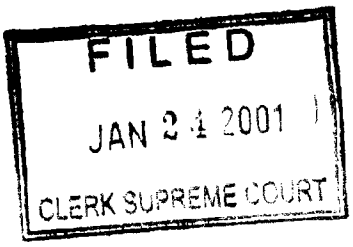
IN THE COURT OF APPEALS OF IOWA

No. 0-694 / 99-0708
Filed January 24, 2001

SCOTT W. LOWE,
Appellant/Cross-Appellee,

vs.

TODD'S FLYING SERVICE, INC.,
Appellee/Cross-Appellant.



TODD'S FLYING SERVICE, INC.,
Counterclaim Plaintiff-Appellee/Cross-Appellant,

vs.

SCOTT W. LOWE,
Counterclaim Defendant-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Polk County, Linda R. Reade, Judge.

Plaintiff Scott Lowe appeals the district court ruling granting the defendant's motion for summary judgment on his claims of libel, slander and tortious interference with prospective business advantage. **AFFIRMED.**

Thomas L. Staack, Chad A. Swanson, and Lynn M. Smith of Dutton, Braun, Staack & Hellman, P.L.C., Waterloo, for appellant Lowe.

Timothy S. Eckley of Duncan, Green, Brown, Langeness & Eckley, P.C., Des Moines, for appellee Todd's Flying Service.

Heard by Sackett, C.J., and Vogel and Miller, JJ.

VOGEL, J.

Scott Lowe appeals the district court's ruling, which granted Todd's Flying Service, Inc.'s motion for summary judgment on the claims of libel, slander and tortious interference with prospective business advantage. Todd cross appeals. We affirm both grants of summary judgment.

Background facts. This suit arises from several allegedly damaging comments made by Lowe's former employer, Allan Todd of Todd's Flying Service, Inc. (Todd), to an investigation firm, Transportation Safety West, Inc., for the benefit of a prospective employer, DHL Airways, Inc. Lowe is a pilot and has worked for several different companies since his employment with Todd in 1991. During the employment application process for DHL Airways, Lowe signed a release form, allowing Transportation Safety West, Inc. to contact and verify application information with his former employers. Todd was contacted by the investigation firm and he made comments regarding Lowe. DHL failed to hire Lowe but did not give any reason that would implicate Todd's unfavorable reference as the basis. Shortly thereafter, Lowe was also denied employment at United Airlines with no evidence that Todd's statements played a part of that decision. Lowe filed suit against Todd, alleging various theories of defamation and interference with prospective business advantage. Todd filed a counterclaim, also alleging libel and slander. Todd then filed a motion for summary judgment. Lowe filed his own motion for summary judgment of Todd's counterclaim. On April 26, 1999, the trial court issued a ruling granting both motions. Lowe and Todd both appeal.

The statements. Todd's. The purportedly damaging verbal comments from Todd, which were later incorporated into the investigatory report provided to DHL, were as follows: 1) Lowe quit without notice, 2) Lowe left him high and dry, 3) Lowe's work quality was poor, 4) Lowe's attendance was poor, 5) Lowe's attitude was poor, 6) Lowe's employment period was approximately two to three months in duration, and 7) Lowe refused a drug test[1]. Lowe claims Todd's comments were extremely damaging to him, because they impugned his work performance and ethics, branded him a liar, and questioned whether he has used illegal drugs, all of which are extremely sensitive to a pilot's career.

Lowe's. Todd based its counterclaim on Lowe's statement to prospective employers of, "Mr. Todd has established a reputation for not giving credible references." Todd claims the trial court should have allowed a jury to determine whether this statement was defamatory.

Scope of review. Summary judgment is appropriate under Iowa Rule of Civil Procedure 237 only when no genuine issue of material fact exists and the moving party is entitled to a judgment as a matter of law. Iowa R. Civ. P. 237(c); *City of West Branch v. Miller,* 546 N.W.2d 598, 600 (Iowa 1996). In ruling upon the motion, the court considers the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits. *City of West Branch,* 546 N.W.2d at 600. No fact question exists if the only dispute concerns the legal consequences flowing from undisputed facts. *Id.* Thus, we examine the record before the district court to decide whether a genuine issue of material fact exists

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[1] Additional alleged statements not contained in the report included: "Dammit you don't want him," "I think he does drugs," and "Bullshit, not a fucking captain. He's a liar."

and whether the court correctly applied the law. *Gerst v. Marshall,* 549 N.W.2d 810, 811-12 (Iowa 1996). In doing so, we view the facts in the light most favorable to the party opposing the motion for summary judgment. *Id.*

Motion for summary judgment. Lowe's claim. Lowe completed an employment application for DHL approximately six years after his employment with Todd ended. The application was seven pages in length and contained several different sections requiring specific information. One section, entitled "Employment Experience," required a list of all employment for the past ten years. Such information included the name and address of the employer, starting and ending position, starting and ending date, starting and ending salary, responsibilities, reason for leaving, name and title of supervisor. Another section of the application was entitled "Professional References." Lowe did not list Todd in this section. The next section, entitled "Agreement," included this language:

> I authorize DHL (and its parent, subsidiaries, affiliates, or agents) to verify all information provided in this application, including employment history, educational background and references. I authorize the references listed herein to release any and all information they may have, personal or otherwise. I release DHL, and any person, company or organization furnishing such information, from any and all liability arising from providing or receiving such information.

Lowe signed immediately below this agreement. The "Background Screening Form" section required the applicant to list all places of residence for the past ten years. The application also contained another agreement, which read as follows:

> DHL Airways, Inc. will be obtaining a report verifying certain employment application information from Transportation Security West (TSW). This information will also be used to comply with applicable DOT and FAA regulations. I hereby authorize DHL Airways, Inc. to request and TSW to obtain and to release any and

> all information concerning my previous place(s) of residence and employment and any pertinent information it may have, personal or otherwise as required for processing my application for employment. I hereby release DHL Airways, Inc., TSW, its authorized agents, and any person, company or organization furnishing such information from any and all liability arising from providing or receiving such information. I understand that the commencement and/or continuation of my employment at DHL Airways, Inc. is contingent upon receipt by DHL Airways, Inc. of favorable and satisfactory information.

Lowe signed below this portion of the application.

Lowe alleges the trial court erred in granting Todd's motion for summary judgment. Todd asserts the release signed by Lowe insulates him from all liability stemming from the statements made in the employment verification process. Specifically, Lowe claims the releases signed in the employment application and on the background screening form were ambiguous. Since a release is a contract, its validity is governed by the usual rules relating to contracts. *Verne R. Houghton Ins. Agency, Inc. v. Orr Drywall Co.*, 470 N.W.2d 39, 42 (Iowa 1991). The cardinal principle is that the intent of the parties must control and, except in cases of ambiguity, this intent is determined by the language of the contract itself. *Id.* Todd argues the trial court was wrong in finding the meaning of the releases was clear and asserts the trial court should have employed the rules of construction. He makes these claims for the first time on appeal. An issue not raised before the trial court cannot be considered for the first time on appeal. *Wesley Retirement Services, Inc. v. Hansen Lind Meyer, Inc.*, 594 N.W.2d 22, 29 (Iowa 1999).

Nonetheless, we look to the two agreements to review the trial court's decision to grant summary judgment to Todd on this issue. Lowe claims the

agreements did not insulate Todd's comments because use of the words "pertinent information" and "such information" are not specific enough to know what they actually refer to. However, the second agreement was placed near the end of the entire application, just below a disclaimer paragraph on age discrimination and immediately preceding an inquiry regarding the availability of a free copy of the report. Thus, the second agreement appears to be a sweeping release of liability rather than referring to any specific portion of the application. The second agreement contains the following language:

> I hereby authorize DHL Airways, Inc. to request and TSW to obtain and to release any and all information concerning my previous place(s) of residence and employment and any pertinent information it may have, personal or otherwise as required for procession my application for employment.

The trial court found the agreements broad enough to cover all the comments, stating:

> There was a clear, unambiguous intent in the release language to release any former employers, which would have included Allan Todd and Todd's Flying Service, from liability for furnishing, "any and all" information concerning Lowe's past employment. The release language was not limited in any respect to only certain kinds or a certain quality of personnel information. There is nothing in the release language which limited the release to only such information that is not arguably false, slanderous or libelous.

Lowe also claims it is against public policy to find the releases provide immunity for an intentional and malicious tort. The legislature has crafted a statute to establish the liability of a current or former employer in providing employment information. The language of Iowa Code section 91B.2 follows:

> 1. An employer or an employer's representative who, upon request by or authorization of a current or former employee or upon request made by a person who in good faith is believed to be a

> representative of a prospective employer of a current or former employee, provides work-related information about a current or former employee, is immune from civil liability unless the employer or the employer's representative acted unreasonably in providing the work-related information.
>
> 2. For purposes of this section, an employer acts unreasonably if any of the following are present:
>
> * * *
>
> c. The work-related information is not relevant to the inquiry being made, is provided with malice, or is provided with no good faith belief that it is true.

This statute serves to insulate a former employer while providing employment information regarding previous employees within certain stated parameters. Lowe contends the legislature did not intend to immunize a former employer from providing irrelevant information or even work-related information that is provided with malice. Again, Lowe failed to preserve error by raising these arguments before the district court. We will not address them for the first time on appeal. *See Ward v. Loomis Bros., Inc.*, 532 N.W.2d 807, 812 (Iowa App. 1995).

Motion for summary judgment, Todd's claim. In an attempt to counter Todd's statements during the employment verification process, Lowe admittedly stated to prospective employers, "Mr. Todd has established a reputation for not giving credible references." The district court granted summary judgment on Todd's counterclaim, and Todd appeals. Todd alleges the trial court erred in finding the claim did not meet the elements of libel per se and that because the trial court found the statement was ambiguous, the claim should have proceeded to the jury.

The court found the statement was ambiguous and would require extrinsic evidence to ascertain the exact meaning of the statement before a determination of libel or slander could be made. Therefore, it could not constitute libel or slander per se. "A statement is not defamatory per se if it is susceptible to two reasonable constructions or meanings, one not defamatory." *Kerndt v. Rolling Hills Nat. Bank,* 558 N.W.2d 410, 418 (Iowa 1997). Libel or slander per se requires more than just a statement to a third party to reach the jury. The statements must have "a natural tendency to provoke the plaintiff to wrath or expose him to public hatred, contempt, or ridicule, or to deprive him of the benefit of public confidence or social intercourse" or to injure the person in the maintenance of their business. *Schlegel v. Ottumwa Courier, a Div. of Lee Enterprises, Inc.,* 585 N.W.2d 217, 222 (Iowa 1998) (*quoting Prewitt v. Wilson,* 128 Iowa 198, 202, 103 N.W. 365, 367 (1905)); *Vinson v. Linn-Mar Community School Dist.,* 360 N.W.2d 108, 115 (Iowa 1984). Some clear examples of defamation per se include an attack on the integrity and moral character of a party or an accusation that a person is a liar. *Id.* The court found, and we agree, the statement Lowe made is simply too general in nature to rise to the level of defamation per se.

Further, Lowe correctly asserts that if a statement is susceptible to two possible meanings, the jury, not the court must decide whether a statement is defamatory. "If the language is capable of two meanings including the one ascribed by the complainant, it is for the jury to say whether such meaning was the one conveyed." *Vinson,* 360 N.W.2d at 115 (*citing Berger v. Freeman*

Tribune Publishing Co., 132 Iowa 290, 295, 109 N.W. 784, 786 (1906)). "On a motion for summary judgment, the court does not weigh the evidence. Instead, the court inquires whether a reasonable jury, faced with the evidence presented, could return a verdict for the nonmoving party." *Bitner v. Ottumwa Community School Dist.*, 549 N.W.2d 295, 300 (Iowa 1996). However, where, as here, the statements do not rise to the level of libel or slander per se, Todd must also show he suffered damages to prevail on a defamation claim. We agree with the trial court's finding that Todd's Flying Service, Inc. has failed to present evidence to establish any harm suffered as a result of this statement. We affirm the district court's granting of summary judgment on Todd's counterclaim.

Finding regarding drug test. In its ruling on the motions for summary judgment, the trial court went beyond sustaining Todd's motion and found Lowe had refused to take a drug test. The trial court stated:

> On August 24, 1990, at about ten o'clock in the morning, while employed at Todd's Flying Service, Lowe was given notice he was required to give a urine sample that same day, at 3:30 p.m. which would be tested for alcohol and controlled substances. Lowe failed to appear to give the urine sample as directed and *thus the Court finds he "refused" the drug test.* . . . (emphasis added)

Lowe alleges this incident occurred prior to the federal regulations now applicable for the testing of pilots. He alleges he had made a night flight, fell asleep, and overslept the appointment. He contacted his employer who scheduled an alternate time for him to take the test. He successfully did as his employer requested. Because of this unrefuted explanation, he asserts the trial court's "finding" of a refusal to take a drug test is especially egregious to him as a pilot attempting to obtain employment. We agree that such a finding was not

necessary to the ruling on the motions for summary judgment. In fact, a ruling sustaining the motions for summary judgment would have dismissed this issue from the trial court's review as well. Accordingly, we strike the trial court's finding regarding the drug test, but affirm the granting of summary judgment to both parties.

Accordingly, we affirm.

AFFIRMED.