STATE OF MINNESOTA
IN COURT OF APPEALS
A03-1329

Consumer Justice Center P.A., et al.,
Appellants,

vs.

Trans Union L.L.C.,
Respondent.

Filed April 27, 2004
Reversed and Remanded
Randall, Judge

Ramsey County District Court
File No. C9-02-006884

Thomas J. Lyons, John H. Goolsby, Thomas J. Lyons & Associates, P.A., 342 East County Road D, Little Canada, MN 55117 (for appellants)

James F. Roegge, Michael T. Browne, Meagher & Geer, PLLP, 33 South Sixth Street, Suite 4200, Minneapolis, MN 55402; and

Robert J. Schuckit (pro hac vice), Kirstie D. Anderson (pro hac vice), Katz & Korin, 10 West Market Street, Suite 1120, Indianapolis, IN 46204 (for respondent)

Considered and decided by Randall, Presiding Judge, Klaphake, Judge, and Harten, Judge.

UNPUBLISHED OPINION

RANDALL, Judge

Appellants sued respondent for libel based on respondent's statements that appellants are a credit repair agency, that respondent's experiences showed they routinely

dispute accurate information, and that appellants' conduct merited referral to a law enforcement agency. Respondent asserted truth as a defense. The district court granted summary judgment to respondent and denied other relief to appellants. On appeal appellants argue that (1) there are genuine issues of material fact as to whether respondent's statements are true; (2) the court erred in finding appellants fit the statutory definition of a credit repair agency as a matter of law; (3) the court erred in denying appellant's motion for rule 36.02 relief; and (4) the court erred by refusing to reconsider its decision based on newly discovered evidence. We conclude the record reflects highly contested material fact issues and, thus, at this stage, summary judgment was inappropriate. We reverse and remand.

FACTS

Appellants, attorney Thomas J. Lyons Jr. and his law firm, the Consumer Justice Center, P.A. (CJC), allege that respondent Trans Union, LLC, defamed them in two written communications respondent sent to appellants' clients. Appellants have been representing consumers who report disputes with credit reporting agencies such as respondent, since 1996. Respondent is a consumer credit reporting agency as defined under 15 U.S.C. § 1681a(f). As a credit reporting agency, respondent regularly assembles, evaluates, and disperses information concerning consumers for the purpose of furnishing consumers' reports to third parties. *See* 15 U.S.C. § 1681a(f).

On January 10, 2002, on behalf of a client, George Wessman, and then on May 9, 2002, on behalf of a client, William Rossman, appellants sent letters to respondent disputing entries in their clients' credit reports. Some time after January 10 and before

May 29, respondent notified appellants and their client, George Wessman, that there was a mistake on Wessman's credit report and that they would delete the error.

On May 29, 2002, Lyons sent a letter to respondent acknowledging that respondent correctly deleted an error on Wessman's credit report, and then went on to state that Wessman "still adamantly disput[ed]" another entry on Wessman's credit report. On June 6, 2002, Wessman received a form letter from respondent that contained the following language:

> We received a dispute regarding your credit report from a credit repair agency. Our experience with that agency shows that they routinely and knowingly dispute accurate information. . . . For this reason, we consider their dispute to be frivolous and we will not take action on it. . . . If you believe the credit repair agency misrepresented their services to you, and you would like to be referred to the appropriate law enforcement agencies to file a complaint, let us know and we will provide you a referral.

With regard to William Rossman, after appellants' May 9 letter on his behalf, respondent mailed a letter to Rossman on May 20 containing the identical form paragraphs that went to Wessman. Both Rossman and Wessman showed the letters from respondent to Lyons.

On July 16, 2002, appellants sued respondent for libel based on respondent's written statements. Appellants argue that the language contained in both letters either expressly or by implication made the following defamatory factual assertions: (1) appellants routinely and knowingly dispute accurate information; (2) that appellants are a credit repair organization; (3) that appellants had engaged in criminal conduct; and (4)

that respondents impugned their professional integrity. Respondent's answer asserted truth as a defense.

On February 21, 2003, respondent served discovery, including requests for admissions, interrogatories, and documents requests. Appellants' answer to respondent's request for admissions was due on March 24, 2003. Appellants' answer to respondent's requests for admissions was served on April 17, 2003, approximately 24 days late. On May 29, 2003, appellants formally moved to extend the time for answering the requests for admissions. That same day, respondents moved for summary judgment based, in part, on appellants' failure to timely respond to admissions. At hearings on the parties' cross-motions appellants' counsel acknowledged he did not respond to respondent's request for admissions within the 30-day time limit because he was "vacation[ing] in Florida from March 19, 2003 to April 14, 2003.

On June 18, 2003, appellants filed their opposition to summary judgment. Appellants attached lengthy affidavits from Lyons and Rossman. The Lyons affidavit denied that appellants are a credit repair organization or that they had held themselves out as such. His affidavit stated that appellants, as attorneys, are specifically hired on a "blended retainer-contingency basis to investigate the source and cause of credit reporting inaccuracies" and that "if my investigation leads to the conclusion that there has been a violation of the [FCRA] I am engaged to litigate those claims." His affidavit further stated that "as [a] step in the process of investigating [his] clients[']' potential claims to litigate [he] will write letters on their behalf disputing the inaccuracies on their credit reports with the national credit reporting agencies." Rossman's affidavit

established that Rossman paid Lyons to "assist [him] in resolving the inaccurate credit reporting matter."

On June 24, 2003, respondent served its reply to appellants' opposition. Respondent attached an affidavit from Jean Sorenson. Sorenson's affidavit stated that respondent removes disputed items from a consumer's credit report if the creditor does not verify them as correct within thirty days of receipt of the dispute. Her affidavit also stated that she supervised respondent's investigation of third-party disputes submitted to respondent by appellants. Sorenson's affidavit stated that respondent processes thousands of disputes each week, and thus, a certain number of those requests cannot be responded to within 30 days. Her affidavit stated that prior to May 20, 2003, the Consumer Justice Center had submitted 59 disputes to respondent, and respondent verified 41 of those disputes. Sorenson's affidavit also stated that respondent was unable to investigate two-thirds of the list of appellants' clients because appellants refused to provide the social security numbers. Her affidavit stated that respondent previously verified as accurate five of the six disputed items submitted by appellants as to clients Wessman and Rossman.

On July 9, 2003, the district court granted respondent's motion for summary judgment. The court concluded that "[appellants] . . . failed to point out any evidence tending to show that there is a genuine issue of material fact regarding the facts uncovered by [respondent's] examination of its records." The district court also concluded that appellants fit the statutory definition of a credit repair agency or organization. The court denied appellants' request for an extension to answer

respondent's request for admissions. The district court noted that its summary judgment ruling was not based on appellants' failure to respond to respondent's request for admissions. The court stated:

> Without regard to [appellants'] failure to respond to the request for admissions, the undisputed facts are that [appellants] are a credit repair agency or organization and that [respondent's] experience with [appellants] is that they routinely and knowingly disputed accurate information. These statements are literally true and their underlying implications are also true. That being the case and truth being an absolute defense to a claim of defamation, [respondent] is entitled to summary judgment.

On August 5, 2003, the district court issued an amended order denying, among other things, appellants' motions for reconsideration, and again denying appellants' motion for an extension to answer request for admissions. On August 12, 2003, appellants filed a motion to vacate the summary judgment ruling based on "newly discovered evidence" in the form of transcripts of three depositions taken in June, the results of respondent's investigation of its records, and items from appellants' own records. On August 29, 2003, the district court heard appellants' motion to vacate, and shortly after denied appellants' motion. This appeal follows.

DECISION

When reviewing a grant of summary judgment, an appellate court must determine whether any genuine issues of material fact exist and whether the district court erred in applying the law. *Cummings v. Koehnen*, 568 N.W.2d 418, 420 (Minn. 1997). Evidence must be viewed in the light most favorable to the non-moving party, and any doubt as to whether there is a factual issue should be resolved in favor of that party. *Wartnick v.*

Moss & Barnett, 490 N.W.2d 108, 112 (Minn. 1992). To defeat a summary judgment motion, a party cannot rely on denials or general averments, but must offer specific facts to show that there is a genuine issue of material fact for trial. Minn. R. Civ. P. 56.05; *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997).

1. Defamation Claim

Appellants first argue that the respondent had the burden of proving the truth of their statements because appellants were entitled to a "presumption of falsity" in respondent's letters. We reject the argument that "respondent had the burden of proving truth" and note that our decision does not turn on this issue.

Appellants assert that the district court erred in granting judgment for respondent at the summary judgment stage. Appellants sued respondent for libel based on respondent's statements that appellants are a credit repair agency, that respondent's experience showed they routinely dispute accurate information, and that appellants' conduct merited referral to a law enforcement agency. Respondent asserted truth as a defense. The district court concluded as a matter of law that respondent established its affirmative defense of truth and that there were no material fact issues in dispute. We agree with appellants that the district court erred in granting summary judgment at this stage.

In Minnesota, the elements of defamation "require the plaintiff to prove that a statement was false, that it was communicated to someone besides the plaintiff, and that it tended to harm the plaintiff's reputation and to lower him in the estimation of the community." *Rouse v. Dunkley & Bennett, P.A.*, 520 N.W.2d 406, 410 (Minn. 1994).

Truth is a complete defense to a defamation claim. *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 255 (Minn. 1980). It is the first element of defamation that is in dispute in this case.

Appellants assert that genuine issues of material fact exist as to whether respondent's statements were false. We agree. For instance, the district court concluded that the undisputed facts showed appellants are a credit repair agency *and routinely and knowingly dispute accurate information*. We can only point out the obvious. Sorenson's own affidavit (on behalf of respondent) indicates that respondent managed to verify 41 of 59 claimed disputes over credit reports. By definition, that means respondent could not verify 18 out of 49, which is 30%! This coincides with what the credit reporting industry knows and what the national consumer organizations know, which is that with the millions of people in this country doing millions of transactions on a daily or weekly basis, at any give time a credit report selected at random may contain one-third to one-half nonverifiable entries. Hence, the universal mandate, including from the credit reporting companies themselves, like respondent is, to periodically pay a modest fee to review your credit report to make sure it is accurate! It is worth noting that respondent's affidavit indicated respondent could verify as accurate five of six disputed items submitted by appellants as to his clients Wessman and Rossman. That means one out of six was either in error or nonverifiable; that is 16%. Without passing on the merits, we conclude "there could be a fact issue here" as to whether appellants "routinely and knowingly" dispute accurate information.

A careful review of the record reveals that appellants have put forth evidence to show genuine fact issues exist as the whether the statements made by respondent are false to survive summary judgment. *See Murphy v. Country House, Inc.*, 307 Minn. 344, 351-52, 240 N.W.2d 507, 512 (1976) (genuine issue must be established by "substantial evidence" or evidence sufficient to avoid a directed verdict at trial); *see also Lamb v. Jordan*, 333 N.W.2d 852, 855 (Minn. 1983) (JNOV granted if "reasonable minds cannot differ" as to the outcome).

There is a serious dispute in the record about whether appellants qualify as a credit repair agency. Under Minn. Stat. § 335.52, subd. 3(b)(8), "credit services organizations do not include . . . any person licensed to practice law in this state if the person renders services within the course and scope of practice as an attorney." Appellants submitted Lyons' affidavit, which stated that Lyons is an attorney and CJC is his law firm. Respondent argues that appellants fit the statutory definition of a credit repair agency under 15 U.S.C. § 1679a(3). Respondent submitted the statements in the affidavits of Lyons and Rossman to demonstrate that appellants are a credit repair agency. Respondent claims that Minn. Stat. § 335.52, subd. 3(b)(8), is trumped by a federal statute and can be ignored.

The record simply shows clear factual disputes about whether appellants routinely and knowingly disputed accurate information, and about who they are. Appellants offered correspondence between themselves and respondent concerning appellants' client Wessman. Respondent acknowledged an error as to Wessman, and respondent's supporting affidavit acknowledges nonverifiable entries ranging from 16 to 30%.

Appellants raised genuine issues of fact as to whether appellants' actions constituted criminal conduct. There are serious issues here as to what respondent's form letter accused appellants of. The allegedly defamatory language stated, "[i]f you believe the credit repair agency misrepresented their services to you, and you would like to be referred to the appropriate law enforcement agencies to file a complaint, let us know and we will provide you a referral." The phrase "law enforcement agencies" suggests criminal wrongdoing, contrary to respondent's assertions. We conclude a lay jury could reasonably infer that respondent accused appellants of criminal conduct. That accusation in slander and libel cases presumes damage as a matter of law. *See Becker v. Alloy Hardfacing & Eng'g Co.*, 401 N.W.2d 655, 661 (Minn. 1987).

Appellants have shown sufficient evidence that genuine issues of material fact exist as to what their status is, as to what they do, as to what they dispute, and as to whether their conduct is illegal. For the district court to come to the conclusion it did, it had to, at the summary judgment stage, consider the evidence, weigh it, make credibility determinations, and then resolve the inferences against the nonmoving parties, appellants, and in favor of the party moving for summary judgment, respondent. This is plain error. *See Fairview Hosp. & Health Care Servs. v. St. Paul Fire & Marine Inc. Co.*, 535 N.W.2d 337, 341 (Minn. 1995) (stating that on a summary judgment motion, the district court may not weigh the evidence and must view the evidence in the light most favorable to the nonmoving party). The district court erred by concluding that no genuine issues of fact material fact existed in this case. *Russ*, 566 N.W.2d at 70 (district court may not resolve disputed factual issues).

2. Rule 36.02

Appellants also argue that the district court erred by refusing to grant their motion for relief under 36.02 where they sought additional time to answer respondent's request for admissions. Specifically, appellants argue that the district court failed to consider their late answer to respondent's request for admissions. We need not decide the 36.02 issue. First, the district court specifically stated in its order that it did not consider lateness in its decision. Most importantly, because we reverse the grant of summary judgment on factual grounds, the issue is moot unless it reappears in district court.

3. Sorenson's Affidavit

Appellants make additional arguments concerning the Sorenson affidavit submitted by respondent. However, appellants failed to argue this issue to the district court. *See Midway Nat'l Bank of St. Paul v. Bollmeier*, 474 N.W.2d 335, 339 (Minn. 1991) (refusing to consider issues raised by a losing party for the first time on appeal); *see also Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that this court generally will not consider matters not raised below). Further, in light of our decision, this issue is moot and we decline to address it.

4. Newly Discovered Evidence

Appellants argue that the district court erred by refusing to reconsider its decision based on "newly discovered evidence." Because we reverse the grant of summary judgment to respondent on the other grounds, we do not address this issue.

We conclude that substantial and material factual issues are in dispute and that summary judgment for either side is inappropriate at this stage on this record.

Reversed and remanded.

4-20-04