**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A19-0665**

Michelle L. MacDonald, et al.,
Appellants,

vs.

Michael Brodkorb, et al.,
Respondents.

**Filed February 24, 2020**
**Affirmed; motion granted in part**
**Ross, Judge**

Ramsey County District Court
File No. 62-CV-18-4145

Karlowba R. Adams Powell, St. Paul, Minnesota (for appellants)

Nathan M. Hansen, North St. Paul, Minnesota (for respondents)

Considered and decided by Jesson, Presiding Judge; Ross, Judge; and Smith, John, Judge.[*]

**S Y L L A B U S**

I. A candidate for public office is a limited-purpose public figure whose claims for defamation require proof of actual malice.

II. A candidate for public office may remain a public figure after an election loss by repeatedly seeking elective office.

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

III. A public-figure candidate for public office cannot maintain a claim of defamation by implication.

## O P I N I O N

**ROSS**, Judge

Appellants Michelle MacDonald and MacDonald Law Firm LLC sued respondents Michael Brodkorb, Missing in Minnesota LLC, and others, alleging defamation for statements referring to MacDonald's arrest on suspicion of drunk driving and her involvement in a high-profile family-law case. Respondents moved for summary judgment, and the district court dismissed the claims, reasoning that MacDonald was a public figure, that defamation by implication was not actionable, and that there was no genuine issue of material fact about either the truth of respondents' statements or respondents' lack of actual malice. MacDonald and her law firm ask us to reverse and remand, arguing that the district court prematurely granted respondents' summary-judgment motion in violation of due process, that the district court misapplied the law, and that the district court improperly resolved genuine issues of material fact. We affirm because the district court correctly held that MacDonald was a public figure, that the defamation-by-implication claim failed as a matter of law, and that no genuine dispute of material fact prevented summary judgment.

## FACTS

Appellants Michelle MacDonald and MacDonald Law Firm LLC (together, MacDonald) sued respondents Michael Brodkorb, Missing in Minnesota LLC (together, Brodkorb), and "John and Mary Does" in June 2018 for defamation generally, defamation per se, and defamation by implication. MacDonald alleged that Brodkorb defamed her in

numerous statements falling into three general categories. First, she alleged that Brodkorb falsely identified her as a "person of interest" in the disappearance of the Rucki sisters, daughters of MacDonald's client Sandra Grazzini-Rucki.[1] Second, she alleged that Brodkorb falsely reported that an appellate court affirmed MacDonald's conviction for driving under the influence.[2] Third, she alleged that Brodkorb repeatedly published a photograph "as if a mug shot" so as to imply that MacDonald was a criminal, a "drunk," or mentally ill.

MacDonald filed her complaint in both Dakota County and Ramsey County, prompting Brodkorb to move for sanctions against MacDonald in Ramsey County, arguing that her lawsuit was harassing and needlessly increased costs in light of the Dakota County filing. The Dakota County District Court ultimately dismissed its case without prejudice, and the Ramsey County case proceeded.

MacDonald moved for default judgment in September 2018, arguing that Brodkorb had failed to serve a timely answer. She supported the motion with her "affidavit," which was a restatement of the amended complaint. The "affidavit" was neither notarized nor signed under penalty of perjury. Brodkorb moved for summary judgment the day after

[1] Grazzini-Rucki spirited two of her teenage daughters into hiding on a ranch where they remained for two years, ultimately resulting in Grazzini-Rucki's convictions for deprivation of parental rights. *State v. Grazzini-Rucki*, No. A16-1997, 2017 WL 5077562, at *1–2 (Minn. App. Nov. 6, 2017), *review denied* (Minn. Jan. 16, 2018).

[2] A jury found MacDonald guilty of test refusal and obstructing legal process and not guilty of driving under the influence of alcohol, and we affirmed her convictions on appeal. *State v. Shimota*, 875 N.W.2d 363, 365, 373 (Minn. App. 2016), *review denied* (Minn. Apr. 27, 2016).

MacDonald's default-judgment motion, supporting his motion with his own affidavit and exhibits. In his affidavit, Brodkorb admitted to identifying MacDonald as a person of interest in the Grazzini-Rucki criminal case, but he asserted that the Star Tribune had already described her that way and that investigating police officers had confirmed MacDonald's person-of-interest status "on multiple occasions." He denied having ever reported that she was convicted of drunk driving. Brodkorb also stated that the disputed "mug shot" photograph was in fact an actual booking photograph of MacDonald that he obtained from the Dakota County Sheriff's Department. Brodkorb argued that no genuine dispute of material fact existed and that summary judgment was appropriate.

The district court denied MacDonald's default motion, a decision she does not challenge on appeal. The district court granted Brodkorb's motion for summary judgment. It concluded that MacDonald was a public figure based on her "perennial" candidacy for public office in 2014, 2016, and 2018, a conclusion that would defeat her defamation claim unless she provided proof of Brodkorb's actual malice. It dismissed MacDonald's defamation-by-implication claim, reasoning that Minnesota has rejected the cause of action by public officials.

Addressing MacDonald's person-of-interest defamation allegations, the district court concluded that MacDonald had offered no evidence to create a genuine dispute that Brodkorb acted with actual malice. It focused on Brodkorb's and MacDonald's competing "affidavits": Brodkorb's affidavit asserted that investigating police had informed him that MacDonald was in fact a person of interest in the Grazzini-Rucki criminal case, while MacDonald's "affidavit" asserted that police had told her she was *not* a person of interest.

The district court reasoned that MacDonald's statement was inadmissible hearsay but that Brodkorb's statement was not hearsay because it was offered to prove his lack of actual malice rather than to prove the truth of the matter asserted. The district court concluded that the record was therefore "devoid of evidence that [Brodkorb] broadcasted [the] statements . . . knowing that the information was false or that [Brodkorb] entertained serious doubts as to the truth of [the] statements."

Addressing MacDonald's drunk-driving defamation allegations, the district court observed that MacDonald had failed to produce the alleged twitter.com "tweet" in which, according to her, Brodkorb falsely announced that she had been convicted of drunk driving. The district court recognized that Brodkorb denied tweeting the claimed false announcement, and it considered whether any evidence before it supported MacDonald's allegation. It assessed a missinginminnesota.com post in which Brodkorb reported only that MacDonald was found guilty of test refusal, obstructing legal process, and speeding, not of drunk driving.

Addressing MacDonald's "mug shot" defamation allegations, the district court rejected MacDonald's premise that the photograph was defamatory on its face, noting that it was never purported to be a mug shot. The district court instead clarified her argument: "What [MacDonald is] really arguing is that the unflattering photograph and caption containing the reference to MacDonald being a 'person of interest,' even if true or lacking actual malice, are defamatory by implication." It rejected the claim based on Minnesota's rejection of defamation-by-implication claims as to public officials.

MacDonald appealed. Brodkorb moved to strike two documents from her addendum: a June 22, 2018 letter MacDonald filed in Dakota County indicating her case filing was made in error; and a photograph purporting to show the February 16, 2016 tweet in which Brodkorb allegedly claimed an appellate court affirmed MacDonald's "DWI" conviction. We chose to decide the motion and appeal together.

## ISSUES

I. Should portions of MacDonald's addendum be stricken from the appellate record?

II. Did MacDonald waive any due-process arguments by failing to raise them before the district court?

III. Did the district court err by granting Brodkorb's motion for summary judgment?

## ANALYSIS

MacDonald argues that the district court prematurely granted summary judgment, improperly resolved factual disputes, and misapplied the law. Brodkorb urges us to affirm the district court, and he also asks us to strike portions of MacDonald's addendum. For the following reasons, we grant in part and deny in part Brodkorb's motion to strike, and we affirm the district court's summary-judgment decision dismissing MacDonald's claims.

### I

Brodkorb asks us to strike two documents from MacDonald's addendum because they were not in the district court's record. "The documents filed in the trial court, the exhibits, and the transcript of the proceedings, if any, shall constitute the record on appeal in all cases." Minn. R. Civ. App. P. 110.01. We generally will not consider matters outside the record on appeal or evidence not produced and received in the district court. *Thiele v.*

*Stich*, 425 N.W.2d 580, 582–83 (Minn. 1988). One challenged document is a copy of a letter MacDonald filed with the Dakota County District Court on June 22, 2018, representing that she had filed her case in Dakota County in error. The other is a photograph of a cell-phone screen depicting an image of the February 16, 2016 tweet in which Brodkorb allegedly represented that MacDonald was convicted of drunk driving. The two documents prompt different conclusions.

We deny Brodkorb's motion as to the letter. We may take judicial notice of, or refuse to strike, public documents not received into evidence in the district court. *See State v. Rewitzer*, 617 N.W.2d 407, 411 (Minn. 2000). Although the letter was not included in the record in this case, it is part of the Dakota County District Court's public record. *See MacDonald v. Brodkorb*, No. 19HA-CV-18-2643 (Minn. Dist. Ct. June 22, 2018) (correspondence). The district court in this case adopted the Dakota County District Court's stated procedural history, which itself referenced the letter. Because the correspondence is a public document and the district court took judicial notice of it, we decline to strike it on appeal.

We grant Brodkorb's motion as to the tweet photograph. MacDonald failed to produce the photograph in the district court. Its absence expressly factored into the district court's decision. MacDonald argues that the tweet was referenced in the civil complaint in this case and therefore was incorporated into the record. She cites no authority for the proposition that an appellate court reviewing a summary-judgment decision should consider evidence not considered or even properly offered during the summary-judgment proceeding simply because it was mentioned in a different pleading. And incorporation

by reference is typically limited to situations where the district court's consideration of documents referenced in a complaint does not convert a motion to dismiss under Minnesota Rule of Civil Procedure 12.02 into a motion for summary judgment. *See N. States Power Co. v. Minn. Metro. Council*, 684 N.W.2d 485, 490 (Minn. 2004). Because the evidence was not in the district court record, it is not properly before us.

**II**

MacDonald argues that the district court violated her due-process rights by granting summary judgment without requiring an answer or affording time for discovery. We generally decline to address issues raised for the first time on appeal. *See Thiele*, 425 N.W.2d at 582. The rule is flexible, and we may review forfeited issues as the interests of justice require. *See Putz v. Putz*, 645 N.W.2d 343, 350 (Minn. 2002); *see also* Minn. R. Civ. App. P. 103.04. Brodkorb accurately emphasizes that MacDonald failed to raise the argument in the district court, failed to seek permission to conduct discovery, and failed to request a continuance to facilitate any discovery she now asserts was necessary. MacDonald had ample opportunity to seek relief to avoid an early-stage summary judgment:

> If a nonmovant shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:
>
> (a) defer considering the motion or deny it;
>
> (b) allow time to obtain affidavits or to take discovery; or
>
> (c) issue any other appropriate order.

Minn. R. Civ. P. 56.04. MacDonald failed to pursue the relief available under rule 56.04. Her counsel briefly addressed the issue during oral arguments before the district court, stating, "[A]ccording to the rules [respondents'] motion could possibly be premature because discovery has not even beg[u]n. . . . So their motion is really technically premature." This passing reference by counsel falls far short of the affidavit procedure authorizing the district court to grant the relief that counsel was suggesting. It is neither a sufficient ground for us to deem the issue preserved for our consideration on appeal under *Thiele* nor timely presented under the general-practice rules. *See* Minn. R. Gen. Prac. 115.03(b) (2018) (requiring responsive memoranda to be served and filed "at least 9 days prior to the hearing").[3] The argument is forfeited.

**III**

MacDonald challenges the district court's summary-judgment decision on numerous bases, generally contending that the district court improperly resolved factual disputes and misapplied the law. Summary judgment is appropriate if the moving party shows that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.01. We review a district court's summary-judgment decision de novo, assessing whether any genuine issues of material fact exist and whether the district court misapplied the law. *Melrose Gates, LLC v. Chor Moua*, 875 N.W.2d 814, 819 (Minn. 2016). We view the evidence in the light most favorable to the nonmoving

[3] Minnesota Rule of General Practice 115.03(b) was amended, effective January 1, 2020, to require responsive memoranda to be filed at least 14 days before the hearing. We refer to the rule that was in effect at the time of the parties' motions.

party and resolve doubts regarding the existence of material facts in that party's favor. *Senogles v. Carlson*, 902 N.W.2d 38, 42 (Minn. 2017).

A plaintiff alleging defamation must establish four elements: (1) that the defendant communicated a statement to a third party; (2) that the statement was false; (3) that the statement tends to cause reputational harm; and (4) that the recipient of the statement understands that it refers to a specific individual. *McKee v. Laurion*, 825 N.W.2d 725, 729–30 (Minn. 2013). Defamation affecting a plaintiff's "business, trade, profession, office or calling" is defamation per se. *Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910, 920 (Minn. 2009) (quotation omitted). But if the plaintiff is a public figure, her defamation claim requires clear and convincing proof that the defendant acted with actual malice, meaning he willfully or recklessly disregarded the truth or falsity of the allegedly defamatory statements. *Metge v. Cent. Neighborhood Improvements Ass'n*, 649 N.W.2d 488, 496–97 (Minn. App. 2002), *review dismissed* (Minn. Oct. 15, 2002). One form of defamation is defamation by implication. *Id.* at 498. This type of defamation may involve truthful statements that imply defamatory content, and it occurs when a defendant either "juxtaposes a series of facts to imply a defamatory connection between them" or "creates a defamatory implication by omitting facts." *Id.*

***MacDonald failed to provide evidence creating any genuine dispute of material fact.***

MacDonald rests several claim-specific arguments on her general contention that the district court improperly resolved genuine disputes of material fact. Our de novo review of the record convinces us that MacDonald failed to present any genuine dispute of material fact to challenge the facts asserted in Brodkorb's affidavit. As the summary-judgment

movant, Brodkorb bore the initial burden of showing that no genuine fact issue exists. *See* Minn. R. Civ. P. 56.01; *see also Anderson v. State, Dep't of Nat. Res.*, 693 N.W.2d 181, 191 (Minn. 2005). MacDonald, in response and as the nonmoving party, could not avoid summary judgment by resting on mere assertions. *See Stringer v. Minn. Vikings Football Club, LLC*, 705 N.W.2d 746, 754 (Minn. 2005). She instead could avoid summary judgment only by producing substantial evidence creating a disputed factual issue to be resolved by a fact-finder. *Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 371 (Minn. 2008).

Brodkorb met his burden as the moving party. His motion included a signed, sworn, notarized affidavit avowing from first-hand information that police had informed him that MacDonald was a "person of interest" in the Rucki investigation, that the photograph MacDonald's complaint referenced was indeed a law-enforcement booking photo, and that he had never reported that MacDonald was convicted of drunk driving. If the facts in Brodkorb's affidavit stand unchallenged, they generally defeat key components of MacDonald's defamation claims. The question then becomes whether MacDonald presented evidence challenging the facts in Brodkorb's affidavit. The answer is no.

Although the district court treated MacDonald's "affidavit" on its merits when it analyzed Brodkorb's summary-judgment motion, our de novo review leads us to treat the submission differently. "An affidavit used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on matters stated." Minn. R. Civ. P. 56.03(d). An affidavit is either "a document that has been signed, sworn, and notarized" or "a document that has

been signed under penalty of perjury pursuant to Minnesota Statutes, section 358.116, provided that the signature is affixed immediately below a declaration" that says something like, "I declare under penalty of perjury that everything I have stated in this document is true and correct." Minn. R. Gen. Prac. 15. MacDonald's so-called affidavit was neither notarized nor signed under penalty of perjury. It is at most an attempted affidavit. It therefore is not evidence that can challenge the facts asserted in Brodkorb's affidavit so as to create a material-fact dispute. We consider MacDonald's specific arguments in this context.

***The district court may consider defenses on a motion for summary judgment.***

MacDonald argues that the district court erred by "ruling on the defense, without ruling on the [appellants'] defamation case in chief." The argument ignores the objective of a summary-judgment motion: "A party may move for summary judgment, identifying each . . . *defense*—or the part of each . . . *defense*—on which summary judgment is sought." Minn. R. Civ. P. 56.01 (emphasis added). The district court properly considered Brodkorb's defenses.

***MacDonald was a public figure at the relevant times.***

The district court determined that MacDonald was a "public figure" at all relevant times because of her candidacy for public office. Based on this determination, the district court subjected MacDonald's defamation claims to the actual-malice standard and, in turn, dismissed the defamation-by-implication claim. Whether a plaintiff is a public figure is a question of law subject to de novo review. *See Jadwin v. Minneapolis Star & Tribune Co.*, 367 N.W.2d 476, 483 (Minn. 1985). But it is a question of law that might involve disputes

of material fact. *Chafoulias v. Peterson*, 668 N.W.2d 642, 649 (Minn. 2003). Alternative methods are available to resolve facts necessary to a public-figure determination: "submission to a jury for special interrogatory verdicts or under specific instruction as to the elements of the privilege," or "pretrial submission to the district court for determination by specific findings of fact based upon an evidentiary hearing." *Id.* at 650. But neither of these methods was necessary here because MacDonald's recurring candidacy was not disputed.

MacDonald contends that the district court made its public-figure determination *sua sponte*, depriving her of any opportunity to challenge the determination. The record does not support her contention. Brodkorb raised the issue of MacDonald's potential public-figure status in his memorandum supporting his motion for summary judgment, and the argument featured prominently in both the briefing and oral arguments before the district court. MacDonald does not contest the district court's factual predicate that she "has been a perennial candidate for statewide office, challenging incumbent justices for a seat on the Minnesota Supreme Court in 2014, 2016 and again in 2018." She conceded that factual determination below and again on appeal, and that she lost her elections in November of each election year. We may take judicial notice of public documents not part of the record below, *see Rewitzer*, 617 N.W.2d at 411, and we observe that MacDonald filed her affidavits of candidacy for the 2014, 2016, and 2018 elections in May of those years. MacDonald does not identify any specific public-figure factual dispute that she was deprived of raising in the district court. Nor does the record reflect that she either made any effort to pursue an evidentiary hearing before the district court or even suggested that one

was necessary to decide the question. She has identified no error in the procedure followed here.

Challenging the merits of the district court's public-figure determination, MacDonald argues that the district court misapplied caselaw and that the defamation concerned periods during which MacDonald was not a candidate. We begin with the well-settled precept that the "freedom of expression upon public questions is secured by the First Amendment." *New York Times Co. v. Sullivan*, 376 U.S. 254, 269, 84 S. Ct. 710, 720 (1964). The Supreme Court held that the First and Fourteenth Amendments "delimit[] a [s]tate's power to award damages for libel in actions brought by public officials against critics of their official conduct," and that such claims require proof of actual malice. *Id.* at 283, 84 S. Ct. at 727. The Court extended its actual-malice rule to "public figures" in *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155, 87 S. Ct. 1975, 1991–92 (1967). And in *Gertz v. Robert Welch, Inc.*, it identified three categories of public figures: involuntary public figures, who attain their status through no purposeful action; all-purpose public figures, like celebrities; and limited-purpose public figures, who "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." 418 U.S. 323, 345, 94 S. Ct. 2997, 3009 (1974).

MacDonald clearly does not qualify as either an involuntary or an all-purpose public figure, and Brodkorb does not contend otherwise. This leaves the question of whether she is a limited-purpose public figure. The answer depends on three factors: "(1) whether a public controversy existed; (2) whether the plaintiff played a meaningful role in the

controversy; and (3) whether the allegedly defamatory statement related to the controversy." *Chafoulias*, 668 N.W.2d at 651.

We conclude first that a contested election for the office of a Minnesota Supreme Court justice constitutes a public controversy. "A public controversy requires two elements: (1) there must be some real dispute that is being publicly debated; and (2) it must be reasonably foreseeable that the dispute could have substantial ramifications for persons beyond the immediate participants." *Id.* at 652. A contested supreme court election meets both public-controversy elements. The state supreme court as a body is the final interpreter of all state constitutional provisions, the final authority on the meaning of disputed state statutes, and potentially the final arbiter on every issue—large and small—in every case in the state judiciary. It has the power to finesse the common law, modify the rules of criminal and civil procedure in all lower courts, and discipline state attorneys and judges. The qualitative merit of two persons competing to retain or obtain one of seven seats on the court constitutes a real and public debate. And the contest necessarily has substantial ramifications far beyond the immediate participants, reaching not only all Minnesotans but also non-Minnesotans whose interests may be decided in Minnesota courts.

We conclude second that, of course, MacDonald played a meaningful role in the controversy. By choosing to seek the post, MacDonald effectively invited every eligible adult Minnesotan to consider casting a vote in her favor, and she necessarily "thrust [her]self to the forefront of the controversy . . . so as to achieve a 'special prominence' in the debate and become a factor in resolving the controversy." *Id.* at 653.

And we conclude third that the allegedly defamatory statements related to the controversy. The statements are of a nature that could theoretically call into question MacDonald's qualifications for the position she has frequently sought. Judges must act in a manner "that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety." Minn. Code Jud. Conduct Rule 1.2. And candidates for judicial office must likewise "act at all times in a manner consistent with the independence, integrity, and impartiality of the judiciary." Minn. Code Jud. Conduct Rule 4.2(A)(1). MacDonald has alleged as defamation various statements suggesting that police considered her involvement to be relevant in their criminal investigation concerning children kept illegally from their father. The content of the alleged defamation also revealed her criminal conduct surrounding her arrest on suspicion of drunk driving. Statements suggesting unethical, improper, or illegal behavior by a candidate for judicial office relate to the contest and qualifications for the office.

We are not persuaded to a different conclusion by MacDonald's underdeveloped temporal argument. She argues on appeal that the defamation included "periods when Ms. MacDonald was not a candidate for office." But she did not so contend in the district court or produce any evidence disputing the periods of her candidacy. A review of her complaint and its cursory timeline along with the import of MacDonald's recurring candidacy leads us to reject her argument.

The amended complaint indicates that it concerns incidents "leading up to and following incidents on June 22, 2016," and alleges that Brodkorb "*began* a social media

campaign against Ms. MacDonald" (emphasis added) approximately in September 2016. The amended complaint also alleges that MacDonald learned on August 3, 2016, that Brodkorb was labeling MacDonald as a "person of interest." Given MacDonald's May 2016 filing for candidacy, Brodkorb began his allegedly defamatory campaign while MacDonald was an active candidate for office. MacDonald alleges instances of Brodkorb's tweeting the "mug shot," identifying her as a person of interest, and also implying that she "crashed" a press conference, all of which she alleges occurred on June 5, 2018—again during her active candidacy. The amended complaint is silent as to some of the dates of alleged defamation. We decline to assume from the vagueness of MacDonald's complaint that alleged defamation occurred at times when MacDonald was not an active candidate.

The amended complaint does allege that Brodkorb began posting the "mug shot" in January 2017—a period *after* MacDonald's 2016 election loss but before her 2018 active candidacy. But we share the district court's view that MacDonald's "perennial candida[cy] for statewide office" on the supreme court established her public-figure status at all relevant times.

At oral argument, MacDonald's counsel suggested that MacDonald's status as a public figure came and went with each new bid for office and election loss, giving rise to and then extinguishing her public-figure status. The argument supposes that gaps between MacDonald's May election filings and her November election losses establish only periodic, approximately six-month-long terms as a public figure. The argument assumes, we think unpersuasively, that MacDonald's public-figure status immediately terminated at the end of each active election cycle. Candidacy for public office might for some be a

one-time occurrence, while for others, like MacDonald, it is recurrent. And it is commonly known that campaigns for public office are rarely confined to the active, official campaign period between filing and election. Determined candidates for public office may demonstrate a long-term campaign strategy that includes persistent refilings and elections interspersed with fundraising or publicity-enhancing efforts unbounded by the official election period. By the time of Brodkorb's alleged 2017 defamation, MacDonald had already demonstrated a persistent objective of repeated challenges rather than a single-occurrence effort.

This case does not require us to determine the shelf life of a candidate's public-figure status. It is likely true that, under other circumstances, a judicial candidate's public-figure status may have ended before allegedly defamatory statements occurred. It is not difficult to imagine a case where a candidate who once clearly thrust herself into the forefront of public controversy has since clearly retreated, abandoning her public-figure role. MacDonald presented no facts to the district court suggesting that this is such a case. We hold that a candidate for public office is a limited-purpose public figure and that a recurring candidate remains a public figure between formal election periods. MacDonald remained a public figure by not retreating after thrusting herself into the forefront of public controversy and by continually seeking a supreme court seat. The district court did not err by concluding that she was a public figure.

***A public-figure candidate for public office cannot maintain a claim for defamation by implication.***

MacDonald argues that the district court erred by conflating public officials with public figures when it dismissed her defamation-by-implication claim. The district court relied on *Diesen v. Hessburg*, in which the supreme court held that any implication arising from true statements about a public official are "constitutionally protected criticism of a public official" and are not defamation as a matter of law. 455 N.W.2d 446, 452 (Minn. 1990). We review questions of law de novo. *See State v. Minn. Sch. of Bus., Inc.*, 935 N.W.2d 124, 132 (Minn. 2019). We conclude that the district court properly dismissed MacDonald's defamation claim by relying on *Diesen*.

MacDonald accurately observes that *Diesen*'s express holding was limited to public officials, not public figures. And public figures and public officials are different in nature. Unlike a public official, "[a] person becomes a public figure not by her government employment, but by voluntarily entering a public controversy." *Britton v. Koep*, 470 N.W.2d 518, 521 n.1 (Minn. 1991). In *Diesen*, the Carlton County Attorney sued media parties for articles criticizing his job performance in prosecuting domestic abuse. 455 N.W.2d at 447. The *Diesen* court recognized that Diesen, "as county attorney, was a public official and as such, '[ran] the risk of closer public scrutiny than might otherwise be the case.'" *Id.* at 450 (quoting *Gertz*, 418 U.S. at 344, 94 S. Ct. at 3009). The court also explained that this heightened scrutiny is a "necessary and positive element of our democracy," and that the "free speech and free press rights at stake" could expose public officials to reputational harms for which they might have no recovery. *Id.* In precluding

defamation-by-implication claims brought by public officials, the *Diesen* court agreed with a federal court's explanation that "speech about government and its officers, about how well or badly they carry out their duties, lies at the very heart of the First Amendment." *Id.* at 451–52 (quoting *Janklow v. Newsweek, Inc.*, 788 F.2d 1300, 1304 (8th Cir. 1986)).

It is true that MacDonald was not a public official, but was only seeking to become one. But the *Diesen* court's reasoning about protecting critics of public officials from punishment applies with equal force to protecting critics of persons whose public-figure status rests on their efforts to become public officials. The First Amendment interests are congruent, a fact the United States Supreme Court recognized when considering the breadth of the actual-malice standard: "There is little doubt that public discussion of the qualifications of a candidate for elective office presents what is probably the strongest possible case for application of the *New York Times* rule." *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 686, 109 S. Ct. 2678, 2695 (1989) (quotation omitted). Like this case, the *Harte-Hanks* case involved an "unsuccessful candidate" for a judgeship. *Id.* at 660, 109 S. Ct. at 2682. Public discussion of candidates for an elective office is a "value [that] must be protected with special vigilance," and "[v]igorous reportage of political campaigns is necessary for the optimal functioning of democratic institutions and central to our history of individual liberty." *Id.* at 687, 109 S. Ct. at 2695–96.

And in *Monitor Patriot Co. v. Roy*, the Court also observed that the distinctions between public figures and public officials were largely immaterial with regard to the constitutional interests involved:

> The trial judge instructed the jury that Roy, as a candidate for elective public office, was a 'public official,' and that characterization has not been challenged here. Given the later cases, it might be preferable to categorize a candidate as a 'public figure,' if for no other reason than to avoid straining the common meaning of words. But the question is of no importance so far as the standard of liability in this case is concerned, for it is abundantly clear that, whichever term is applied, *publications concerning candidates must be accorded at least as much protection under the First and Fourteenth Amendments as those concerning occupants of public office. . . . [I]t can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office*.

401 U.S. 265, 271–72, 91 S. Ct. 621, 625 (1971) (emphasis added).

Although *Harte-Hanks* and *Monitor Patriot* addressed the standard of liability, their analysis of constitutional interests informs our decision here. And it leads us to conclude that the *Diesen* standard for defamation by implication applies to candidates for public office. Where the motives and functioning of government officials are proper targets for the heightened protection of public discourse, *see Diesen*, 455 N.W.2d at 450–52, the same must be true for candidates seeking to become public officials. We therefore reject the claim in MacDonald's complaint that a "technically true" statement may support a claim of defamation by implication in this case. To the extent Brodkorb's statements were true, MacDonald's defamation case cannot rest on the potential falsity of their implication. The district court therefore properly dismissed the claim.

***There is no genuine dispute that Brodkorb lacked actual malice in making the person-of-interest statements.***

MacDonald argues that the district court improperly determined facts and erroneously concluded that Brodkorb lacked actual malice in claiming MacDonald was a

"person of interest." We have already determined that the MacDonald "affidavit" was not an affidavit for the purposes of presenting evidence opposing the summary-judgment motion. That police informed Brodkorb that MacDonald was a person of interest is therefore an undisputed fact for the purposes of summary judgment.

Although the district court unnecessarily considered the merits of MacDonald's so-called affidavit, it accurately concluded that the affidavit created no genuine dispute as to Brodkorb's lack of actual malice. "An affidavit used to support or oppose a motion must be made on personal knowledge, set out facts *that would be admissible in evidence*, and show that the affiant is competent to testify on matters stated." Minn. R. Civ. P. 56.03(d) (emphasis added). The district court reasoned that Brodkorb's affidavit, which declared that "Lakeville Police investigators had confirmed to me, on multiple occasions, that plaintiff was a 'person of interest' in the investigation," was the only admissible evidence about Brodkorb's alleged actual malice. The district court properly concluded that Brodkorb's representation about his communication with police was not hearsay, as Brodkorb did not offer it to prove the truth of any officer's understanding of whether MacDonald was actually a person of interest. *See* Minn. R. Evid. 801(c) (defining hearsay). The district court relied on the Brodkorb affidavit on this point instead only to disprove MacDonald's theory that Brodkorb had made the report knowing it was false, or with disregard for its truth or falsity. This was an appropriate, limited use of that part of his affidavit. Because the district court properly concluded MacDonald was a public figure, and because the district court properly determined that MacDonald offered no admissible

evidence of Brodkorb's alleged actual malice, it properly dismissed any defamation claim resting on the person-of-interest theory.

***No genuine dispute exists about Brodkorb's alleged tweeting about a drunk-driving conviction.***

The district court rejected MacDonald's drunk-driving-tweet claim because she provided no evidence of the purported tweet, because Brodkorb's affidavit denied posting the alleged tweet, and because Brodkorb's actual report did not describe the dispositions of MacDonald's criminal cases inaccurately. MacDonald argues that the "post clearly sets forth that a DUI conviction was upheld, which is false." The argument rests on information we have already stricken from our consideration. Based on this and on our determination that MacDonald's "affidavit" is not an affidavit that merits consideration during the summary-judgment analysis, the district court properly dismissed MacDonald's claims about the alleged February 2016 tweet.

***The district court properly rejected MacDonald's "mug shot" claims.***

The district court reasoned that Brodkorb had not referred to the contested photograph as a "mug shot" or booking photograph, and that the crux of MacDonald's argument was that the "unflattering photograph" and caption were defamatory by implication. Brodkorb's affidavit avowed that the photograph actually *is* a booking photograph, and MacDonald offered no competing evidence. She argues instead that the district court improperly rejected any *implication* of defamation because "[t]he innuendo that one is a criminal, drunk, and mentally ill is clearly defamatory and it would be up to a jury[—]not a judge[—]to determine whether that meaning was the one actually conveyed."

Our holding that MacDonald cannot maintain a claim on a defamation-by-implication theory disposes of the argument. The district court properly dismissed the defamation claims resting on the posting of the "mug shot."

***The district court did not err by dismissing MacDonald's claims by limiting its consideration to three areas of alleged defamation.***

MacDonald argues that the district court improperly dismissed her claims by limiting its analysis to only three instances of alleged defamation when, "[i]n fact, the complaint was not confined to three defamatory statements." We have addressed MacDonald's contentions about the person-of-interest statements, the 2016 drunk-driving tweet, and the "mug shot" postings. Nothing in what remains of MacDonald's amended complaint provides any basis to reverse. She says that a radio host called her a "masochist," that other Twitter users called her "deranged" and needing of a straitjacket, and that Brodkorb claimed that she inappropriately crashed a press conference. Brodkorb is liable for neither statements by third parties, *see Maethner v. Someplace Safe, Inc.*, 929 N.W.2d 868, 873 (Minn. 2019) (defamation requires proof that the *defendant* made the statement), nor his opinions about the appropriateness of MacDonald's press-conference attendance, *see Diesen*, 455 N.W.2d at 452. The district court did not err by addressing only the three specific areas of alleged defamation.

***The district court properly dismissed all claims by MacDonald Law.***

MacDonald and MacDonald Law imply that the district court improperly dismissed the claims to the extent they applied to MacDonald Law rather than to MacDonald personally. They cite no part of their complaint alleging defamation against MacDonald

Law, and our review uncovers none. Consistent with how we have discussed the claims, the complaint is framed so as to demonstrate that MacDonald Law's claims are entirely contingent on MacDonald's claims personally. All claims were properly dismissed.

## D E C I S I O N

We partly grant and partly deny respondents' motion to strike. We affirm the district court's summary-judgment decision dismissing all defamation claims because no material-fact issues exist, MacDonald was a public figure, and defamation by implication is not actionable here.

**Affirmed; motion granted in part.**