THE UTAH COURT OF APPEALS

SHANE KEISEL AND JENNIFER HUFF,
Appellants,
v.
RUSSELL WESTBROOK III AND JAZZ BASKETBALL INVESTORS INC. DBA THE UTAH JAZZ,
Appellees.

Opinion
No. 20210414-CA
Filed December 29, 2023

Fourth District Court, Provo Department
The Honorable Derek P. Pullan
No. 190401976

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JUDGE RYAN D. TENNEY authored this Opinion, in which JUDGES MICHELE M. CHRISTIANSEN FORSTER and RYAN M. HARRIS concurred.

TENNEY, Judge:

¶1 In March 2019, the Utah Jazz were playing a game against the Oklahoma City Thunder. Midway through the second quarter, Russell Westbrook, the Thunder's point guard at the time, had a verbal altercation with Shane Keisel, a Jazz fan who was sitting next to his girlfriend Jennifer Huff just a few rows up

from the court. In the initial moments of this altercation, Keisel said something to Westbrook that included the phrase "on your knees." Westbrook responded profanely and aggressively, and his response was caught on video and then circulated on social media before the game had concluded. When Westbrook was asked about the altercation in a post-game interview, Westbrook said that he thought Keisel's initial comment to him was "racial." Westbrook also said that Keisel's "wife" had made a similar comment.

¶2 The Jazz quickly investigated the altercation, determined that Keisel had violated a code of conduct that governs fan behavior, and banned Keisel from attending its home games for life. Before the next home game, then-owner Gail Miller addressed the crowd and said, among other things, "We are not a racist community."

¶3 Keisel and Huff sued both Westbrook and the Jazz, alleging defamation, false light, intentional infliction of emotional distress, and negligent infliction of emotional distress. The district court granted summary judgment for both defendants. Keisel and Huff now appeal. For the reasons set forth below, we affirm the district court's decision.

BACKGROUND[1]

The Verbal Altercation, the Video, & the Post-Game Statements

¶4 In 2019, Keisel was a Utah Jazz fan who attended eight to ten home games a year. Keisel was employed by a car dealership

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1. "When reviewing a grant of summary judgment, we recite the disputed facts in a light most favorable to the nonmoving party." *Young v. Fire Ins. Exch.*, 2008 UT App 114, ¶ 19, 182 P.3d 911 (quotation simplified). Unless otherwise noted, our recitation is (continued…)

in Orem, Utah, and he regularly sat in his employer's seats, which were located just three rows off the floor near the opposing team's bench. Keisel was also enrolled in a pilot training program.

¶5 On March 11, 2019, the Jazz hosted the Oklahoma City Thunder for a basketball game at its home arena. Keisel attended that game with Huff, who was his girlfriend at the time.[2] As a condition of admission, every fan was subject to "the NBA & Utah Jazz Fan Code of Conduct" (the Code of Conduct). The Code of Conduct prohibited fans from engaging in "disruptive behavior, including using foul or abusive language or obscene gestures." Arena security personnel enforced the Code of Conduct and were authorized to issue warning cards or eject fans for violations of it.

¶6 Westbrook was a point guard for the Thunder at this game. During the second quarter, Westbrook was sitting on the bench with packs of some sort wrapped around his knees when he began exchanging words with Keisel. A security camera recorded video footage of the exchange, though it didn't capture any audio. This footage showed Keisel standing, looking directly at Westbrook, and then speaking to him while making a downward motion with his right hand as he sat down. It also showed Westbrook immediately reacting to Keisel's comments and gesture, with Westbrook pointing and apparently yelling at

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drawn from facts that were deemed undisputed by the district court or for which we see no dispute in the record.

2. Keisel and Huff filed suit together and have proceeded together on appeal as well. Keisel and Huff inform us in their brief that they've since married, but they provide no record support for that assertion. Regardless, it's undisputed that Huff was Keisel's girlfriend at the time of this incident (though, as will be discussed, Westbrook mistakenly assumed that they were married). And we note that their apparent post-altercation nuptials don't impact the legal issues presented on appeal in any way.

Keisel. In a subsequent deposition, Keisel testified that he had said to Westbrook, "Bro, sit down and ice your knees." Keisel also testified that Westbrook responded, "This is heat. This is heat. Know what the fuck you're talking about if you're going to talk to me," to which Keisel said that he replied, "Well, heat them up, you're going to be on them a lot later."

¶7 A fan who was sitting nearby recorded Westbrook's response to this on his cell phone. This video captured Westbrook saying,

> I'm going to say one thing. I'll fuck him up. . . . I promise you. You think I'm playing. I swear to God. I swear to God, I'll fuck you up, you and your wife, I'll fuck you up, . . . I promise you on everything I love, on everything I love, I promise you.

¶8 Security personnel from both the Jazz and the Thunder (collectively, Security) responded and spoke with Keisel shortly after this verbal altercation ended. Keisel told Security that he had told Westbrook, "you're going to need ice on your knees later, or something to that effect." Security issued a warning card to Keisel for "using Westbrook's name and directing remarks at Westbrook," and Security directed Keisel to not make any further remarks to players. As Keisel returned to his seat, he displayed the warning card above his head to the other fans in his section, many of whom cheered him on.

¶9 The fan who recorded the exchange on his phone texted the video to Keisel after Keisel returned to his seat. This video captured Westbrook's response to Keisel, but it does not identify Keisel by name or show Keisel or Huff at all. After receiving the video, Keisel forwarded it to a "good buddy" of his who was something of "a social media influencer." Keisel told his friend, "Make this go viral bro." Keisel also forwarded the video to his cousin (Cousin). After Cousin informed Keisel that he had

forwarded the video to KSL (a local news station), Keisel responded, "Nice! Let's make it go viral!!" And after Cousin informed Keisel that he had posted the video to Twitter, Keisel replied, "I love it!"

¶10 Cousin soon informed Keisel that KSL wanted to interview Keisel, to which Keisel responded, "Lol!! I'll talk to them." A KSL reporter texted Keisel directly, asking Keisel if he would agree to an on-camera interview about the confrontation and "what provoked [Westbrook's] response." Keisel replied that he'd "be happy to talk to" the reporter. After the game, Keisel participated in interviews with both KSL and ESPN. In his ESPN interview, Keisel denied saying "anything inappropriate" to Westbrook, and he claimed that Westbrook "just went nuts." Keisel also said he wanted the exchange to be seen because Westbrook "needs to be exposed." Keisel later testified that he participated in the KSL interview because he "wanted the public to know about Russell Westbrook's behavior and his abusiveness towards fans." Keisel voluntarily disclosed his name to both KSL and ESPN. During the interview with KSL, Keisel disclosed Huff's first name. After the interviews, Keisel texted Cousin, "I got interviewed by KSL and ESPN post game!"

¶11 Westbrook was also interviewed after the game. When Westbrook was asked about the verbal altercation with Keisel, Westbrook said that Keisel had told him to "get down on [your] knees like you used to." As will be discussed at length in this opinion, Westbrook then said, "[T]o me, ah, I think it's racial." Westbrook's full statement about the incident was recorded, and it was as follows:

> Obviously, um everybody's talkin' about the same video but, the realization of it is, is how it started was, um a young, young man and his wife in the stands told me, ah, to get down on my knees like you used to, and for me that's just completely

disrespectful, ah to me, ah, I think it's racial, um, I think it's just inappropriate in the sense of, um, there is no protection for the players. Um, I think there, there are a lot of great fans in around the world that like to come to the game and enjoy the game. And there are people that come to the game to say mean, disrespectful thing about me, my family, um. For many years, man, I've done all the right things. I've never done anything to hurt or harm anybody, um, I've never been in any trouble, I never fought a fan. Um, been in the league 11 years, clean slate, humble. Um, I take whatever, all the criticism from everybody. I've been doing the same thing for years. Um and for me, um, disrespect would not be taken from me. Um, I'm, I'm completely, ah, just sit back sometime take it like that. That's just one video, but throughout the whole game, throughout, since, since I've been here, especially here in Utah, every time I come here there a lot of disrespectful things are said and um, and for me, I'm, I'm just not going to continue to take disrespect for ah, my family. Um, and I just think that there's got to be something done, there's got to be some consequences for those type of people, ah, that come to the game just to say and do, ah, whatever they want to say. And um, I don't think it's fair, ah, to the players, not just to me, but I, I don't think it's fair to the players. Um, and if I had to do it over again, I would say the same exact thing because, I, I, truly, ah, will stand up for myself, for my family, for my kids, for my wife, for my mom, for my dad every single time. Um, I expect anybody else to do the same. Um, so that's kinda where I'm at with the whole situation. Um, as for beating up, um, his wife, I've, I've never put my hand on a woman, I never will. Um, never been in any

> domestic violence ah, before, never have before, but once he said the comment, his wife repeated it, the same thing to me as well. So that's kinda how that started. I know you guys only got the tail end of the video, but the start of the video, um, is way more important and way more disrespectful than what you guys heard, so appreciate you all.[3]

¶12 The next morning, Keisel contacted a reporter at KSL and publicly defended his conduct. Keisel denied making any racial comments.

The Jazz's Investigation, Imposition of Discipline, & Public Response

¶13 The Jazz's general counsel (General Counsel) quickly led an investigation by the team of the Keisel/Westbrook confrontation. The purpose of this investigation was to determine whether Keisel had violated the Code of Conduct. As part of this investigation, General Counsel watched the security video referenced above. General Counsel also conducted a recorded telephone interview with Keisel the day after the incident. During this phone interview, Keisel said that he had told Westbrook to "sit down and . . . heat [his] knees because [he was] going to be on them later." Keisel said that what he meant was that Westbrook

3. We note that in a usual case, we would likely have made some typographical corrections to a quote such as this one (appropriately bracketed, of course), and we may also have removed the *um*'s and *ah*'s, which are most commonly regarded as non-substantive verbal fillers. Since much of this case turns on the precise things that Westbrook said, however, and since Westbrook's brief includes the fillers in its recitation, we present the quote in its full form as presented to us and confirmed by our review of the audio in the record.

would be using his knees later to "win the game."[4] But Keisel also admitted that Westbrook "could have taken it as, oh, yeah I was telling him that he was going to suck some dick or whatever. I get that there could be sexual type of things. But racism? Come on, man."

¶14 After the game, several fans who had been seated near Keisel contacted the Jazz's administration indicating that they had observed the confrontation. As part of the investigation, General Counsel requested that these fans submit written statements about what they observed. Five fans submitted written responses the morning after the confrontation. Their accounts of what they heard Keisel say were as follows:

> Fan 1: "Get on your knees like you always do to service your team mates [sic]."
>
> Fan 2: "Well get on your knees like you're used to."
>
> Fan 3: "You better sit down with those old knees" or "get on your knees like you're used to." Fan 3 also said that he "understood the comment to be a sexual vulgarity," and he testified in a deposition that the comment was offensive to him.
>
> Fan 4: "Keep taking care of your knees because you're used to being down on your knees."

4. During a subsequent deposition, Keisel admitted that he had first told Westbrook, "Bro, sit down and ice your knees," and that after Westbrook responded to him, Keisel had then said, "Well, heat them up, you're going to be on them a lot later." This echoed the admissions he made to General Counsel in this interview.

> Fan 5: Heard a "derogatory sexual remark" toward Westbrook.[5]

¶15 Based on the information collected in the investigation, General Counsel determined that Keisel had violated the Code of Conduct. The Jazz then permanently banned Keisel from the team's arena. In a letter that was sent to Keisel the day after the confrontation, General Counsel informed Keisel that he was being banned for violating the Code of Conduct by making "inappropriate, obscene and offensive statements" to Westbrook. General Counsel later testified that in making this determination, the team did not make a more particular judgment about whether Keisel's comment to Westbrook was racist or homophobic. Instead, the Jazz just made a determination that Keisel's comment had violated the Code of Conduct.

¶16 Later that day, the Jazz issued a press release (the March 12 press release) to the Jazz's standard press-release list, which included mostly local media and journalists. The press release read as follows:

> The Utah Jazz and Larry H. Miller Group announced today a permanent ban of the fan who engaged in the inappropriate conversation with the Oklahoma City Thunder's Russell Westbrook last night at [the arena]. The ban is effective immediately and includes all arena events.
>
> The organization conducted an investigation through video review and eyewitness accounts. The ban is based on excessive and derogatory verbal

5. Another fan sitting nearby later testified at a deposition that he heard Keisel tell Westbrook: "You're going to be on your knees begging like you're used to."

> abuse directed at a player during the game that violated the [Code of Conduct].
>
> The Utah Jazz will not tolerate fans who act inappropriately. There is no place in our game for personal attacks or disrespect.
>
> "Everyone deserves the opportunity to enjoy and play the game in a safe, positive and inclusive environment," said Steve Starks, president of the Utah Jazz. "Offensive and abusive behavior does not reflect the values of the Miller family, our organization and the community. We all have a responsibility to respect the game of basketball and, more importantly, each other as human beings. This has always been a hallmark of our incredible fan base and should forever be our standard moving forward."

¶17 Multiple local and national news outlets reported on the Keisel/Westbrook altercation in the days that followed. Some of the coverage moved beyond this incident to recount past incidents involving other Jazz fans, including incidents in which fans had made racist comments. For example, a video circulated showing another fan repeatedly shouting "Here we go, boy" at Westbrook during a past playoff game. *The Salt Lake Tribune* reported on that episode and the Jazz's subsequent lifetime ban of that fan, linking that event to Keisel's lifetime ban for the altercation at issue here.[6] *Sports Illustrated* reported on the Keisel/Westbrook altercation and its aftermath as well.

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6. Eric Walden, *Utah Jazz Issue Another Lifetime Ban, to the Fan Caught Calling Russell Westbrook 'Boy' During 2018 Playoffs*, The Salt Lake Tribune (March 17, 2019, 2:39 P.M.), (continued…)

¶18 On March 14, 2019, the Jazz sent an email (the March 14 email) to its season ticket holders that read:

> In light of recent events, we want to address fan behavior and how we choose to express the passion we all have for the Utah Jazz. . . . The Utah Jazz will strictly enforce the [Code of Conduct] with zero tolerance. . . . We do not permit hate speech, racism, sexism, or homophobia. We also do not allow disruptive behavior, including bullying, foul or abusive language, or obscene gestures. Violators may be subject to ejection and other penalties, including a lifetime ban.

¶19 Later that night, Miller, who was the team's owner at the time, made a statement to the crowd before a home game (which was the team's first home game since the March 11 game against the Thunder). Miller wrote the statement herself, though Jazz management had encouraged her to make some statement about the incident. Miller's statement was as follows:

> As the owner of the Utah Jazz, I feel it's important for me to take this opportunity to express some thoughts and concerns about the unfortunate event at the game Monday night. I am extremely disappointed that one of our "fans" conducted himself in such a way as to offend not only a guest in our arena but also me personally, my family, our organization, the community, our players and you, the best fans in the NBA.
>
> This should never happen. We are not a racist community. We believe in treating people with

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https://www.sltrib.com/sports/2019/03/15/utah-jazz-issue-another/ [https://perma.cc/3CE6-YD4X].

courtesy and respect as human beings. From time to time individual fans exhibit poor behavior and forget their manners. Some disrespect players on the other [teams]. When that happens, I want to get up and shout STOP!

We have a code of conduct in this arena. It will be strictly enforced.

Everyone who comes here, visiting teams included, deserves the right and the expectation to be treated with dignity at all times. When bad incidents, like Monday night, happen it not only affects the player it's directed at, it also affects our players. Other teams are not our enemies, they are our competitors. Competition is a good thing. It allows players to showcase their talents. It allows fans to encourage, appreciate, cheer for and enjoy those who share those talents with us.

We have been stewards of this team for 34 years. We love sharing it with all of you and receiving your support. It is also important that you support our players as citizens of our community and treat them and their families with respect. They have chosen to become part of our community and they make us richer with their diversity.

My heartfelt request to all of you is that from this time forward, we will all take pride in holding ourselves and those around us to the highest standard of decency.

Use your energy cheering OUR players with your honest, sincere enthusiasm rather than degrading or demeaning players on the opposing team. No one wins when respect goes away.

> Let's be the supporting fans our players know and deserve. Thank you and GO JAZZ.

Adverse Impact of the Publicity on Keisel & Huff

¶20 In the wake of the altercation, the car dealership at which Keisel worked received many hateful and threatening phone calls and emails. Keisel was terminated from his position there, and he was soon removed from his pilot training program as well. Huff had been working as both a housecleaner and as a furniture refinisher, and she later stated that she lost work as a result of the incident.

¶21 Keisel also received hateful and threatening text messages, emails, and customer reviews. Fake social media accounts were created in his name that depicted Keisel as having made racist comments. Both Keisel and Huff later claimed they experienced "severe emotional distress" because of the altercation and its aftermath.

Procedural History

¶22 In December 2019, Keisel and Huff filed a civil complaint against both Westbrook and the Jazz, asserting causes of action for defamation, false light, intentional infliction of emotional distress, and negligent infliction of emotional distress. The details of the claims will be discussed as needed below. In brief, the claims alleged:

- defamation against Westbrook based on his post-game statement in which he either expressly said or "implied" that Keisel and Huff "had made statements that were racist . . . in nature";

- defamation against the Jazz based on their press releases and public statements that implied that "the alleged offensive behavior was racism or racist commentary";

- false light against both Westbrook and the Jazz based on Westbrook's post-game statement and the Jazz's email, press release, and public statement, which, according to the complaint, suggested that Keisel and Huff had "acted as racists" or had "made racist statements"; and

- intentional infliction of emotional distress and negligent infliction of emotional distress against both Westbrook and the Jazz based on Westbrook's in-game statement, Westbrook's post-game statement, and the Jazz's "corroborat[ion]" of Westbrook's post-game statement that Keisel and Huff "had made racist comments."

¶23 After discovery was conducted and completed, Westbrook and the Jazz filed separate motions for summary judgment. The district court heard arguments in April 2021. In May 2021, the court issued a written ruling dismissing all of Keisel and Huff's claims.

¶24 With respect to the defamation claims from Keisel and Huff against Westbrook, the court granted Westbrook's motion for summary judgment on essentially two grounds. First, it concluded that at the time Westbrook made his post-game statement, "no hearer could have reasonably understood the statement to be directed at Keisel and Huff, who were just two of thousands of fans" at the arena. The court reasoned that because the "only way a hearer could identify Keisel or Huff as the 'man and his wife' to whom Westbrook referred would have been access to other news sources (KSL and ESPN) over which Westbrook had no control," the statement was "not actionable in defamation." Second, the court separately concluded that "whether a person is racist or whether a statement is racial is a matter of opinion which cannot be verified as true or false," and it accordingly concluded that the "racial meaning of Keisel's statement cannot be objectively verified as true or false." Thus, because Westbrook had "plausibly concluded that the statement

was racial," the court concluded the statement could not give rise to a defamation claim.

¶25 With respect to Keisel's defamation claim against the Jazz, the court found that the March 12 press release, the March 14 email, and Miller's speech did concern Keisel and were, "cumulatively and in context, capable of defamatory meaning." Even so, the court determined that "whether any of the statements attributed to Keisel and Huff were in fact racist cannot be verified as true or false" and that this was therefore "a question of opinion." The court thus concluded that "calling a person racist or attributing racist statements to him is not actionable in defamation."

¶26 This left the claims for false light, intentional infliction of emotional distress, and negligent infliction of emotional distress against both Westbrook and the Jazz. The court noted that these causes of action were based on the same statements that were at issue in the defamation claims, namely, Westbrook's post-game statement, the Jazz's email and press release, and Miller's speech. The court concluded that "Keisel and Huff cannot do 'an end-run around' [First Amendment] protections by recasting their failed defamation claim[s]" against Westbrook and the Jazz "in the form of non-defamation torts" because "'non-defamation torts based on speech must meet First Amendment requirements."

¶27 With respect to the emotional distress claims based on Westbrook's in-game statement during the altercation, the court concluded that "Westbrook's in-game statement—while coarse and offensive—[did] not as a matter of law rise to the level of extreme and outrageous conduct." The court concluded that because the statements were made during an NBA game "in the presence of security personnel and thousands of spectators," because Keisel and Huff were not in close physical proximity to Westbrook, and because Keisel and Huff remained in the arena after the altercation to watch the rest of the game, there "never

was any real risk that Westbrook would make good on his threat." The court also concluded that "a reasonable speaker could not have realized that the in-game statement would cause emotional distress."

¶28 And with respect to the emotional distress claims against the Jazz, the court particularly concluded that the "published statements of which Plaintiffs complain—that they are racists or made racist comments—constitute opinions," and "[b]y definition, statements of opinion cannot be objectively verified as true or false." For this reason, the court concluded that "as a matter of law a person cannot be negligent as to the falsity of such a statement" and that the emotional distress claims against the Jazz were nonactionable.

¶29 Keisel and Huff timely appealed.

ISSUES AND STANDARD OF REVIEW

¶30 Keisel and Huff raise several challenges to the district court's decision granting summary judgment to Westbrook and the Jazz. "We review the district court's grant of summary judgment for correctness and accord no deference to its conclusions of law." *Davidson v. Baird*, 2019 UT App 8, ¶ 24, 438 P.3d 928 (quotation simplified).

ANALYSIS

¶31 Keisel and Huff challenge the district court's decision granting summary judgment on their defamation claims against Westbrook, Keisel's defamation claim against the Jazz, and the remaining claims (including false light, intentional infliction of emotional distress, and negligent infliction of emotional distress). As explained below, we agree with the district court on all fronts.

I. Defamation Against Westbrook

¶32 Keisel's defamation claim against Westbrook was based on Westbrook's post-game statement, wherein Westbrook stated that what Keisel had said to him was "completely disrespectful" and he thought it was "racial." Keisel argues that the district court erred in concluding that Westbrook's post-game statement was not "of or concerning" Keisel (or Huff, for that matter), and he further argues that the court erred in determining that Westbrook's post-game statement was not actionable because it was a statement of opinion. We disagree with Keisel's contentions.[7]

¶33 "Under Utah law, a statement is defamatory if it impeaches an individual's honesty, integrity, virtue, or reputation and thereby exposes the individual to public hatred, contempt, or ridicule." *West v. Thomson Newspapers*, 872 P.2d 999, 1008 (Utah 1994). "At its core, an action for defamation is intended to protect an individual's interest in maintaining a good reputation." *Id.* "A publication is not defamatory simply because it is nettlesome or embarrassing to a plaintiff, or even because it makes a false statement about the plaintiff." *Id.* at 1009 (quotation simplified). A plaintiff must establish that the statement at issue is "more than sharp criticism," that it instead "damaged" the plaintiff's "reputation . . . in the eyes of at least a substantial and respectable minority of its audience." *Id.* "To state a claim for defamation," a plaintiff must therefore "show that defendants published the statement concerning him, that the statements were false, defamatory, and not subject to any privilege, that the statements

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7. This portion of our analysis is primarily focused on Keisel's defamation claim against Westbrook, which was the driving force behind much of this litigation. Our resolution of it also applies and largely resolves Huff's defamation claim as well. There are some aspects of Huff's defamation claim that might potentially be distinct, however, and we address those in footnote 9.

were published with the requisite degree of fault, and that their publication resulted in damage." *Id.* at 1007–08 (quotation simplified); *see also Jacob v. Bezzant*, 2009 UT 37, ¶ 21, 212 P.3d 535. Moreover, because "the existence of defamatory content is a matter of law, a reviewing court can, and must, conduct a context-driven assessment of the alleged defamatory statement and reach an independent conclusion about the statement's susceptibility to a defamatory interpretation." *O'Connor v. Burningham*, 2007 UT 58, ¶ 26, 165 P.3d 1214.

¶34 As noted, the district court gave two reasons for dismissing the defamation claim against Westbrook. The first was its conclusion that "no hearer could have reasonably understood [Westbrook's] statement to be directed at Keisel and Huff, who were just two of thousands of fans" in the arena. Keisel and Huff challenge this, arguing that although Westbrook didn't personally name them, "given the publicity of the incident, their family, friends, and peers could readily identify them." By contrast, Westbrook maintains that because he "did not know Keisel's and Huff's identities and certainly did not identify them in referring to a 'young man and his wife in the stands,'" not even their "family and closest friends would be able to identify them based solely on Westbrook's Post-Game Statement at the time it was made." We need not resolve this dispute, however, because we agree with the district court's second reason for dismissing the claim: Westbrook's post-game statement was a constitutionally protected statement of opinion.

¶35 In reviewing a grant of summary judgment, we ordinarily "review a district court's legal conclusions and ultimate grant or denial of summary judgment for correctness," viewing "the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party." *R.O.A. Gen. Inc. v. Salt Lake City Corp.*, 2022 UT App 141, ¶ 13, 525 P.3d 100 (quotation simplified). "Defamation merits a departure from the standard treatment, however, primarily because it never arrives at court

without its companion and antagonist, the First Amendment, in tow." *O'Connor*, 2007 UT 58, ¶ 27. "Because the existence of defamatory content is a matter of law," our review is "nondeferential," leaving "no room for indulging inferences in favor of the nonmoving party in the district court." *Id*. ¶¶ 26–27. "To accommodate the respect we accord its protections of speech, the First Amendment's presence merits altering our customary rules of review by denying a nonmoving party the benefit of a favorable interpretation of factual inferences." *Id.* ¶ 27. The determination of whether a particular statement qualifies as opinion thus presents a question of law for the court to decide. *See West*, 872 P.2d at 1008.

¶36 As noted, one of the elements of a defamation claim is that the statement at issue must be "false." *Id.* at 1007; *see also Jacob*, 2009 UT 37, ¶ 21. By extension, a statement can only be actionable as defamation if it is capable of being proven to be true or false. And by further extension, a plaintiff is "definitionally unable" to satisfy this falsity element "with regard to statements of pure opinion, because such statements are incapable of being verified and therefore cannot serve as the basis for defamation liability." *Davidson v. Baird*, 2019 UT App 8, ¶ 31, 438 P.3d 928 (quotation simplified). The reason that "opinions are inherently incapable of verification" is that "they embody ideas, not facts." *West*, 872 P.2d at 1014 (quotation simplified). "Because expressions of pure opinion fuel the marketplace of ideas and because such expressions are incapable of being verified, they cannot serve as the basis for defamation liability," *id.* at 1015, and "the Utah Constitution provides an independent source of protection for expressions of opinion," *id.* at 1013. The First Amendment to the United States Constitution likewise protects statements of opinion, and this protection is even more pronounced in matters of public concern. *See, e.g.*, *Snyder v. Phelps*, 562 U.S. 443, 452–53 (2011) (noting that speech is a matter of public concern if it is "fairly considered as relating to any matter of political, social, or other concern to the community" and that for matters of public

concern, courts should "accord broad protection to speech to ensure that courts themselves do not become inadvertent censors" (quotation simplified)).[8]

¶37 Again, Keisel's defamation claim against Westbrook is based on a statement that Westbrook made in his post-game interview. After stating that a "young man and his wife in the stands told me, ah, to get down on my knees like you used to," Westbrook opined that "for me that's just completely disrespectful, ah to me, ah, I think it's racial." Keisel's claim is largely focused on the latter portion of this statement—Westbrook's assertion that "I think it's racial." But the district court concluded that this was a statement of opinion, and we agree.

¶38 Although no Utah appellate case has yet considered this kind of statement in a defamation case, many courts have concluded that calling someone a racist cannot be actionable as defamation. And this is so because the statement cannot be verified as being true or false. *See, e.g.*, *Squitieri v. Piedmont Airlines, Inc.*, No. 3:17CV441, 2018 WL 934829, at *4 (W.D.N.C. Feb. 16, 2018) (concluding that statements "indicating that Plaintiff is racist are clearly expressions of opinion that cannot be proven as verifiably true or false" and thus are "statements of opinion . . . not actionable for defamation"); *Edelman v. Croonquist*,

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8. In the arguments below, Westbrook and the Jazz relied on the protections of both the state and federal constitutions, and the district court likewise relied on both constitutions when granting the motions for summary judgment. In its brief, the Jazz suggest that the First Amendment's protections may be "narrower." But both constitutions recognize that statements of opinion are protected, and recognition of this general principle alone is enough for us to affirm. We have no need in this case to more particularly decide whether there's a relevant distinction between the two.

No. 09-1938, 2010 WL 1816180, at *6 (D.N.J. May 4, 2010) (concluding that a defendant's characterization of a plaintiff as racist "is a subjective assertion, not sufficiently susceptible to being proved true or false to constitute defamation"); *Martin v. Brock*, No. 07C3154, 2007 WL 2122184, at *3 (N.D. Ill. July 19, 2007) (concluding that the "defendants' description of [the plaintiff] as a racist" was, as a matter of law, "an opinion and thus is not actionable"); *Smith v. School Dist.*, 112 F. Supp. 2d 417, 429 (E.D. Pa. 2000) ("While the [c]ourt acknowledges that a statement that [the] plaintiff is 'racist and [antisemitic],' if it was made, would be unflattering, annoying and embarrassing, such a statement does not rise to the level of defamation as a matter of law because it is merely non-fact based rhetoric.").

¶39 That said, some courts have held that an allegation of racism can in certain circumstances be defamatory. *See, e.g.*, *Garrard ex rel. R.C.G. v. Charleston County School Dist.*, 890 S.E.2d 567, 598 (S.C. 2023) (rejecting "any suggestion that calling someone a racist can never be defamatory"); 50 Am. Jur. 2d *Libel and Slander* § 200 (2023) (noting the divide in some cases on this point). And on this front, some courts have drawn a distinction between an allegation of racism generally (which would not be actionable) and an allegation based on more particular conduct (which could be). *See, e.g.*, *La Liberte v. Reid*, 966 F.3d 79, 93 (2d Cir. 2020) (holding that "accusations of concrete, wrongful conduct are actionable[,] while general statements charging a person with being racist, unfair, or unjust are not" (quotation simplified)); *Law Offices of David Freydin, PC v. Chamara*, 24 F.4th 1122, 1131 (7th Cir. 2022) (recognizing that Illinois defamation law treats allegations of racism "as actionable when based on identifiable conduct but as non-actionable when stated in general terms, without asserting specific factual support"); *Forte v. Jones*, No. 1:11-cv-0718, 2013 WL 1164929, at *6 (E.D. Cal. March 20, 2013) (holding that while an "allegation of membership in the Ku Klux Klan" would be actionable, an "allegation that a person is a 'racist,' on the other

hand" would not be actionable "because the term 'racist' has no factually-verifiable meaning").

¶40 Keisel asks us to draw that same distinction here. In his view, because Westbrook's post-game comments were linked to Keisel's particular in-game statement (as opposed to being about Keisel generally), Westbrook could be sued for defamation. But as an initial matter, we note that some courts have held that even if an allegation of racism was tied to a particular statement or conduct, it's still protectible opinion. *See, e.g.*, *Skidmore v. Gilbert*, No. 20-cv-06415, 2022 WL 464177, at *2–3, *9–10 (N.D. Cal. Feb. 15, 2022) (concluding that characterizing a statement from a student's Facebook page as "virulently racist" and "disturbingly xenophobic" was non-verifiable opinion); *Dodge v. Evergreen School Dist. No. 114*, No. 3:20-cv-05224, 2020 WL 4366054, at *6 (W.D. Wash. July 30, 2020) (concluding that characterizing someone as "racist" and "bigoted" based on wearing a MAGA hat was non-verifiable opinion, and further concluding that "whether someone is racist, bigoted, and hateful in general is not a factual question"). And the underlying rationale for these decisions is the same rationale at issue in other cases involving other kinds of opinions: the indeterminacy of an opinion itself. Because "a certain set of facts might be viewed as racially insensitive by one group of people who share the same political or social views, but another group might view it as noncontroversial and socially acceptable," a court is "not in a position to give its imprimatur to one view or the other" precisely because "the phraseology used is one of opinion . . . not capable of being proven true or false." *Covino v. Hagemann*, 165 Misc. 2d 465, 470 (N.Y. Sup. Ct. 1995).

¶41 Indeed, Keisel himself implicitly acknowledged the fluid nature of interpretation while speaking with General Counsel the day after the altercation. There, Keisel agreed that his statement to Westbrook could have been construed as being derogatory in a sexual sense. According to Keisel, Westbrook "could have taken it as, oh, yeah I was telling him that he was going to suck some

dick or whatever. I get that there could be sexual type of things. But racism? Come on, man." The thing that would make this statement susceptible to a sexual connotation, however, was its attendant context—where the statement was made, who said it, who the comments were directed at, and what sorts of cues were implied by culture or circumstance. But if the implicit subtleties of context could allow Westbrook to understand this as a sexual slur, they could also allow Westbrook to understand it as a racial slur. And this is why Westbrook's assertion that Keisel's comment was "racial" can't be proven to be true or false. Simply put, if beauty is in the eye of the beholder, ugliness is too.

¶42 As a result, we conclude that although Westbrook opined that particular statements were "racial" in nature (as opposed to directing that kind of assessment at Keisel more generally), his opinion still enjoyed constitutional protection. And lest there was any doubt that he was indeed expressing an opinion, Westbrook himself added several qualifiers that emphasized the subjective nature of what he was saying. Again, Westbrook said that "*for me* that's just completely disrespectful, ah *to me*, ah, *I think* it's racial." (Emphases added.) Those three qualifiers—"for me," "to me," "I think"—all anchored Westbrook's ensuing comments to his own perception of Keisel's earlier statement. Given these qualifiers, any reasonable person who heard Westbrook's statement would understand that Westbrook was doing nothing more than expressing an opinion. And statements of opinion are constitutionally protected.

¶43 Pushing back, Keisel argues that Westbrook's post-game statement still fell outside the realm of protected opinion because the broader statement—or, at least, its "implication"—advanced certain subsidiary facts that were themselves false and could be verified as such. Though a touch unclear, Keisel seems to be making something of a defamation-by-implication claim. In such a claim, "it is the implication arising from the [allegedly defamatory] statement and the context in which it was made, not

the statement itself," that provides the basis for the suit. *West*, 872 P.2d at 1011. And "the objectively verifiable element" in a defamation-by-implication claim "essentially breaks down into two questions. First, could a reasonable fact finder conclude that the underlying statement conveys the allegedly defamatory implication? Second, if so, is that implication sufficiently factual to be susceptible of being proven true or false?" *Id.* at 1019 (quotation simplified).

¶44 Here, Keisel asserts that Westbrook made two subsidiary claims in his post-game statement that were objectively verifiable, false, and thus defamatory: namely, that Keisel had said (1) something about Westbrook's family and (2) something else that was "worse." We'll address each of these assertions below. But before doing so, we pause to note that Keisel's brief was in some measure reliant on an inaccurate account of what Westbrook actually said. Westbrook's post-game statement was recorded, and that recording is in the record. In his brief, Westbrook provided us with the full statement. We've reviewed the recording, and Westbrook's transcription of his post-game statement comports with the recording. The full text of his statement that we recounted above in the Background is consistent with Westbrook's recorded words.

¶45 In his opening brief, however, Keisel provided us with a block quote that purported to be Westbrook's statement—but Keisel's proffered quote made several alterations to what Westbrook had actually said. For example, while Westbrook made a few references to his "family" in sentences that were spread out among his other comments, Keisel took the references to Westbrook's family and lined them up together at the beginning of the block quote, and he did so without giving us any indication that those statements were being presented out of sequence. Also, in his actual statement, Westbrook said "I'm just not going to take disrespect for ah, my family" a single time in the middle of the statement. In Keisel's

recounting, however, this was the very first thing that Westbrook said (thus seeming to place this assertion into a position of more prominence), and Keisel then included that same sentence a second time later in the block quote, thus falsely suggesting that Westbrook had said it twice. There were other changes too, most notably in rearranging the sequencing of various sentences from Westbrook's statement.

¶46 These alterations may seem like a trifling matter, and Keisel's counsel tried to downplay them at oral argument. But in the context of this case, they're not trifling at all. For example, one of the pieces of Keisel's defamation-by-implication claim is the assertion that Westbrook falsely claimed that Keisel had said something about Westbrook's family. But Keisel has now rearranged the very statements that Westbrook made that referenced his family. At the risk of stating the obvious, a sentence's meaning will naturally be derived in no small measure from the sentences that surround it. By splicing and then rearranging what Westbrook said, Keisel misrepresented the text and indeed the nature of Westbrook's statement. And we can't help but note the irony: Keisel claims that Westbrook defamed him by saying false things, but Keisel provided this court with a false account of what it was that Westbrook said while advancing that claim on appeal.

¶47 For purposes of assessing Keisel's defamation claim, we'll assess Westbrook's words as they were actually spoken, not how Keisel presented them to us in his brief. So viewed, we first address Keisel's claim that Westbrook falsely implied that Keisel had said "'mean, disrespectful' things about his family." We disagree with Keisel's assertion. To be sure, Westbrook did use the word "family" a few times in his post-game statement. But in assessing a defamation-by-implication claim like this one, the surrounding words must matter.

¶48 In the first passage in which Westbrook referred to his family, Westbrook said: "Um, I think there, there are a lot of great fans in around the world that like to come to the game and enjoy the game. And there are people that come to the game to say mean, disrespectful thing about me, my family." Here, Westbrook discussed "a lot of great fans . . . around the world," and he then contrasted those "great fans" with "*people* that come to the game to say mean, disrespectful thing about me, my family." (Emphasis added.) In this sense, Westbrook was talking about "people" in the plural, as opposed to any one person such as Keisel.

¶49 Westbrook's generalized focus on the abuse that he receives from NBA fandom continued in the next passage, which is where he made the next references to his family. There (and with our emphasis added to those statements to highlight them), he said:

> That's just one video, but throughout the whole game, throughout, since, since I've been here, especially here in Utah, every time I come here there a lot of disrespectful things are said and um, and for me, I'm, *I'm just not going to continue to take disrespect for ah, my family*. Um, and I just think that there's got to be something done, there's got to be some consequences for those type of people, ah, that come to the game just to say and do, ah, whatever they want to say. And um, I don't think it's fair, ah, to the players, not just to me, but I, I don't think it's fair to the players. Um, and if I had to do it over again, I would say the same exact thing because, I, *I, truly, ah, will stand up for myself, for my family, for my kids, for my wife, for my mom, for my dad every single time.*

In this passage, Westbrook started out by creating a contrast between the "one video" (an apparent reference to his interaction with Keisel that had been caught on video) and other situations

from "throughout the whole game" or other times that he had come to Utah and "those type of people" had "disrespect[ed]" his family. In this sense, he was clearly talking about his experiences in Utah over the years. And this generalized focus continued during the rest of this statement. Read as a whole, what Westbrook was complaining about was the abuse that he has taken from fans generally, some of which came from "people" (plural), and some of which has included hostility directed toward his family, and he was then using this as an explanation for why he's willing to react to such abuse.

¶50 But when Westbrook wrapped this point up by saying that "I truly, ah, will stand up for myself, for my family, for my kids, for my wife, for my mom, for my dad every single time," no reasonable person would think that Westbrook was saying that *every* fan across the years who had insulted him (whether it be Keisel or anyone else) had also insulted *every one* of the family members that Westbrook had just listed. Rather, a reasonable hearer would understand that Westbrook was saying that if a fan insulted any of these people, Westbrook would "stand up for them." In this case, Keisel has admitted that he did say something to Westbrook about his "knees" that Westbrook could have taken as a derogatory slur. Since Westbrook notably included himself on this list of people that he said he would protect, and since Westbrook never then claimed that Keisel had said something about Westbrook's family, this statement is fairly understood as being an assertion that Westbrook had chosen to "stand up for" himself because Keisel had said something to (and about) Westbrook. Thus, like the district court, we see no basis for concluding that Westbrook can be sued for implying that Keisel had said something about Westbrook's family. This aspect of the defamation-by-implication claim accordingly fails. *See West*, 872 P.2d at 1019 (noting the first step in analyzing a defamation-by-implication claim is to determine whether "a reasonable fact finder" could "conclude that the underlying statement conveys the allegedly defamatory implication").

¶51 Second, Keisel claims in his brief that Westbrook implied that "the 'N' word had been used." Keisel draws this alleged implication from Westbrook's reference to something "way more disrespectful" that had been said earlier. In Keisel's view, Westbrook's "way more disrespectful" reference set up a contrast between what Keisel was known to have said (i.e., the "on your knees" comment) and some other thing that Keisel had allegedly said that was worse (which, in Keisel's proposed implication, must have been "the 'N' word"). But when Westbrook's statement is reviewed in context, this wasn't the contrast that Westbrook was actually drawing. With our emphasis added, here's what Westbrook said:

> Um, so that's kinda where I'm at with the whole situation. Um, as for beating up, um, his wife, I've, I've never put my hand on a woman, I never will. Um, never been in any domestic violence ah, before, never have before, but once he said the comment, his wife repeated it, the same thing to me as well. So that's kinda how that started. *I know you guys only got the tail end of the video, but the start of the video, um, is way more important and way more disrespectful than what you guys heard*, so appreciate you all.

As is clear from the emphasized passage, with the "way more disrespectful" reference, Westbrook was drawing a contrast between "what you guys heard" at "the tail end of the video" (i.e., Westbrook's hostile words to Keisel) and what Westbrook apparently thought would have been at the "start of the video" (i.e., what Keisel had said to provoke Westbrook's outburst). In other words, Westbrook was saying that when Keisel made his "on your knees" comment, that was "way more disrespectful" than what Westbrook had said in response. Because of this, we see no basis for concluding that Westbrook implied that Keisel had said anything worse than the "on your knees" comment, let alone "the 'N' word."

¶52 In short, Westbrook's post-game statement "I think it's racial" was protectible opinion, and we see no basis for implying that Westbrook said anything else that could support a defamation-by-implication claim. The district court therefore did not err in granting Westbrook's motion for summary judgment on the defamation claims at issue.[9]

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9. Keisel and Huff have proceeded together throughout this case, including by filing a joint appellate brief. Though our analysis above largely resolves Huff's defamation claim, there are potential distinctions between the claims of Keisel and Huff against Westbrook that do warrant some final discussion. As noted, Keisel admits that he said something involving "on your knees" to Westbrook, which is why his defamation claim turns on whether Westbrook's assessment that the comment was "racial" was a protected opinion. Unlike Keisel, however, Huff alleged in the complaint that she "had not said anything" to Westbrook. And at oral argument before this court, Westbrook's counsel agreed that it was "undisputed that she didn't say anything." But Westbrook has nevertheless argued throughout this appeal that Huff still can't prevail on her defamation claim because Westbrook's opinion that her (non-)statement was "racial" was constitutionally protected.

This presents us with something of a legal conundrum. Huff can satisfy the falsity element of a defamation claim in a way that Keisel cannot. But a "publication is not defamatory simply because it is nettlesome or embarrassing to a plaintiff, or even because it makes a false statement about the plaintiff." *West v. Thomson Newspapers*, 872 P.2d 999, 1009 (Utah 1994) (quotation simplified). Instead, even a false statement is defamatory only "if it impeaches an individual's honesty, integrity, virtue, or reputation and thereby exposes the individual to public hatred, contempt, or ridicule." *Id.* at 1008. As discussed, Westbrook can't be sued for expressing his opinion that Keisel said something

(continued…)

II. Defamation Against the Jazz[10]

¶53 Keisel next argues that the district court erred in granting the Jazz's motion for summary judgment on the defamation claim

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"racial" to him. But can Westbrook be sued for defamation for expressing that same opinion if it turns out that Huff didn't say the underlying thing at all? Or perhaps more generally, could Westbrook still be sued for falsely suggesting that Huff had made a vulgar and offensive comment toward him (even if it wasn't racial)?

When the district court dismissed the claims of both Keisel and Huff, it did so without addressing these potential distinctions. And while Huff could in theory have separately challenged the dismissal of her claim on these bases, she didn't. While the brief that she jointly filed with Keisel pointed out in a few places (albeit usually in passing) that Huff didn't say anything to Westbrook, it didn't provide us with any authority or reasoned discussion showing that there would be any legal distinction between Huff's claim and Keisel's. To the contrary, the joint brief made the same arguments with respect to Huff that it made with respect to Keisel – namely, that Westbrook had defamed them both by expressing his opinion at all.

Because Huff made no real effort to differentiate her claim on a nuanced legal basis, we're in no position to do this work ourselves. Instead, taking the arguments that were presented to us, we conclude that Huff has not carried her burden of showing that there was any error with respect to the district court's dismissal of her claim. In doing so, we leave open the possibility that, if some future case arises in which these potential distinctions are better presented, we may consider them anew.

10. It was somewhat unclear at times whether, in addition to Keisel, Huff was also suing the Jazz for defamation, but Keisel and Huff's counsel conceded at oral argument that Huff has no claims against the Jazz.

that Keisel filed against the team. As with his claims against Westbrook, Keisel argues that the Jazz defamed him by falsely communicating to the public that he had said something racist—both expressly and by implication.

¶54 Keisel's arguments briefly touch on the team's March 12 press release and its March 14 email. But Keisel does not meaningfully develop any argument regarding either communication. In any event, he has not persuaded us that the district court erred by concluding that neither of these communications supported the racism-based defamation claim at issue.

¶55 The March 12 press release said nothing about racism. Rather, it simply said that Keisel was being banned for "excessive and derogatory verbal abuse directed at a player." As noted, Keisel admitted to General Counsel that his comments to Westbrook could have been interpreted as "sexual type" insults. He then admits in his brief that his words to Westbrook were "somewhat capable of being misinterpreted" as being "sexually" derogatory, and he faults the Jazz for "falsely label[ing] the incident racial instead of homophobic." Given his own admissions, no reasonable person could think there was anything false, much less defamatory, about this press release.

¶56 So too with respect to the March 14 email. There, the Jazz informed ticket holders: "We do not permit hate speech, racism, sexism or homophobia. We also no not allow disruptive behavior, including bullying, foul or abusive language, or obscene gestures." The Jazz didn't single out any particular kind of violation, instead referring to various categories collectively. And again, Keisel admits that his words to Westbrook could have been understood as a sexually derogatory taunt. We therefore see no basis for concluding that this email defamed Keisel.

¶57 This leaves the pre-game statement by Miller before the March 14 home game. Although Miller didn't name Keisel, Keisel argues that she defamed him by suggesting that he had said something racist to Westbrook at the earlier game. Though somewhat unclear from his briefing, we understand his argument to be focused on the "on your knees" comment.

¶58 In response, the Jazz initially suggest that a listener wouldn't have understood that Miller was talking about Keisel. The Jazz argue that because Miller simply said, "We are not a racist *community*" (emphasis added), her words would not have been understood as referring to any one person. We have some doubt whether the Jazz are correct about this. Again, when determining the meaning or even the implied meaning of words, the sequencing and the surrounding words must matter. Here, Miller began by stating that "at the game Monday night," "one of our 'fans' conducted himself in such a way as to offend not only a guest in our arena but also me personally, my family, our organization, the community, our players and you, the best fans in the NBA." The very next thing she said was, "This should never happen. We are not a racist community." The clear import of the statement "*this* should never happen" (emphasis added) was to draw a contrast with what "one of our 'fans'" had done at the previous game, and the immediately ensuing declaration that "we are not a racist community" would have reasonably been understood to be a response to that fan's conduct as well.

¶59 But even so, we still agree with the district court that this was not defamatory. And this is so for the same reasons discussed above. "Statements of pure opinion" are "incapable of being verified and therefore cannot serve as the basis for defamation liability." *Davidson*, 2019 UT App 8, ¶ 31 (quotation simplified). The reason for this rule is that opinions "embody ideas, not facts." *West*, 872 P.2d at 1014. Like Westbrook, Miller and the Jazz had a constitutionally protected right to express their opinion about Keisel's earlier statements.

¶60 In a final attempt to establish some basis for liability against the Jazz, Keisel suggests that the team defamed him by implication in a manner that's distinct from the claim against Westbrook. Keisel points out that in the March 12 press release, the Jazz publicly referred to their investigation into the incident. According to Keisel, when Miller then publicly said on March 14 that "[w]e are not a racist community," she thus implied that the Jazz had learned through their investigation that Keisel had said something "worse" to Westbrook, such as "the 'N' word." In Keisel's view, the Jazz thus defamed him by not fully informing the public about the results of their investigation, while a full disclosure would have cured the allegedly defamatory implications that the public might otherwise draw from Miller's statement.

¶61 Keisel does not cite any Utah authority for what's essentially a defamation-by-incomplete-disclosure claim. And in their respective briefs, Keisel and the Jazz disagree about the contours of this doctrine as it has developed in other cases from other jurisdictions. Considering the matter, we note that the cases the parties discuss generally derive this doctrine from the Restatement (Second) of Torts section 566 (Am. L. Inst. 1977). There, the Restatement opines that if the expression of an opinion "is reasonably understood as implying the assertion of the existence of undisclosed facts about the plaintiff that must be defamatory in character in order to justify the opinion," the defendant may be "subject to liability" for failing to disclose those underlying facts. *Id.* § 566 cmt. c. In this sense, if a speaker's failure to disclose what the speaker knows implies the existence of other facts, and those unspoken facts are defamatory, it's those unspoken facts (as opposed to the resultant expression of opinion) that provide the basis for a defamation suit.

¶62 We need not decide whether to officially adopt this portion of the Restatement, nor do we need to decide which side's view of the resultant doctrine is correct. Assuming for argument only

that Keisel is correct about both the doctrine's validity and its contours, his claim still fails on the record before us.

¶63 Again, under Utah law, the first step in analyzing a defamation-by-implication claim is to determine whether "a reasonable fact finder" could "conclude that the underlying statement conveys the allegedly defamatory implication." *West*, 872 P.2d at 1019. And Keisel's proposed version of such a claim turns on whether the speaker reasonably implied the existence of undisclosed facts that are themselves defamatory. But in applying this same doctrine, the Seventh Circuit has held that if a statement "refers to facts in the public record," it "is not actionable apart from those facts." *Stevens v. Tillman*, 855 F.2d 394, 400–01 (7th Cir. 1988). And the court then cited with approval an Illinois case holding that a statement about a matter of public controversy was not actionable because "a newspaper earlier had published the facts on which these characterizations had been based." *Id.* at 401.

¶64 In another case, the Rhode Island Supreme Court likewise held that if the facts "underlying an expressed derogatory opinion are publicly known or disclosed, the opinion, justified or unjustified, is privileged as a matter of law." *Alves v. Hometown Newspapers, Inc.*, 857 A.2d 743, 751 (R.I. 2004) (quotation simplified). In such a circumstance, listeners "will understand they are getting the author's interpretation of the facts presented" and "are therefore unlikely to construe the statement as insinuating the existence of additional, undisclosed defamatory facts." *Id.* (quotation simplified).

¶65 Here, the altercation between Keisel and Westbrook occurred in front of thousands of other fans. There was nothing hidden or private about it. And before the Jazz ever spoke publicly about it, Keisel and Westbrook had both given public accounts of what Keisel had allegedly said. Westbrook claimed in his post-game interview that Keisel had told him to "get down on [his] knees like [he] used to." And in his own interview with KSL

that night, Keisel said that he had told Westbrook to "sit down and ice your knees." In the days that followed, both assertions were widely discussed in local and national media.

¶66 True, the Jazz then informed the public through a press release that the team had conducted an investigation. And a few days later, Miller made the public statement that "[w]e are not a racist community." But we don't see anywhere in the press release, Miller's statement, or any other place in the record where the Jazz reasonably implied that their investigation had uncovered evidence that Keisel had said anything worse than what had already been publicly reported. If anything, Miller implied the opposite. At the outset of her statement, she said that "one of our 'fans' conducted himself in such a way as to offend not only a guest in our arena but also me personally, my family, our organization, the community, our players and you, the best fans in the NBA." By noting that Keisel's conduct had offended "a guest in our arena," Miller was making an apparent reference to Westbrook; and by doing so, Miller was suggesting that the Jazz were reacting in part to his view of the offensive nature of what had been said. As already discussed, Westbrook had publicly expressed his view that Keisel's "on [your] knees" comment alone was racial.

¶67 Given all this, we believe that Keisel's proposed defamation-by-inadequate-disclosure claim stretches the record too far. The Jazz told the public that they had investigated, and then, as was the team's constitutional right, the Jazz reacted publicly. But by that point, the details of that altercation had been widely discussed, and those publicly discussed details had already prompted Westbrook to assert that Keisel had said something racial. Read in context, Miller's statement was a reaction to both that and the controversy that had followed. We see no place where the team reasonably implied that it had uncovered evidence that Keisel had said anything else that was worse than the public already knew, let alone something so

particularly pointed as "the N word." As a result, the district court correctly dismissed this aspect of the defamation claim as well.

III. Remaining Claims

¶68 The district court also dismissed the claims for false light, intentional infliction of emotional distress, and negligent infliction of emotional distress against both Westbrook and the Jazz.[11] Keisel and Huff challenge those dismissals on appeal, but we again agree with the district court.

¶69 There appear to be two separate components to these claims. First, the claims against both Westbrook and the Jazz are based on the same statements at issue in the defamation claims. And second, Keisel and Huff separately claim that Westbrook's profane outburst on the court could give rise to liability as well.

¶70 To the extent that the claims are based on the statements at issue in the defamation claims, they necessarily fail. Our supreme court has recognized that there are "substantial areas of overlap between" defamation and other speech-based torts. *SIRQ, Inc. v. Layton Cos.*, 2016 UT 30, ¶ 50, 379 P.3d 1237 (quotation simplified). "Virtually any defamation claim may be recast as an action for false light invasion of privacy," and for "that reason[,] false light claims that arise from defamatory speech raise the same First Amendment concerns as are implicated by defamation claims." *Id.* (quotation simplified). Similarly, "where an emotional distress claim is based on the same facts as a claim for defamation, appropriate concern for the First Amendment rights of the parties must be considered." *Russell v. Thomson Newspapers, Inc.*, 842 P.2d

11. The district court's ruling on summary judgment does not separate any of the claims between Keisel and Huff, instead referring to the plural "Plaintiffs" for its decision on each claim. As noted, however, Keisel and Huff's counsel conceded at oral argument that Huff has no claims against the Jazz.

896, 906 (Utah 1992). "A plaintiff may not attempt an end-run around First Amendment strictures protecting speech by instead suing for defamation-type damages under non-reputational tort claims." *Allen v. Beirich*, No. CCB-18-3781, 2019 WL 5962676, at *5 (D. Md. Nov. 13, 2019) (quotation simplified), *aff'd in part, vacated on other grounds*, *Allen v. Beirich*, No. 19-2419, 2021 WL 2911736 (4th Cir. July 12, 2021). "Rather, non-defamation torts based on speech must meet First Amendment requirements." *Id.* As a result, at oral argument, Keisel's counsel conceded (correctly, we think) that if this court concludes that the statements at issue were constitutionally protected opinion (thus warranting dismissal of the defamation claims), then those statements could not be the basis for the false light or emotional distress claims either.

¶71 In Parts I and II above, we have indeed concluded that the statements at issue from Westbrook and the Jazz were constitutionally protected statements of opinion. To the extent that the remaining claims were based on these same statements, the claims accordingly fail as a matter of law.

¶72 This leaves the assertion that Westbrook can be held liable for either intentional or negligent infliction of emotional distress based on his in-game outburst. Again, in that outburst, Westbrook shouted: "I swear to God, I'll fuck you up, you and your wife, I'll fuck you up, . . . I promise you on everything I love, on everything I love, I promise you." Unlike the later statements, we see nothing in this outburst in which Westbrook expressed a constitutionally protectible opinion. But even so, summary judgment was still warranted if "the evidence shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Anderson Dev. Co. v. Tobias*, 2005 UT 36, ¶ 19, 116 P.3d 323 (quotation simplified).

¶73 "Due to the highly subjective and volatile nature of emotional distress and the variability of its causations, the courts have historically been wary of dangers in opening the door to

recovery therefor." *Oman v. Davis School Dist.*, 2008 UT 70, ¶ 51, 194 P.3d 956 (quotation simplified). On an intentional infliction of emotional distress claim, our courts thus require a plaintiff to demonstrate:

> (a) that a defendant intentionally engaged in some conduct toward the plaintiff considered outrageous and intolerable in that it offends the generally accepted standards of decency and morality; (b) with the purpose of inflicting emotional distress or where any reasonable person would have known that such would result; and (c) that severe emotional distress resulted as a direct consequence of the defendant's conduct.

Davidson, 2019 UT App 8, ¶ 56 (quotation simplified). And to sustain such a claim, "a defendant's alleged conduct must be more than unreasonable, unkind, or unfair, it must instead be so severe as to evoke outrage or revulsion." *Id.* (quotation simplified).

¶74 "Unlike a claim for intentional infliction of emotional distress, a claim for negligent infliction of emotional distress does not require proof of outrageous conduct." *Anderson Dev. Co.*, 2005 UT 36, ¶ 57. But even so, the conduct at issue "must be severe; it must be such that a reasonable person, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case." *Mower v. Baird*, 2018 UT 29, ¶ 57, 422 P.3d 837 (quotation simplified). A defendant can therefore be held liable for negligent infliction of emotional distress only if the defendant "(a) should have realized that his conduct involved an unreasonable risk of causing the distress, otherwise than by knowledge of the harm or peril of a third person, and (b) from facts known to him, should have realized that the distress, if it were caused, might result in illness or bodily harm." *Carlton v. Brown*, 2014 UT 6, ¶ 56, 323 P.3d 571 (quotation simplified).

¶75 The district court concluded that while Westbrook's in-game outburst was "coarse and offensive," it did not "as a matter of law rise to the level of extreme and outrageous conduct" necessary to sustain an intentional infliction of emotional distress claim. The court also concluded that Westbrook had no basis for realizing that his outburst was so severe that it "might result in illness or bodily harm" to Keisel or Huff for purposes of the negligent infliction of emotional distress claim. We agree with the district court.

¶76 Profane outbursts are of course unfortunate and disfavored in civil society. But even so, courts commonly hold that, without something more, a profane outburst isn't enough to sustain an intentional infliction of emotional distress claim. *See, e.g.*, *McGrew v. Duncan*, 333 F. Supp. 3d 730, 742–43 (E.D. Mich. 2018); *Jiminez v. CRST Specialized Transp. Mgmt., Inc.*, 213 F. Supp. 3d 1058, 1065–66 (N.D. Ind. 2016); *Walker v. Mississippi Delta Comm'n on Mental Health*, No. 4:11CV044, 2012 WL 5304755, at *9–10 (N.D. Miss. Oct. 25, 2012); *Lawson v. Heidelberg E.*, 872 F. Supp. 335, 336, 338–39 (N.D. Miss. 1995); *Groff v. Southwest Beverage Co., Inc.*, 997 So. 2d 782, 787 (La. Ct. App. 2008); *Lombardo v. Mahoney*, No. 92608, 2009 WL 3649997, at *1–2 (Ohio Ct. App. Nov. 5, 2009).[12] And while we're aware of no similar case that arose in the negligent infliction of emotional distress context, we believe that a similar result would likely be reached if such outbursts were assessed under the "severe" conduct rubric that's used in such cases. *See Mower*, 2018 UT 29, ¶ 57 (quotation simplified).

¶77 Moreover, in assessing any emotional distress claim, a court must of course consider the context in which the offending

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12. Each decision in this string cite rejected an emotional distress claim that was based on a profane outburst, and the language at issue in many of these decisions was as aggressive (if not more so) than the language at issue here. We have no need to further publicize the particulars.

conduct occurs. Words that might be outrageous or severe if spoken at a funeral may well be interpreted differently if they are spoken by the proverbial sailors at sea. And this is largely why we agree with the district court's rejection of the claims at issue here. Westbrook's outburst occurred at a professional sporting event, a place where society has unfortunately come to expect some amount of intemperate behavior. And the outburst at issue also wasn't unprovoked. Again, Keisel admitted that Westbrook was responding to an initial statement from Keisel that could have been understood as a sexual if not homophobic slur. These details of course change the calculus as to whether Westbrook's response was so outrageous or severe that it could support an emotional distress claim.

¶78 Pushing back, Keisel and Huff repeatedly assert that they felt physically threatened by Westbrook's outburst. But when confronted with claims like these, a court must be capable of distinguishing between actual threats of violence and something that was merely profane posturing. Here as elsewhere, context is key. As recognized by the district court, Westbrook's outburst occurred "in the presence of security personnel and thousands of spectators," and Westbrook was separated from Keisel and Huff by several rows of spectators. As also recognized by the district court, Keisel and Huff then "remained in the Arena to watch the rest of the game," a choice that belies any suggestion that they really thought there was a "real risk that Westbrook would make good on his threat."

¶79 Still seeking to find some solid footing for their suit, Keisel and Huff point to the power imbalance between them and Westbrook. From this, they suggest that Westbrook had implicitly threatened to evoke outrage against them through his "followers." But Westbrook said nothing of the sort. Rather, what he said was "I'll fuck you up." While this was clearly a profane response to Keisel's initial comments, it strains credulity to suggest that, with this statement alone, Westbrook was

threatening to subsequently engage in an orchestrated campaign of public ridicule against this unnamed fan who had just taunted him from the stands.

¶80 In dismissing these claims, the district court quoted the following comment from the Restatement:

> [P]laintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where someone's feelings are hurt. There must still be freedom to express an unflattering opinion, and some safety valve must be left through which irascible tempers may blow off relatively harmless steam.

(Quoting Restatement (Second) of Torts § 46 cmt. d (Am. L. Inst. 1965).) While this comment from the Restatement was directed at the "outrageousness" element of an intentional infliction of emotional distress claim, the sentiment has some natural bearing on the "severe" element of a negligent infliction claim as well. And it largely explains why the profane statements from Westbrook do not support the claims at issue.

¶81 We certainly don't condone what Westbrook said. Sports and society alike would be better off without such language. And for that matter, the other fans who were sitting nearby deserved far better from both Westbrook and Keisel. These two adults could and should have found a way to disagree better.

¶82 But even so, under well-worn legal standards, we agree with the district court that Westbrook's outburst could not support a claim for either intentional or negligent infliction of

emotional distress. We therefore affirm the court's dismissal of those claims.[13]

CONCLUSION

¶83 For the foregoing reasons, we conclude that the district court did not err in granting summary judgment to Westbrook and the Jazz. We therefore affirm.

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13. Two final issues warrant brief discussion. First, around the same time that Westbrook and the Jazz filed their motions for summary judgment, Keisel and Huff filed a motion to amend their complaint to add additional claims against the Jazz. The court denied that request, and Keisel and Huff did not challenge that denial in their appellate brief. In this same motion, Keisel and Huff also sought leave to add an untimely request for a jury trial. The court denied that request as well. Keisel and Huff have challenged that portion of this ruling on appeal, but we have no need to consider this challenge given our decision to affirm the court's dismissal of their claims.

Second, after the court granted summary judgment, it awarded costs to both Westbrook and the Jazz under rule 54(d) of the Utah Rules of Civil Procedure. In a single sentence at the close of their brief, Keisel and Huff challenge that ruling. But they provide no authority or reasoned argument to support that challenge. They accordingly have not carried their burden of persuading us that there was any error with respect to it.