied the principle repeatedly in the following years.² No reason exists for this court to depart from that established precedent.

B. This Plaintiff Cannot Recover for Tortious Interference, because the Jury Determined that the Statement was not False.

A defamation plaintiff bears the burden of proving that the allegedly harmful statement was not true. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986); *Ferrell v. Cross*, 557 N.W.2d 560, 565 (Minn. 1997) (defamation plaintiff must establish that the alleged statement was false). This plaintiff did not meet that burden; the jury determined that the statement as issue was not false. For the same reasons that plaintiff Moore could not prevail on his defamation claim, he cannot prevail on his claims for tortious

² See, e.g., *MSK EyES Ltd. v. Wells Fargo Bank*, 546 F.3d 533, 544 (8th Cir. 2008) (“Claims arising out of purported defamatory statements, such as tortious interference, are properly analyzed under the law of defamation.”); *European Roasterie, Inc. v. Dale*, Civ. No. 10-53 (DWF/JJG), 2010 WL 1782239, at *5 (D. Minn. May 4, 2010) (“Tortious interference claims that are duplicative of a claim for defamation are properly dismissed.”); *ACLU v. Tarek Ibn Ziyad Acad.*, Civ. No. 09-138 (DWF/JJG), 2009 WL 4823378, at *5 (D. Minn. Dec. 9, 2009) (same); *Guzhagin v. State Farm Mut. Auto. Ins. Co.*, 566 F.Supp.2d 962, 969 (D. Minn. 2008) (dismissing tortious interference claim with prejudice because “a Minnesota plaintiff is not permitted to avoid defenses to a defamation claim by challenging the defamatory statements under another doctrine”); *Pinto v. Internationale Set, Inc.*, 650 F. Supp. 306, 309 (D. Minn. 1986) (“[I]n Minnesota, a plaintiff cannot elude the absolute privilege by relabeling a claim that sounds in defamation.”); *Mahoney & Hagberg v. Newgard*, 729 N.W.2d 302, 310 (Minn. 2007) (“Regardless of the label, appellant’s claims are in essence defamation claims . . . , and we find that absolute privilege operates to bar all of the claims at issue on this appeal.”); *Pham v. Le*, Nos. A06-1127, A06-1189, 2007 WL 2363853, at *7-8 (Minn. App. Aug. 21, 2007) (unpublished; copy attached as Exhibit B) (applying *Wild v. Rarig* and *NAACP v. Clairborne Hardware*, dismissing tortious interference claim arising from same statements as unsuccessful defamation claim); *Zagaros v. Erickson*, 558 N.W.2d 516, 523 (Minn. App. 1997) (plaintiff asserted claim of “negligent trial testimony”; court followed *Wild* and held that defamation standards and privileges apply to any “claim [that] is essentially relabeling a defamation claim”); *McGaa v. Glumack*, 441 N.W.2d 823, 827 (Minn. App. 1989) (“In Minnesota, one ‘cannot evade the absolute privilege by relabeling a claim that sounds in defamation’”) (citations omitted).

interference with employment contract and with prospective employment advantage, to the extent that those claims are based upon an allegedly defamatory statement.

* * *

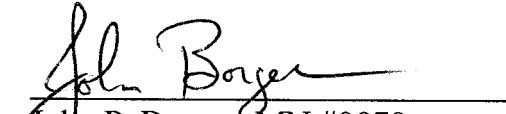
This court should follow the foregoing clear state and federal precedents and reject the plaintiff's attempt to recover under a theory of tortious interference when that claim is based upon the same statement as his failed claim for defamation.

Conclusion

The court should allow the Minnesota Pro Chapter of the Society of Professional Journalists to participate in this action as an *amicus curiae*. In considering defendant's post-trial motions, the court should apply the same rules to publicly accessible online statements that it would to a print version of the same material.

Dated: March 23, 2011

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*Attorneys for the Minnesota Pro
Chapter of the Society of Professional
Journalists*

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

HARRY A. JOHNSON, JR. M.D.

3-95-624

Plaintiff,

v.

ORDER

COLUMBIA BROADCASTING SYSTEM, INC., a
California corporation,

Defendant.

Best & Flanagan, P.L.L.P. by ALLEN D. BARNARD and MICHAEL H.
PINK, Minneapolis, Minnesota for Plaintiff, and

Faegre & Benson, L.L.P. by JOHN BORGER, Minneapolis, Minnesota, for
Defendant.

The above-entitled matter comes before the Court on Defendant's motion for partial summary judgment (docket no. 38). Plaintiff Harry A. Johnson, Jr., M.D. ("Johnson"), a cosmetic surgeon in the Twin Cities, brings this suit against Defendant Columbia Broadcasting System, Inc. ("CBS") because of a story aired by the local CBS affiliate, WCCO, during its ten o'clock news Dimension segment on November 27, 1993. The segment, which was entitled "Scarred for Life", presented what Johnson characterizes as a sensationalized, misleading, and deceptive view of his surgery practice. Johnson claims that as a result of the broadcast his surgery practice was essentially destroyed. He commenced suit against CBS alleging three counts. Count I alleges CBS is liable for trespass because of the actions of a reporter who visited Johnson's office with a hidden

FILED JUN 24 1997
FRANCIS E. DOSAL, CLERK
JUDGMENT ENTD. _____
DEPUTY CLERK _____

1 camera, posing as a prospective patient. Count II alleges tortious interference with
2 prospective business relations. Count III alleges a violation of the Minnesota Deceptive
3 Trade Practices Act, Minn. Stat. § 325D.44. In this motion, CBS moves for summary
4 judgment on Counts I and III. Also with respect to Count II CBS moves the Court to hold:
5 (1) that Johnson be required to satisfy the same elements as in a defamation claim; and (2)
6 that Johnson be found to be a public figure for purposes of this action and therefore
7 required to prove both that the statements at issue were false and that CBS published those
8 statements with "actual malice". The Court will consider CBS' motion with respect to
9 Count II followed by Counts I and III.

10 DISCUSSION

11 Summary judgment is appropriate under Fed. R. Civ. P. 56 (c) when an examination
12 of the evidence in a light most favorable to the non-moving party reveals no genuine issue
13 as to any material fact and that the moving party is entitled to judgment as a matter of law.
14 Anderson v. Liberty Lobby, 477 U.S. 242, 247 (1986). If a party fails to make a showing
15 sufficient to establish the existence of an element essential to that party's case on which the
16 party bears the burden of proof at trial, summary judgment is appropriate. Celotext Corp.
17 v. Catrett, 477 U.S. 317, 324 (1986).

20 I. TORTIOUS INTERFERENCE WITH PROSPECTIVE BUSINESS RELATIONS

21 Under Minnesota law, in a claim for tortious interference the plaintiff must prove
22 that the defendant committed a wrongful act and that the act improperly interfered with a
23 prospective relationship. Hunt v. University of Minnesota, 465 N.W.2d 88, 95 (Minn. Ct.
24 App. 1991). The wrongful act alleged by Johnson is CBS' production and airing of the
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1 Dimension segment on Johnson's cosmetic surgery practice. According to CBS the conduct
2 giving rise to Johnson's tortious interference claim is also conduct that gives rise to a claim
3 for defamation. Relying upon Minnesota and Eighth Circuit case law and Hustler
4 Magazine, Inc. v. Falwell, 485 U.S. 46 (1988) CBS maintains that the special rules of
5 defamation apply to Johnson's tortious interference claim. According to Johnson the cases
6 cited by CBS are distinguishable and Cohen v. Cowles Media Co., 501 U.S. 663 indicates
7 that a claim such as Johnson's tortious interference claim is not subject to the strictures of
8 the first amendment.

9 The Court finds that the case law supports CBS's argument. In Hustler, 485 U.S.
10 at 57 the Supreme Court held that to establish a claim for intentional infliction of emotional
11 distress based upon an alleged defamatory publication the plaintiff had to satisfy the
12 standard for a defamation claim. Johnson argues that because he is not seeking reputation
13 damages the Supreme Court's decision in Cohen and not Hustler applies. In Cohen the
14 Supreme Court held that a plaintiff's claim against newspaper publishers based upon a
15 theory of promissory estoppel for publication of a confidential informant's name was
16 distinguishable from Hustler and did not require the plaintiff to prove libel or defamation.
17 In Cohen, however, not only did the Court find that the plaintiff was not seeking damages
18 for injury to his reputation or state of mind, it found that the plaintiff could not sue in
19 defamation and therefore the Court was assured that the plaintiff was not attempting to use
20 a promissory estoppel cause of action "to avoid the strict requirements for establishing a
21 libel or defamation claim." 501 U.S. at 671. The facts do not show that Johnson cannot sue
22 in defamation nor do they assure the Court that the plaintiff is not using a tortious
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1 interference claim to avoid the requirements for establishing a defamation claim. The Court
2 finds that under Hustler Johnson must satisfy the defamation standard to establish his claim
3 for tortious interference. In reaching this conclusion the Court relies also upon the Eighth
4 Circuit's decision in Beverly Hills Foodland, Inc. v. Union, 39 F.3d 191 (8th Cir. 1994).
5 In Beverly Hills the court held that a plaintiff alleging tortious interference had to satisfy
6 the standard applicable to defamation claims where the tortious interference claim was
7 based upon the same conduct or statements as a claim for defamation. The court reasoned
8 that allowing a claim for tortious interference to proceed without requiring proof of
9 defamation, which in a labor dispute requires proof of malice, would deny the defendant
10 the protection afforded it by the Constitution. Id. at 197. The Court finds that the rationale
11 offered in Beverly Hills applies in the instant case and accordingly Johnson's tortious
12 interference claim should be subject to the standards applicable to a claim for defamation.

13
14 CBS argues that if the defamation standard applies, the Court should find that
15 Johnson is a public figure for purposes of CBS' broadcast and therefore that Johnson must
16 prove "actual malice". Both Johnson and CBS agree that the test for determining whether
17 an individual is a "limited purpose public figure" has three elements: (1) the existence of
18 a public controversy; (2) the individual's purposeful or prominent role in that controversy;
19 (3) a relation between the allegedly defamatory statements and the public controversy.
20 Hunter v. Hartman, 545 N.W.2d 699, 704 (Minn. App. 1996), rev. denied (Minn. 1996).
21 The parties also agree that whether Johnson is a limited purpose public figure is a question
22 of law. See id. According to CBS, Johnson became a public figure through his involvement
23 in both a general public controversy concerning the community's acceptance of plastic
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1 surgery and a more specific controversy concerning Johnson's treatment of his patients.
2 CBS argues that Johnson played a prominent role in the controversy. In support of its
3 argument CBS points to Johnson's promotion of cosmetic surgery through numerous
4 television presentations, radio advertisements, and magazine articles, and to seminars he
5 presented on controversial aspects of plastic surgery, such as the safety of silicone breast
6 implants. The Court finds that Johnson's self-promotional activities do not establish the
7 existence of a public controversy. See, e.g. Jadwin v. Minneapolis Star and Tribune Co.,
8 367 N.W.2d 476, 486 (Minn. 1985) (financial professional's soliciting public investment
9 in bond fund insufficient to transform small businessman into public figure). CBS also
10 points to a judgment entered against Johnson in a malpractice action which was reported
11 in the Star Tribune shortly before CBS's broadcast. The Court finds a newspaper report on
12 a \$279,552 jury verdict in a malpractice action does not create a public controversy that
13 would establish Johnson as a limited public figure. Having failed to establish an element
14 essential to a limited purpose public figure, the Court holds that Johnson is not required to
15 show actual malice in order to establish his claim under Count II of his complaint.
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17 II. TRESPASS CLAIM

18 Under Minnesota law a trespass is committed when a person enters the land of
19 another without consent. Copeland v. Hubbard Broadcasting, Inc., 526 N.W.2d 402, 404
20 (Minn. App. 1995) (citation omitted). A person may become a trespasser by moving beyond
21 the possessor's invitation or permission. Id. Johnson maintains that the WCCO producer
22 who entered Johnson's office posing as a prospective cosmetic surgery patient exceeded
23 the bounds of Johnson's consent when she misrepresented her purpose for being in his
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office and secretly videotaped her visit. In support of its argument Johnson cites the Minnesota Court of Appeal's decision in Copeland. The Copeland Court held that a television station could be sued for trespass based upon the actions of an employee purportedly accompanying a veterinarian on a house call for educational reasons who secretly videotaped the veterinarian for an investigative report. CBS contends that Copeland is distinguishable because it involves intrusion into a private home and the instant case involves entrance into a business generally opened to the public.

To determine what law applies to a claim of trespass in Minnesota, the Court observes that in the exercise of diversity jurisdiction, this Court is bound by the decisions of the state's highest court. See Nelson Distributing v. Steward-Warner, 808 F. Supp. 684, 687 (D. Minn. 1992). The Minnesota Supreme Court has not addressed the issue, and therefore the court must determine what rule it believes the state's highest court would follow. In making this determination the Court may consider the Minnesota Court of Appeals's decision in Copeland. See id. The Copeland Court held that, "News gathering does not create a license to trespass or to intrude by electronic means into the precincts of another's home or office." 526 N.W. 2d at 405 (citation omitted). In reaching this decision the court noted several decisions in other jurisdictions that have recognized trespass as a remedy when broadcasters use secret cameras for news gathering. Also, the Court observes that a federal district court in North Carolina reached a similar conclusion in Food Lion, Inc. v. Capital Cities/ABC, Inc., 887 F. Supp. 811 (M.D.N.C. 1995) finding that a food store could bring a trespass claim against television broadcasters for using two television employees doubling as food store employees to make videotapes of plaintiff's deli and meat

departments.

1 CBS maintains that even if the law recognizes a claim for trespass in the instant
2 case the verdicts in the Copeland and Food Lion case, which found only \$1.00 in damages,
3 show that such a claim should not be recognized on policy grounds. Oral Argument Tr., 11.
4 According to CBS the verdicts show that there are no damages cognizable in trespass for
5 a claim such as Johnson's and by permitting such a claim to go forward the Court will
6 encourage plaintiffs to tie up the courts with long and expensive litigation. While the Court
7 agrees that the tort of trespass does not appear to remedy the injuries alleged by Johnson,
8 the Court is not persuaded that the Minnesota Supreme Court would adopt the policy
9 argument advanced by CBS. Instead the Court finds that the Minnesota Supreme Court
10 would follow Copeland and recognize a claim for trespass in the instant case where the
11 plaintiff alleges injury based upon intrusion into a business. The Court recognizes that its
12 determination that such a claim exists does not resolve the issue of the nature or extent of
13 damages that can be recovered under such a claim.
14

15 16 III. DECEPTIVE TRADE PRACTICES CLAIM

17 CBS argues that Johnson has failed to show that he has a claim under the Minnesota
18 Deceptive Trade Practices Act ("MDTPA"), Minn. Stat. § 325D.43 et seq. The statute
19 provides that publishers or broadcasters who publish or broadcast material are subject to
20 the MDTPA "only if the persons have either knowledge of the deceptive trade practice or
21 a financial interest in the goods or services being deceptively offered for sale." Minn. Stat.
22 § 325D.46. CBS contends that the statute does not cover a news report but rather covers
23 commercial speech that constitutes anti-competitive conduct. Johnson contends that the
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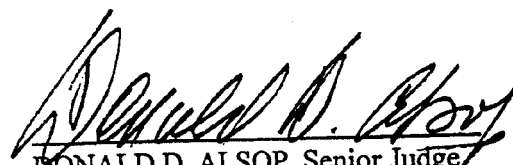
1 plain language of the act and precedent indicate that deceptive trade practices include the
2 creation of a misleading tape and dissemination of the tape by a broadcaster. The Court
3 finds that the plain language of the statute supports CBS's and not Johnson's reading of the
4 provision. Moreover, the Court finds no established precedent among those Johnson cites
5 that relate to the MDTPA, let alone interpret the provision relating to broadcasters as
6 Johnson proposes. The statute prohibits publishers and broadcasters from airing the
7 representation of a competitor that it knows to be a deceptive trade practice. As the
8 evidence does not indicate that CBS knowingly broadcast the representation of a competitor
9 of Johnson or had a financial interest in products or services offered by Johnson's
10 competitors, Johnson cannot establish a claim against CBS under the MDTPA.

11 Accordingly, upon review of all the files, records and proceedings herein,

12 **IT IS HEREBY ORDERED** that

- 13
- 14 1. Defendant's motion for summary judgment on Plaintiff's claim for trespass
15 under Count I is DENIED;
 - 16 2. Defendant's motion for summary judgment on Plaintiff's claim for
17 violation of the Minnesota Deceptive Trade Practices Act under Count III
18 is GRANTED, and Count III is dismissed;
 - 19 3. Defendant's motion with respect to Plaintiff's claim for tortious interference
20 under Count II is GRANTED IN PART and DENIED IN PART; in order to
21 establish his claim for tortious interference Plaintiff is required to satisfy the
22 standards applicable to a defamation claim; for purposes of establishing the
23 standards applicable to his claim in defamation Plaintiff is not a limited public
24 figure.

25 Dated: June 24, 1997

26 
DONALD D. ALSOP, Senior Judge
United States District Court



1 of 1 DOCUMENT



Positive
As of: Mar 22, 2011

Tuan J. Pham, Respondent, Mai Vu, et al., Plaintiffs (A06-1127), Respondents (A06-1189), vs. Thang Dinh Le, Appellant (A06-1127), Defendant (A06-1189), Tram Bui, Appellant (A06-1127), Defendant (A06-1189), Thanh Van Tran, Appellant (A06-1127), Defendant (A06-1189) Dean Do, et al., Appellants (A06-1189), Defendants (A06-1127).

A06-1127, A06-1189

COURT OF APPEALS OF MINNESOTA

2007 Minn. App. Unpub. LEXIS 854

August 21, 2007, Filed

NOTICE: THIS OPINION WILL BE UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINNESOTA STATUTES.

SUBSEQUENT HISTORY: Review denied by, Request denied by *Pham v. Thang Dinh Le, 2007 Minn. LEXIS 690 (2007)*

US Supreme Court certiorari denied by *Tran v. V Pham, 2008 U.S. LEXIS 3283 (U.S., Apr. 14, 2008)*

PRIOR HISTORY: [*1]

Ramsey County District Court File No. C7-04-9920.
Hon. John T. Finley.

DISPOSITION: Affirmed in part and reversed in part.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant protesters challenged a judgment of the Ramsey County District Court (Minnesota), which denied their post-trial motions for amended findings and new trial and entered judgment awarding respondents, a store owner and his store, damages on respondents' defamation and tortious interference with prospective advantage claims. The trial court

granted the protesters' motion to amend the verdict by reducing the total award.

OVERVIEW: When a Vietnamese bishop visited, he needed to avoid any public support for South Vietnam including being photographed or seen with the flag of South Vietnam. The owner had the flag lowered at a Vietnamese community center. As a result, the protesters alleged that the owner was a Communist lackey and called for a boycott of the store, which protesters claimed was a Communist fundraising enterprise. On appeal, the court found that the protesters' comments were not protected under the First Amendment. The statements were specific statements that were sufficiently factual to be proven true or false. The protesters admitted that they knew of the owner's background in fighting Communism. The protesters did not object to evidence of tortious interference claim and thus implicitly consented to litigation of that claim under *Minn. R. Civ. P. 15.02*. However, the store's claim of tortious interference was part of its defamation claim when the same evidence supported its claim for defamation. The protest against the store was done for a lawful purpose. Absent unlawful goals or any specific intent to further unlawful aims, the protesters were not liable for the store's business losses.

OUTCOME: The court affirmed the judgment of defamation and the reduction of damages but reversed the judgment in favor of the store for tortious interference with prospective advantage.

LexisNexis(R) Headnotes

Civil Procedure > Judgments > Relief From Judgment > Motions for New Trials

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

[HN1] An appellate court reviews a district court's decision to grant or deny a motion for a new trial for an abuse of discretion.

Civil Procedure > Judgments > Relief From Judgment > Motions for New Trials

[HN2] *Minn. R. Civ. P. 59.01* provides that a new trial may be granted for various reasons which include excessive or insufficient damages, errors of law occurring at the trial, and that the verdict is not justified by the evidence, or is contrary to law.

Torts > Intentional Torts > Defamation > Elements > General Overview

[HN3] To successfully pursue a common-law defamation claim, a plaintiff must prove that the defendant made: (1) a false and defamatory statement about the plaintiff; (2) the statement was unprivileged published to a third party; and (3) the statement harmed the plaintiff's reputation in the community.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Defamation > Public Figures

Torts > Intentional Torts > Defamation > Elements > General Overview

[HN4] The *First Amendment to the United States Constitution* limits the application of the state defamation laws. A federal rule prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with actual malice, that is, with knowledge that it was false or with reckless disregard of whether it was false or not. The "actual malice" culpability requirement ensures that debate on public issues remains uninhibited, robust, and wide-open. The New York Times test applies to criticism of public figures as well as public officials.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Defamation > General Overview

Torts > Intentional Torts > Defamation > Elements > General Overview

[HN5] In cases raising First Amendment issues an appellate court has an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression. Therefore, the question whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law, which an appellate court review de novo.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Defamation > Public Figures

Torts > Intentional Torts > Defamation > Elements > General Overview

[HN6] A statement on matters of public concern must be provable as false before there can be liability under state defamation law. Thus, where a statement of opinion on a matter of public concern reasonably implies false and defamatory facts regarding public figures or officials, those individuals must show that such statements were made with knowledge of their false implications or with reckless disregard of their truth.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Defamation > General Overview

Torts > Intentional Torts > Defamation > Elements > Libel

[HN7] A separate constitutional privilege for opinion is not required in addition to established safeguards regarding defamation to ensure freedom of expression guaranteed by the First Amendment. Put another way, if it is plain that the speaker is expressing a subjective view, such as an interpretation, a theory, conjecture, or surmise, rather than objectively verifiable facts, the statement is not actionable.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Defamation > General Overview

Torts > Intentional Torts > Defamation > Elements > General Overview

[HN8] To determine whether a statement is actionable under Milkovich, consideration must be given to the broad context of the statement, the specific context and content of the statement, and whether the statement is sufficiently objective to be susceptible of being proved true or false.

Torts > Intentional Torts > Defamation > General Overview

[HN9] Generally, falsely accusing someone of collaborating or sympathizing with Communists is generally defamatory.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Defamation > General Overview

Torts > Intentional Torts > Defamation > General Overview

[HN10] While the First Amendment protects a broad spectrum of speech, especially speech pertaining to politics and public issues, it is also true that society has a pervasive and strong interest in preventing and redressing attacks upon reputation.

Torts > Intentional Torts > Defamation > Elements > General Overview

[HN11] Actual malice must be shown by clear and convincing evidence that the defendant made the statements with actual malice, that is, either knowing that they were false or with reckless disregard for whether they were true. Actual malice can be established by evidence that the defendants engaged in purposeful avoidance of the truth.

Civil Procedure > Judgments > Relief From Judgment > Additurs & Remittiturs > General Overview

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

[HN12] An appellate court reviews the grant of a motion to amend a jury verdict for an abuse of that discretion.

Evidence > Procedural Considerations > Burdens of Proof > Allocation

Torts > Intentional Torts > Defamation > Remedies > Damages

[HN13] Damages for defamation include: (1) harm to a plaintiff's reputation and standing in the community; (2) mental distress; (3) humiliation; (4) embarrassment; (5) physical disability; and (6) economic loss caused by the defamatory statement or communication. A party asking

for damages must prove the nature, duration, and consequences of his or her injury, and the jury may not decide damages based on speculation or guess.

Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings > Conforming Pleadings to Evidence

[HN14] *Minn. R. Civ. P. 15.02* allows amendments to the pleadings to conform to the evidence. *Minn. R. Civ. P. 15.02* states that when issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Consent to litigate an issue not raised in pleadings may be implied where a party does not object to evidence relating to the issue or puts in his own evidence relating to the issue. But where evidence offered was pertinent to an issue already stated in the pleadings, the trial court may properly find that no new issue was impliedly litigated by consent.

Torts > Business Torts > Commercial Interference > Prospective Advantage > Elements

[HN15] Minnesota recognizes a cause of action for interference with prospective advantage. One who intentionally and improperly interferes with another's prospective contractual relation is subject to liability to the other for the pecuniary harm resulting from the loss of the benefits of the relation, whether the interference consists of (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or (b) preventing the other from acquiring or continuing the prospective relation.

Torts > Business Torts > Commercial Interference > Prospective Advantage > Elements

[HN16] Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence. For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims.

Civil Procedure > Appeals > Briefs

Civil Procedure > Appeals > Records on Appeal

[HN17] Generally, appellate courts cannot consider material outside the record on appeal. *Minn. R. Civ. App. P. 110.01*. A court may selectively disregard improper references to evidence outside the record without striking the entire brief.

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For Dean Do, Linda Vu and Tuan Pham (A06-1189), Plaintiff Appellants: Michael C. Mahoney, Thomas Foster, Mahoney & Foster, Ltd., Wayzata, MN.

Thang Dinh Le, Appellant, Pro se, Brooklyn Park, MN (A06-1127).

Tram Bui, Appellant, Pro se, Minneapolis, MN (A06-1127).

Thanh Van Tran, Appellant, Pro se, Minneapolis, MN (A06-1127).

JUDGES: Considered and decided by Stoneburner, Presiding Judge; Shumaker, Judge; and Dietzen, Judge.

OPINION BY: DIETZEN

OPINION

UNPUBLISHED OPINION

DIETZEN, Judge

In this consolidated appeal, the represented appellants challenge the denial of their post-trial motions and resulting judgment awarding respondents damages on their defamation and tortious interference with prospective advantage claims, arguing that (1) their statement that respondent is a Communist is protected free speech, and there was no evidence of actual malice; and (2) respondents failed to plead tortious interference with prospective advantage, and that the claim failed as a matter [*2] of law. The pro se appellants also challenge the award of damages on respondents' tortious interference with prospective advantage claim, arguing that the award was not supported by the evidence, and that the jury verdict was based on passion or prejudice. We affirm in part and reverse in part.

FACTS

Plaintiff-respondents Tuan Joseph Pham (respondent Pham) and Mai Vu (respondent Vu) are married and originally from Vietnam. Respondent Pham quit school at age 18 to join the army and fight against the Communists. When the Communists took control of North Vietnam, respondent Pham fled to the South and joined the South Vietnamese Army until the fall of Saigon in April 1975. He was then imprisoned by the Communist government for two years, and following his release in 1979, he began efforts to escape the country. Eventually,

he organized a group of one hundred people who fled Vietnam to Indonesia. Respondents and their family then migrated to Rochester, Minnesota. In 1989, the respondents purchased a building on University Avenue in St. Paul and opened Capital Market, also a respondent in this action.

The Vietnamese Community of Minnesota (VCM) was incorporated in 1981 and represented the interests [*3] of newly-arrived Vietnamese refugees. Historically, the organization was controlled by elder members of the Vietnamese community who held high military positions in the former South Vietnamese Army. It currently represents the majority of the Vietnamese community in Minnesota.

In the late 1990's, younger members of the Vietnamese community were elected to leadership positions in the VCM. In 1998, respondent Pham's son, Alex Pham, was elected vice-president of the VCM. Respondent Pham was also actively involved in fundraising to construct the VCM's community center and acted as an advisor to its board of directors.

Unhappy with the changes in leadership, defendant-appellants Tuan Anh Pham (appellant Pham), Thang Dinh Le (Le), Linda Vu, Tram Bui, Thanh Van Tran, and others left VCM and formed a rival organization named the Vietnamese Community of Minnesota Board of Representatives (VCM-BR). The VCM-BR was incorporated in 2001, and Linda Vu became its second president.

In December 2003, respondent Pham learned that Bishop Hoang Van Tiem, the Catholic bishop for the Bui Chu diocese in Vietnam, would be visiting the United States. Respondent Pham invited Bishop Tiem to Minnesota and the bishop [*4] agreed to come, but because of existing difficulties between the Vietnamese Communist government and the Vatican, he needed to avoid any public support for South Vietnam--including being photographed or seen with the flag of South Vietnam. Respondent Pham agreed to the condition and served as Bishop Tiem's driver.

A luncheon was arranged for Bishop Tiem at a local Vietnamese restaurant, but at the last minute the location was changed to the Vietnam Community Center. Respondent Pham expressed concern to the organizer of the event that the bishop could not be seen or photographed with the South Vietnamese flag that flew over the center. The organizer promised to "take care of everything." When the bishop and respondent Pham approached by car, the bishop observed the South Vietnamese flag flying over the center. Respondent Pham went into the center and requested the flag be lowered, and the organizer complied.

Following the bishop's visit, some members of the Vietnamese community staged protests regarding the lowering of the flag. A "proclamation" was issued by a group entitled "Vietnamese Refugee Community of Minnesota," criticizing the organizer for ordering the South Vietnamese flag [*5] lowered. Appellant Le asked members of the community for information regarding any individuals involved in the bishop's visit. Appellant Dean Do provided Le with a 1999 letter (Minh letter) that his ex-wife Minh Pham, respondent Pham's daughter, wrote criticizing respondent Pham. But the letter was publicly disavowed by Minh Pham in 2000.

In January 2004, Le sent a letter to President Bush and other public officials (Bush letter), with a list of 51 "co-signatories," demanding that respondent Pham be removed from his presidential appointment as a board member of the Vietnam Educational Foundation (VEF), for "misconduct" and "moral turpitude." The Minh letter, which was attached to the Bush letter, accused respondent Pham of bribery, tax evasion, physical abuse, arson and extortion; and that he had poor character and was guilty of hypocrisy.

Later that same month, the represented appellants arranged a boycott of Capital Market, in which protestors held signs and chanted, "Down with the Vietnamese Communists," "Down with Tuan Pham," "Down with Vietnamese Nationals who acted as Communist Lackeys," and "Boycott the Thudo Market." Hundreds of flyers were circulated announcing further demonstrations [*6] and protests. The flyers and pamphlets denounced respondent Pham and others as Communists. At the boycott, protestors stated that Capital Market was a "communist fundraising enterprise," and members of the Vietnamese community were "ordered" not to shop there.

During an interview on a national Vietnamese radio station, appellant Linda Vu accused respondent Pham of being a member of a "Communist sleeper cell" in Minnesota, and that he was controlled by the Vietnamese Communist government. A proclamation dated February 2004, was circulated by appellant Le accusing him of supporting the "Ha Noi Communists" and labeling him a "Communist lackey."

Respondents commenced legal action against the 51 signatories of the Bush letter, which included the represented and pro se appellants, for defamation. During the litigation, respondents dismissed the majority of the co-signatories from the lawsuit on the ground that they had not reviewed the Bush letter before it was sent. The case proceeded with seven remaining defendants, six of whom are the subject of these consolidated appeals.

Prior to trial, the district court concluded that respondent Pham was a limited purpose public figure. At trial, respondent [*7] Pham testified that he was not a

Communist, the Bush and Minh letters were false, and that appellants had defamed him and destroyed his reputation. Respondent Pham claimed that as a result of the boycott, he lost rental income of \$ 33,000 and the gross income of his business decreased by over 50%. In August 2004, Capital Market was forced to close. Appellants testified that their statement that respondent Pham is a Communist was protected free speech and related to the lowering of the South Vietnamese flag.

Following trial, the jury returned a verdict in favor of respondent Pham for \$ 477,000, consisting of \$ 130,000 for past harm to reputation; \$ 73,000 for past income loss; \$ 150,000 for future harm to reputation; \$ 54,000 for damage to future earnings; and \$ 70,000 in punitive damages. The jury returned a verdict in favor of Capital Market for \$ 216,000, consisting of \$ 108,000 for past-income loss; \$ 54,000 for damage to future-earning capacity; and \$ 54,000 for intentional interference with prospective advantage. The jury awarded no damages to Mai Vu.

Appellants moved for a new trial and for amended findings. Following arguments, the district court filed its order granting appellants' [*8] motion to amend the verdict on respondent Pham's defamation claims reducing the total award to \$ 350,000. The district court also reduced Capital Market's total award to \$ 54,000.

The represented appellants and the pro se appellants filed separate appeals. Respondent Pham filed a notice of review. We consolidated the appeals for determination by the court.

DECISION

I.

Appellants argue that the district court erred in denying their motion for amended findings and new trial regarding respondent's defamation claims. Appellants argue their statement that respondent Pham is a "Communist" is protected speech, and was not made with actual malice. Respondents argue that the district court erred in concluding that respondent Pham was a limited purpose public figure and reducing their damage awards for loss of past income and loss of future earning capacity.

[HN1] We review a district court's decision to grant or deny a motion for a new trial for an abuse of discretion. *Halla Nursery, Inc. v. Baumann-Furrie & Co.*, 454 N.W.2d 905, 910 (Minn. 1990). [HN2] *Minn. R. Civ. P. 59.01* provides that a new trial may be granted for various reasons which include excessive or insufficient damages, errors of law occurring [*9] at the trial, and that the verdict is not justified by the evidence, or is contrary to law.

[HN3] To successfully pursue a common-law defamation claim, a plaintiff must prove that the defendant made: (1) a false and defamatory statement about the plaintiff; (2) the statement was unprivileged published to a third party; and (3) the statement harmed the plaintiff's reputation in the community. *Weinberger v. Maplewood Review*, 668 N.W.2d 667, 673 (Minn. 2003). In 1964, the United States Supreme Court decided in *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686, that [HN4] the *First Amendment to the United States Constitution* limits the application of the state defamation laws. The Court recognized the need for "a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'--that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-280, 84 S. Ct. at 726. The Court reasoned that the "actual malice" culpability requirement ensures that debate on public issues remains "uninhibited, robust, and wide-open." *Id.* at 270, 84 S. Ct. at 721. [*10] Three years later in *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967), the Supreme Court determined "that the *New York Times* test should apply to criticism of 'public figures' as well as 'public officials.'" *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 336-337, 94 S. Ct. 2997, 3005, 41 L. Ed. 2d 789 (1974).

The Court later determined that [HN5] "in cases raising *First Amendment* issues . . . an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499, 104 S. Ct. 1949, 1958, 80 L. Ed. 2d 502 (1984) (quoting *New York Times*, 376 U.S. at 284-86, 84 S. Ct. at 728-29). Therefore, "[t]he question whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law," which we review de novo. *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 685, 109 S. Ct. 2678, 2694, 105 L. Ed. 2d 562 (1989).

A. Opinion Statements

Appellants first argue that their allegedly defamatory statements were constitutionally protected political speech. Specifically, appellants [*11] claim that their statement that respondent Pham is a Communist was an opinion based on the fact that Pham had the flag lowered at the Vietnam Center.

Both parties rely on *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 110 S. Ct. 2695, 111 L. Ed. 2d 1 (1990), to support their respective arguments. In that case, Mil-

kovich, a former high school wrestling coach, brought a defamation action against a newspaper and its reporter for publishing an article that implied that Milkovich lied under oath in a judicial proceeding. Appellants rely on the following language from *Milkovich*:

[W]e think *Hepps*¹ stands for the proposition that [HN6] a statement on matters of public concern must be provable as false before there can be liability under state defamation law *Hepps* ensures that a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection.

Id. at 19-20, 110 S. Ct. at 2706. But the *Milkovich* Court went on to conclude:

Thus, where a statement of "opinion" on a matter of public concern reasonably implies false and defamatory facts regarding public figures or officials, those individuals must show that such statements [*12] were made with knowledge of their false implications or with reckless disregard of their truth.

Id. at 20, 110 S. Ct. at 2706-07.

¹ *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777, 106 S. Ct. 1558, 1564, 89 L. Ed. 2d 783 (1986) (holding that the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern).

The Supreme Court reversed the dismissal of Milkovich's claim concluding that the connotation that he committed perjury is sufficiently factual to be susceptible of being proven true or false. In doing so, *Milkovich* held that [HN7] a separate constitutional privilege for "opinion" was not required in addition to established safeguards regarding defamation to ensure freedom of expression guaranteed by the *First Amendment*. Put another way, if it is plain that the speaker is expressing a subjective view, such as an interpretation, a theory, conjecture, or surmise, rather than objectively verifiable facts, the statement is not actionable. *Schlieman v. Gannett Minn. Broad.*, 637 N.W.2d 297, 308 (Minn. App. 2001).

In *Marchant Inv. & Mgmt. Co. v. St. Anthony West Neighborhood Org., Inc.*, 694 N.W.2d 92 (Minn. App. 2005), [*13] this court considered a defamation claim

under *Milkovich*. We concluded that [HN8] to determine whether a statement is actionable under *Milkovich*, consideration must be given to the broad context of the statement, the specific context and content of the statement, and whether the statement is sufficiently objective to be susceptible of being proved true or false. *Id.* at 96.

[HN9] Generally, falsely accusing someone of collaborating or sympathizing with Communists is generally defamatory. *See Gertz*, 418 U.S. at 332 n.4, 94 S. Ct. at 3003 n.4 (stating that falsely labeling someone a "Leninist" or a "Communist-fronter" is generally considered defamatory); *see also Rose v. Koch*, 278 Minn. 235, 244-45, 154 N.W.2d 409, 417 (1967) (holding that a statement that plaintiff had collaborated with Communists and Communist-fronters was defamatory). In *Rose*, our state supreme court noted that statements calling plaintiff a Communist collaborator and Communist-fronter were defamatory because they implied that the plaintiff collaborated with an enemy of the state during the Cold War.

Here, appellants argue that their statements went beyond respondent Pham's role in lowering the South Vietnamese flag, stating that [*14] he is a "Communist lackey" and a member of a "Communist sleeper cell" controlled by the Vietnamese communists; and that his business, Capital Market, is a "Communist fundraising enterprise." Thus, appellants' statements went beyond loose, figurative language, to specific statements that are "sufficiently factual to be proven true or false." *Milkovich*, 497 U.S. at 21, 110 S. Ct. at 2707. [HN10] While the *First Amendment* protects a broad spectrum of speech, especially speech pertaining to politics and public issues, it is also true that "society has a pervasive and strong interest in preventing and redressing attacks upon reputation." *Milkovich*, 497 U.S. at 22, 110 S. Ct. at 2707-08 (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 86, 86 S. Ct. 669, 676, 15 L. Ed. 2d 597 (1966)). We conclude that appellants' statements that respondent Pham is a "Communist lackey controlled by the Vietnamese Communists" are not political speech protected by the *First Amendment*.

B. Actual Malice

Appellants next argue there was insufficient evidence of "actual malice" to support the jury verdict. [HN11] Actual malice must be shown by clear and convincing evidence that the defendant made the statements with actual malice, that is, either knowing [*15] that they were false or with reckless disregard for whether they were true. *Anderson v. Liberty Lobby*, 477 U.S. 242, 257, 106 S. Ct. 2505, 2514-15, 91 L. Ed. 2d 202 (1986). "Actual malice" can be established by evidence that the defendants engaged in "purposeful avoidance of the truth." *Connaughton*, 491 U.S. at 692, 109 S. Ct. at 2698.

Here, appellants admittedly had no evidence that Tuan Pham is a Communist. They argue that because lowering the South Vietnamese flag is such an outrage, it could only mean one thing--that Tuan Pham is a Communist sympathizer. But appellants failed to produce any evidence that respondent Pham is a Communist. Appellants admitted that at the time the statements were made that they knew respondent Pham's background in fighting Communism. Further, the Bush letter contained many statements that appellants admit were false and defamatory. The public retraction of the contents of the Minh letter should have alerted appellants to the letter's untruthfulness and implies a "purposeful avoidance of the truth" by appellants. *See Connaughton*, 491 U.S. at 692, 109 S. Ct. at 2696, 2698. Appellants statement that had Pham simply offered an apology for lowering the South Vietnamese flag [*16] that they would have ceased accusing him of conspiring with the Communists, undercuts their argument that they believed he was a Communist.

Finally, respondent Pham argues that the district court erred as a matter of law by concluding that he was a "limited purpose public figure." But at oral argument, respondent Pham conceded that his primary argument is that the statements were defamatory and were made with "actual malice." Because we agree, it is not necessary for us to address whether respondent Pham was a limited purpose public figure and, therefore, we decline to do so.

C. Damages

Respondents argue that the district court erred by granting appellants' motion to amend the special verdict and by reversing the jury's award of past income loss and loss of future earning capacity. [HN12] We review the grant of a motion to amend a jury verdict for an abuse of that discretion. [HN13] Damages for defamation include: (1) harm to plaintiff's reputation and standing in the community; (2) mental distress; (3) humiliation; (4) embarrassment; (5) physical disability; and (6) economic loss caused by the defamatory statement or communication. 4 *Minnesota Practice*, CIVJIG 50.55 (2006). A party asking for damages [*17] must prove the nature, duration, and consequences of his or her injury, and the jury may not decide damages based on speculation or guess. *Canada v. McCarthy*, 567 N.W.2d 496, 507 (Minn. 1997); 4A *Minnesota Practice*, CIVJIG 90.15 (2006).

The district court concluded that "there was no evidence presented" to show that Pham suffered a loss of either past income or future earning capacity and, therefore, reduced the jury verdict by \$ 73,000 and \$ 54,000, respectively. The district court found that:

The only evidence submitted as to Capital Market was the gross income that was shown on a monthly basis for the year 2003 and up until the Market was sold in 2004. There was no testimony regarding expenses, including but not limited to the cost of goods, labor costs or taxes, which would have to be subtracted from gross income. In this court's opinion, the evidence cannot reasonably sustain the allocation for past income loss or future earning capacity as it relates to Capital Market.

We agree.

No evidence was offered during trial specifying the amount of income respondent Pham received from Capital Market. While there is some evidence in the record that Pham lost rental income due to the defamatory [*18] statements, the evidence is not specific. Respondent Pham did not offer of business expenses, which is necessary to determine net income. On this record, the district court did not abuse its discretion. *McCarthy*, 567 N.W.2d at 507.

II.

Appellants argue that the district court erred in not dismissing respondent Capital Market's claim for tortious interference with prospective advantage on the grounds that respondents failed to plead the claim in their complaint and that the claim fails as a matter of law. Initially, appellants argue that respondent did not plead tortious interference with prospective advantage, that no amendment to the pleading was granted by the district court and, therefore, the claim must be dismissed.

[HN14] *Rule 15.02* allows amendments to the pleadings to conform to the evidence. *See Minn. R. Civ. P. 15.02* (stating that when issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings). Consent to litigate an issue not raised in pleadings may be implied where a party does not object to evidence relating to the issue or puts in his own evidence relating to the [*19] issue. *Folk v. Home Mut. Ins. Co.*, 336 N.W.2d 265, 267 (Minn. 1983); *Shandorf v. Shandorf*, 401 N.W.2d 439, 442 (Minn. App. 1987). But where evidence offered was pertinent to an issue already stated in the pleadings, the trial court may properly find that no new issue was impliedly litigated by consent. *Schumann v. McGinn*, 307 Minn. 446, 469, 240 N.W.2d 525, 538 (1976); *Roberge v. Cambridge Coop. Creamery Co.*, 243 Minn. 230, 234, 67 N.W.2d 400, 403 (1954).

Capital Market presented testimony, without objection, that appellants made defamatory statements during the boycott of its business, resulting in the loss of customers and damage to its business. Respondent's claim for wrongful interference was the subject of a jury instruction and a question on the special verdict form that was presented to the jury without objection from appellant. On this record, we conclude that appellants implicitly consented to litigating the tortious interference claim. Consequently, we turn to the merits of Capital Market's claim for tortious interference with prospective advantage.

[HN15] Minnesota recognizes a cause of action for interference with prospective advantage. *United Wild Rice, Inc. v. Nelson*, 313 N.W.2d 628, 632 (Minn. 1982); [*20] *Wild v. Rarig*, 302 Minn. 419, 442 n.16, 234 N.W.2d 775, 790 n.16 (1975). Minnesota has adopted the *Restatement (Second) of Torts* § 766B (1979) definition for interference with prospective advantage, which provides:

One who intentionally and improperly interferes with another's prospective contractual relation . . . is subject to liability to the other for the pecuniary harm resulting from the loss of the benefits of the relation, whether the interference consists of (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or (b) preventing the other from acquiring or continuing the prospective relation.

See United Wild Rice, 313 N.W.2d at 632-33.

Appellants argue that Capital Market's claim fails as a matter of law on the ground that it is duplicative of respondent's defamation claim. We agree. In *Wild v. Rarig*, the plaintiff brought a claim for breach of contract, interference with contract, and defamation. Our supreme court held, among other things, that a plaintiff's cause of action for tortious interference with prospective advantage was "essentially" part of his cause of action for defamation. 302 Minn. at 447, 234 N.W.2d at 793. The [*21] court reasoned that:

The defamation which is the means used to interfere with his business relationships action is the same defamation that Dr. Wild seeks to recover damages for under his defamation claim. It seems to us that, regardless of what the suit is labeled, the thing done to cause any damage to Dr. Wild eventually stems from

and grew out of the defamation. Business interests may be impaired by false statements about the plaintiff which, because they adversely affect his reputation in the community, induce third persons not to enter into business relationships with him.

Id.

Like *Rarig*, Capital Market's claim of tortious interference is part of its defamation claim. Capital Market presented the same evidence, that is, the boycott of its business and the statements made by appellants at the boycott regarding its business, to support its claim for damages. Capital Market cannot recover the same damages under a tortious interference claim that it unsuccessfully sought to recover under its defamation claim. Specifically, the district concluded that there was insufficient evidence of damages to support Capital Market's claim for defamation. For the same reason, we conclude that there [*22] is insufficient evidence to support Capital Market's damage award for tortious interference with prospective advantage.

Further, Capital Market's tortious interference claim fails under our reading of *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 102 S. Ct. 3409, 73 L. Ed. 2d 1215 (1982). In *Claiborne*, white merchants who had been damaged as a result of a civil rights boycott brought a tortious-interference-with-business-relationships action against civil rights organizations and participants in the boycott. *Id.* at 889, 102 S. Ct. 3413. The Supreme Court reversed the lower court, holding that the boycott was constitutionally protected, and that individuals could only be held liable for damages resulting from violent activity. *Claiborne* concluded, among other things, that:

[HN16] Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence. For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims.

Id. at 920, 102 S. Ct. at 3429.

In *Claiborne*, the purpose of the boycott was to secure compliance [*23] by both civic and business leaders with a lengthy list of demands for equality and racial justice. *Id.* at 889, 102 S. Ct. at 3413. We conclude that the protest against Capital Market was done for a lawful purpose. Appellants organized the boycott to encourage the public not to shop at Capital Market and to protest of respondent Pham's role in lowering the South Vietnamese flag at the community center. Their protest was political and aimed at obtaining an apology from respondent Pham and seeking his ouster from the VEF board. Thus, absent unlawful goals or any specific intent to further unlawful aims, appellants are not liable for Capital Market's business losses sustained as a result of appellants' organization of the boycott.

III.

Respondents argue that the statement of the case and statement of facts in pro se appellants' (Thang Dinh Le, Bui Tram, and Thanh van Tran) informal briefs and certain pages of the pro se appellants' appendix should be stricken from the record because they are not based on evidence introduced at trial. [HN17] Generally, appellate courts cannot consider material outside the record on appeal. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988); see also *Minn. R. Civ. App. P. 110.01* [*24] (defining record on appeal); see also *AFSCME Council No. 14 v. Scott County*, 530 N.W.2d 218, 222-23 (Minn. App. 1995) (stating that the court may selectively disregard improper references to evidence outside the record without striking the entire brief), *review denied* (Minn. May 16, June 14, 1995).

Here, the majority of the material cited by respondents is simply argument or references to material that can be found in the district court file. None of the material to which respondents object, is crucial to deciding the case. And we may selectively ignore the extraneous information. Therefore, we disregard discussion of extraneous events without striking large portions of appellants' pro se brief. Further, we have disregarded evidence not part of the district court record, but found in the appendix of the pro se appellants' brief.

Affirmed in part and reversed in part.