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**DISTRICT II**

February 3, 2016

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You are hereby notified that the Court has entered the following opinion and order:

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2015AP1165

Peter J. Long v. Dennis D. Gitter (L.C. # 2012CV1204)

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

Peter J. Long, pro se, appeals an order denying his motion for summary judgment and granting summary judgment in favor City of Neenah police officer Dennis Gitter and the City of Neenah. Long contends Gitter's police report maliciously defamed him and that this court should "pierce the corporate veil" and hold the City liable for Gitter's acts.

We agree with the circuit court that Gitter is entitled to qualified immunity. We further hold that the action against the City cannot be maintained because Long does not allege that the claimed defamation resulted from a municipal policy or practice. *See Weber v. City of*

*Cedarburg*, 129 Wis.2d 57, 77-78, 384 N.W.2d 333 (1986). Based on our review of the briefs and the record, we conclude that summary disposition is appropriate. See WIS. STAT. RULE 809.21 (2013-14).<sup>1</sup> We affirm.

Long reported to police that, almost four weeks earlier, the basement of a rental property he owned had been broken into and approximately \$2500 worth of construction tools and equipment were missing.<sup>2</sup> Gitter investigated the complaint. According to Gitter's report, the tenant of the rental duplex accompanied him to the basement and told him nothing appeared to be missing or out of order. It also stated that there was no proof Long ever owned the allegedly stolen items. Gitter opined that there had been no burglary and that he suspected insurance fraud based on Long's "extensive" history of theft, fraud, and forgery. Unable to prove his misgivings about the claim, Gitter discontinued the investigation but did not refer the suspected fraud to the district attorney's office for review or charges. Long's insurer paid on his claim but refused to renew his rental property coverage due to Long's "overall claim activity."

Long alleged Gitter defamed him, that Gitter's report was a ministerial act, not a protected discretionary one, and that Gitter's false, defamatory, and prejudicial statements caused Long's insurer to decline to renew his policy. Both sides moved for summary judgment. The circuit court granted Gitter's and the City's motion for summary judgment. It denied Long's cross-motion as well as his subsequent motion for reconsideration. Long appeals.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

<sup>2</sup> Long made his report in a letter to police, as he was incarcerated at the time.

We review summary judgment determinations de novo, using the same methodology as the circuit court and applying the standards of WIS. STAT. § 802.08. *Sunday v. Dave Kohel Agency, Inc.*, 2006 WI 92, ¶20, 293 Wis. 2d 458, 718 N.W.2d 631. We will uphold summary judgment when it has been shown that there are no genuine issues of material fact and that the party is entitled to judgment as a matter of law. Sec. 802.08(2). Cross motions for summary judgment imply a stipulation as to the facts of the case. See *Powalka v. State Mut. Life Assurance Co.*, 53 Wis. 2d 513, 518, 192 N.W.2d 852 (1972).

Discretionary acts by the police are immune from liability under WIS. STAT. § 893.80(4). Three exceptions exist to this general rule. *Barillari v. City of Milwaukee*, 194 Wis. 2d 247, 257, 533 N.W.2d 759 (1995). A public officer does not enjoy immunity (1) if his or her conduct is malicious, willful, or intentional; (2) for the negligent performance of a ministerial duty; or (3) when he or she is aware of a danger that is of such quality that his or her duty to act becomes “absolute, certain and imperative.” *Id.* at 257-58 (citation omitted).

Long contends the statements in Gitter’s report are inflammatory and prove malice. We disagree. Gitter had no proof that Long ever owned the tools he claimed were stolen. The statements regarding Long’s criminal history are not false. Long’s history includes a conviction for simulating legal process, and dismissed and read-in charges of theft, forgery, and identity theft. That the read-in charges were not convictions does not diminish their relevance. *Cf. State v. Damaske*, 212 Wis. 2d 169, 194-97, 567 N.W.2d 905 (Ct. App. 1997) (sentencing court may consider uncharged, unproved conduct for purpose of evaluating defendant’s character and patterns of behavior). Gitter’s stated skepticism that a burglary took place, while perhaps an incorrect conclusion, is merely a subjective statement of personal belief.

Long also contends the allegedly false and defamatory comments violate Gitter’s ministerial duty to tell the truth. Whether a particular action is a ministerial duty is a question of law. See *K.L. v. Hinickle*, 144 Wis. 2d 102, 109, 423 N.W.2d 528 (1988). “A public officer’s

duty is ministerial only when it is absolute, certain and imperative, involving merely the performance of a specific task when the law imposes, prescribes and defines the time, mode and occasion for its performance with such certainty that nothing remains for judgment or discretion.” *Barillari*, 194 Wis. 2d at 257-58 (citation omitted).

We are not persuaded that there is an “absolute, certain and imperative” way in which to investigate and report a citizen complaint. To the contrary, “law enforcement officials must retain the discretion to determine, at all times, how best to carry out their responsibilities.” *Id.* at 260; *see also Olson v. 3M Co.*, 188 Wis. 2d 25, 50, 523 N.W.2d 578 (Ct. App. 1994) (focus and scope of investigation of complaint filed with police department requires judgment and discretion). How Gitter performs his investigative and reporting duties is not ministerial.

We also reject Long’s contentions that the circuit court committed manifest error and thus should have granted his motion for reconsideration. *See Koepsell’s Olde Popcorn Wagons, Inc. v. Koepsell’s Festival Popcorn Wagons, Ltd.*, 2004 WI App 129, ¶44, 275 Wis. 2d 397, 685 N.W.2d 853. He first contends the court erred when it rescheduled and held the summary judgment motion hearing before the parties had completed briefing. Thinking all issues had been fully briefed, the court moved up the hearing date set in the scheduling order before Long had filed his reply to Gitter’s response to Long’s motion.

A circuit court’s decision to amend a scheduling order is discretionary. *Schneller v. St. Mary’s Hosp. Med. Ctr.*, 162 Wis. 2d 296, 305, 470 N.W.2d 873 (1991). The court also has the inherent power to control its dockets to achieve economy of time and effort. *Lentz v. Young*, 195 Wis. 2d 457, 465, 536 N.W.2d 451 (Ct. App. 1995). The court here gave Long the choice of adjourning the hearing and filing his reply or going forward with the hearing and preserving an opportunity to file a reply or motion for reconsideration, should it rule in Gitter’s favor. Long opted to proceed with the hearing. We affirm the court’s decision because it “examined the

relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.” *Schneller*, 162 Wis. 2d at 306.

Long also contends the court manifestly erred when it took no action on his motion to require Gitter and the City to file discovery responses and Long’s deposition transcript to support *Long’s* summary judgment motion. Long cites no law, and we know of none, that requires a party to supplement the record on his or her opponent’s behalf.

Finally, Long contends the court erred when it commented that other remedies exist to address his dissatisfaction with Gitter’s investigation, such as providing police with additional or new information, asking Gitter to reconsider his conclusions, or lodging a complaint with the police chief and/or police commission. We agree with Gitter that the court’s comments were offered to assist Long and cannot be read to say that a defamation claim is predicated on first exhausting administrative remedies. The court decided the summary judgment motions on their merits.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed. WIS. STAT. RULE 809.21.

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*