COURT OF APPEALS
DECISION
DATED AND FILED

May 2, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2016AP2030 **Cir. Ct. No. 2016CV75**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

THADDEUS MARTIN LIETZ,

PLAINTIFF-APPELLANT,

V.

DANIEL FROST,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Winnebago County: SCOTT C. WOLDT, Judge. *Affirmed in part; reversed in part and cause remanded.*

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

¶1 HAGEDORN, J. Thaddeus Lietz filed a complaint alleging that Daniel Frost—a next door neighbor of Lietz's parents—made defamatory remarks against him to his parents and within earshot of others. Among the more

sensational of these statements was an accusation by Frost that Lietz had been peeking in Frost's window and masturbating. The circuit court granted summary judgment to Frost. Although we agree that the court properly dismissed three of Lietz's defamation claims, we conclude that one of Lietz's claims was actionable per se, meaning Lietz was not required to prove special damages (the failure of which served as one of the circuit court's grounds for dismissing this claim). Therefore, we reverse the circuit court's order dismissing that claim and remand for further proceedings consistent with this opinion.

BACKGROUND

¶2 Lietz, proceeding pro se, filed a complaint alleging four defamation claims against Frost. This case comes before us on cross motions for summary judgment, the question here being whether summary judgment was properly granted. We will review the relevant materials submitted.

¶3 We begin with Lietz's complaint. The first claim alleged that while Frost was walking on his lawn in the summer of 2014, he made defamatory comments "in a boisterous manner that could be heard by others," saying something to the effect of, "Yeah, the neighbor's one-arm kid was peeping in my window and masturbating. I got pictures." The second claim alleged "slander under defamation of character" based on statements allegedly made on or around June 19, 2015, at 6:30 a.m. "on the outside lawn in between" Frost's residence and Lietz's parent's residence. These statements "could be heard by others in a public/non-private setting." Though the precise content of these statements was not specified, the complaint did refer to the affidavits of Lietz's parents—Jeffery and Mary Lietz (discussed further below). Lietz's third claim was for "defamation" and alleged that "Frost told law enforcement that … Lietz was

peeking into his window, trampling his bushes right outside his windows, and masturbating." Lietz's fourth and final claim alleged "defamation of character through slander, libel, and/or by intimidation tactics that may or may not be considered blackmailing." This claim generally referred to "statements in writing or vocally," but failed to identify the content of the statements being referenced.

¶4 During Lietz's deposition, he denied that there was any truth to the alleged statements by Frost. And he clarified that the statements were made in front of his parents and others. Lietz also generally referred to certain audio recordings allegedly made of these incidents, but failed to specifically identify those recordings.[1]

¶5 Lietz also submitted evidence from his parents in support of his motion for summary judgment. By his affidavit, Jeffery claimed that at around 6:00 a.m. on June 19, 2015, he heard Frost say, "Oh, oh, wonder if there's any kids … peeping in the windows here." Jeffery understood this to be a reference to his son. Jeffery averred that his wife Mary had called 911 and, while on the phone with dispatch, heard Frost say something about a "one arm kid … peeking in his windows and masturbating." Jeffery also alleged that he heard Frost "loudly conversing on a cell phone … outside" stating "that he had pictures of [Lietz] masturbating." Jeffery further claimed in his affidavit that on July 2, 2015, he "heard and recorded" Frost singing a made up song referring to a "kid … peeking in our bedroom." Jeffery understood this to be a reference to his son as well.

[1] Lietz did not bring any of these recordings to his deposition.

¶6 Jeffery also was deposed by his son, and testified that he heard Frost say "[s]omething to the effect the neighbor's one-armed kid was peeking in his windows," and Frost had pictures of this conduct. When asked whether he believed Frost's accusations against Lietz, Jeffery responded that he "can't say what was true or not" but noted that he did not "think it's in keeping with what we know of … our son." Jeffery was asked if he remembered an incident in 2014 where Frost made defamatory remarks, and he responded he did not.

¶7 In her affidavit, Mary averred that Frost said "someone's one arm kid was peeping in [his] window and masturbating." According to Mary, Frost "looked directly at me when stating this and said such in the presence of another individual … Bob, Surveyor for Herbert Surveying." Frost also told Mary that "he had photos in his possession to prove that [Lietz] was seen masturbating in front of [Frost's] windows."

¶8 At her deposition, Mary testified that Frost had said "things like someone's one-armed kid is peeping in my windows, masturbating, and that he's a pursuer of little girls," and that Lietz was "a perpetrator of child pornography." Mary confirmed that all of these statements were made "very early in the morning on June 19th" of 2015, not 2014. She further explained that she called 911 to report Frost making these statements, but Frost went into his house and did not answer when the police came. After the police left, Mary claimed that Frost "came back out and started it all over again, only worse" by "yelling, screaming, shouting and saying horrible, vulgar, crude things about [her] son." Mary reiterated that these remarks were made "in front of the surveyor."

¶9 In his summary judgment briefing, Frost argued that claims two and four in the complaint—the alleged June 2015 incident and the alleged "defamation

of character through slander, libel, and/or by intimidation tactics that may or may not be considered blackmailing"—should be dismissed because the complaint failed to set forth the "particular words" complained of as required by WIS. STAT. § 802.03(6) (2015-16).[2] Frost additionally argued that any alleged statements made to law enforcement under the third claim were "privileged." Frost finally argued that claim one should be dismissed because "Lietz has failed to assert whether and how his reputation has been lowered in the community as a result of the statements allegedly made by Frost." After a hearing, the circuit court granted Frost's motion for summary judgment, denied Lietz's, and dismissed all of Lietz's claims.[3] Lietz appeals.

DISCUSSION

¶10 Lietz argues that the circuit court erred by granting Frost's motion for summary judgment and denying his.[4] We conclude that the circuit court

[2] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[3] While the record does not include a transcript of the summary judgment hearing, the circuit court did enter a written order memorializing two "Findings" as grounds for its decision. First, it found that Lietz "has not pled nor brought forth the elements to support his claim," and noted in particular, "the plaintiff had to show reputational harm but he is currently sitting in jail." Second, the order stated that the circuit court "finds that the only people who would have heard the alleged statements were the plaintiff's parents and/or law enforcement."

Lietz complains about the circuit court's reasoning, including its comment that he is sitting in jail. However, since our review on summary judgment is independent of the circuit court, we need not address Lietz's characterization of the circuit court's decision.

[4] Several other claims made below will not be addressed here. Lietz unsuccessfully moved for judgment on the pleadings, but he does not pursue that argument on appeal. Frost also sought sanctions below on the grounds that Lietz's case was frivolous. The circuit court disagreed, and Frost does not appeal that determination.

(continued)

properly dismissed claims one, three, and four. However, we agree with Lietz that claim two should not have been dismissed because Lietz was not required to prove special damages.

¶11 We review the circuit court's grant of summary judgment de novo. ***Freer v. M & I Marshall & Ilsley Corp.***, 2004 WI App 201, ¶7, 276 Wis. 2d 721, 688 N.W.2d 756. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show 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." WIS. STAT. § 802.08(2). "In order to survive summary judgment, the party with the burden of proof on an element in the case must establish that there is at least a genuine issue of fact on that element by submitting evidentiary material 'set[ting] forth specific facts' pertinent to that element." ***Freer***, 276 Wis. 2d 721, ¶7 (alteration in original; citation omitted).

¶12 We first address the claims properly dismissed by the circuit court. The first claim alleges that Frost "made slanderous remarks" in "the summer of 2014." However, the evidence Lietz relies upon in his briefing—the depositions and affidavits of his parents—does not contain any reference to alleged defamatory statements occurring in 2014. This evidence only supports allegations of defamation occurring in 2015, as reflected in claim two. And when he was

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Finally, Lietz moved the circuit court to initiate felony charges against Frost and order that Frost "be taken into custody at this time for booking and processing." The circuit court denied the motion because it had "no authority or jurisdiction to issue criminal charges against the defendant in the context of this civil litigation." Though Lietz claims on appeal that this decision was erroneous, he fails to develop any coherent legal argument, so we will not address it further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals need not address undeveloped arguments).

questioned in his deposition about this claim, Lietz admitted that he could not remember anything about the alleged 2014 incident. Lietz may not simply rely on the allegations in his complaint to prevent summary judgment. *See* ***Tews v. NHI, LLC***, 2010 WI 137, ¶82, 330 Wis. 2d 389, 793 N.W.2d 860 ("Once the moving party has made a case for summary judgment, a party opposing summary judgment may not rest on the mere allegations or denials of the pleadings."). Because Lietz fails to point to any evidence supporting his claim that defamation occurred in 2014 as well as 2015, the circuit court properly dismissed this first claim.[5]

¶13 With respect to the third claim—that Frost told police Lietz had been peeking in his window, masturbating, and trampling his bushes—Lietz does not develop a response to Frost's argument that any statements he made to law enforcement were privileged. The only response Lietz offers is a conclusory and undeveloped assertion in his brief-in-chief that all of the statements alleged in the complaint "were not privileged because Frost made the statements outside where anyone could have heard." Lietz did not mention the issue at all in his reply brief. Thus, we conclude that Lietz has conceded the point. *See* ***Schlieper v. DNR***, 188

[5] In various places in his deposition and briefing, Lietz ambiguously refers to certain audio recordings supposedly capturing some of Frost's alleged defamation, as well as a "Scandisk external hard drive" containing these recordings and other documents. However, other than these vague references, Lietz fails to specifically identify what part of the record or "external hard drive" he is referring to. In fact, Lietz's brief-in-chief does not contain a single specific record number citation. Because Lietz fails to identify what recordings he is referencing or even the part(s) of the record where these recordings may be found, we are left to guess what he is referencing. We do note that there is a USB flash drive in the record with numerous audio files and documents. However, we will not develop Lietz's argument for him by scouring this USB drive for support for Lietz's dismissed claims. Pro se or not, he must be his own advocate. *See* ***Pettit***, 171 Wis. 2d at 647.

Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994) (unrefuted arguments may be deemed conceded).

¶14 Turning to Lietz's fourth claim—"defamation of character" through "intimidation tactics that may or may not be considered blackmailing"—we conclude this claim was improperly pled. As Frost points out, a defamation claim must set forth the particular words complained of, and Lietz's complaint fails to do this. *See* WIS. STAT. § 802.03(6). Without a specified date, it is unclear whether the alleged defamatory remarks are the same ones made in June 2015, or whether this is referring to a separate incident. In short, even construing the fourth claim liberally, *see* ***Lewis v. Sullivan***, 188 Wis. 2d 157, 161, 524 N.W.2d 630 (1994) (explaining that pro se pleadings are generally construed liberally), it provides nothing to link it to any of the specific statements alleged elsewhere in the complaint or contained in the summary judgment materials. Furthermore, Lietz never responds to Frost's argument that the circuit court properly dismissed the fourth claim because it was improperly pled. *See* ***Schlieper***, 188 Wis. 2d at 322 (unrefuted arguments may be deemed conceded).

¶15 We now turn to claim two—the alleged defamation occurring in June 2015. Frost argues that the circuit court got it right because Lietz cannot show that the alleged defamatory statements harmed his reputation.[6] Lietz

[6] Frost also suggests that the second claim should be dismissed for failure to set forth the specific defamatory words. In keeping with the established practice of liberally construing the pleadings of pro se litigants, *see* ***Lewis v. Sullivan***, 188 Wis. 2d 157, 161, 524 N.W.2d 630 (1994), we disagree. Though the complaint is somewhat difficult to follow, it sets forth the words complained of in claim one and merely does not repeat them for claim two. Furthermore, the complaint references the affidavits of Jeffery and Mary Lietz, which clearly state the specific defamatory remarks made in 2015—the precise date referenced in claim two. The reasonable and fair inferences from Lietz's summary judgment briefing are that these 2015 remarks form at least part of the basis for claim two.

responds that he need not show reputational harm because statements imputing certain crimes to him—like alleging that he peeked in a window and masturbated—are "actionable without proof of damage." Lietz is correct.

¶16 A defamation claim requires: (1) a false statement; (2) communicated through speech, writing, or conduct to a person other than the person defamed; and (3) "the communication is unprivileged" and is defamatory—that is, the communication "tends to harm one's reputation so as to lower him or her in the estimation of the community or to deter third persons from associating or dealing with him or her." ***Torgerson v. Journal/Sentinel, Inc.***, 210 Wis. 2d 524, 534, 563 N.W.2d 472 (1997); *see also* ***Ranous v. Hughs***, 30 Wis. 2d 452, 460, 141 N.W.2d 251 (1966). Defamation may be either in written form, known as libel, or oral, known as slander. ***Freer***, 276 Wis. 2d 721, ¶9. Lietz's claim here is for slander. As with any tort claim, the plaintiff must generally show that he or she sustained some sort of damages as a result of the defamatory communication; this is referred to as "special damages." ***Martin v. Outboard Marine Corp.***, 15 Wis. 2d 452, 459, 113 N.W.2d 135 (1962); *see also* ***Freer***, 276 Wis. 2d 721, ¶¶9-10.

¶17 Frost does not dispute that Lietz has produced enough evidence on the basic elements of a slander claim to survive summary judgment. Lietz claimed in his deposition testimony that Frost's accusations were false, which at the very least creates a genuine issue of fact for trial. As to whether the statement was communicated to a third party under the second element, Mary and Jeffery testified and averred that they heard the alleged statements. In addition, Mary averred that Frost made the defamatory statements to a third party named Bob, a

surveyor. Thus, Mary's affidavit and her deposition testimony create a material issue of fact regarding whether the remarks were communicated to a third party.[7] Frost does not claim otherwise. Nor does Frost claim that the alleged statements in Lietz's second claim were privileged, and we see no indication that they were. Finally, we reject any notion that the alleged statements did not tend to harm Lietz's reputation so as to lower him in the estimation of the community or to deter third persons from associating or dealing with him under the third element. Regardless of whether a person's reputation is *actually* lowered by being accused of peeking in a window and masturbating—which is a question of damages—we think it obvious that such remarks *tend* to do so and therefore are defamatory.

¶18 Frost's real argument—and the primary basis of the circuit court's ruling dismissing Lietz's defamation claim—is that Lietz has failed to produce any evidence showing actual reputational harm or special damages.[8] Relatedly, Frost argues Lietz could not prove reputation harm because he already had a bad reputation. While parties claiming slander ordinarily must prove special damages, certain types of slander are "'actionable without proof of damages' because damages are 'presumed from the character of the defamatory language.'" ***Freer***, 276 Wis. 2d 721, ¶11 (quoting ***Martin***, 15 Wis. 2d at 459). Our courts sometimes

[7] Frost does not appear to argue that parents cannot be a third party under the second element of the claim. We read Frost's argument to be simply that Lietz's reputation was not lowered in the eyes of his parents. In any event, it is clear that admissible evidence was submitted showing that a surveyor named Bob heard the offending remarks.

[8] Frost also insists that Lietz "cannot show that any alleged statements were made with actual malice" and asks us to affirm the dismissal of all of Lietz's claims on that ground. Although malice is ordinarily implied by the fact of publication, *see* ***Denny v. Mertz***, 106 Wis. 2d 636, 657-58, 318 N.W.2d 141 (1982), Frost does not meaningfully interact with the relevant case law on malice, attempt to explain why Lietz was required to show malice, or meaningfully explain why Lietz's proffered evidence fails to show malice. We decline to address this undeveloped argument. ***Pettit***, 171 Wis. 2d at 646-47.

call this slander that is actionable per se. *See* ***Martin***, 15 Wis. 2d at 459-60.[9] Slander that is actionable per se is limited to the following four categories:

> (1) "'imputation of certain crimes' to the plaintiff;"
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> (2) "'imputation … of a loathsome disease' to the plaintiff;"
>
> (3) "'imputation … of unchastity to a woman' plaintiff;" or
>
> (4) "defamation 'affecting the plaintiff in his business, trade, profession, or office.'"

Freer, 276 Wis. 2d 721, ¶11 (quoting ***Martin***, 15 Wis. 2d at 459).

¶19 Here we are concerned with the first category—making slanderous remarks imputing criminal conduct to another person. Over a century ago, our supreme court confirmed that statements imputing a "crime involving moral turpitude" or a crime which could subject the plaintiff "to an infamous punishment" are actionable per se. ***Earley v. Winn***, 129 Wis. 291, 309, 109 N.W. 633 (1906) (citation omitted). As to what punishments are "infamous," the court

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[9] ***Martin*** explained:

> Libel per se and slander per se have been used to mean actionable per se and sometimes confused with it. The distinction between defamation, which is actionable by itself, or per se, and that which requires proof of special damages is not the same as the distinction between language which may be defamatory on its face or may convey a defamatory meaning only by reason of extrinsic circumstances.

Martin v. Outboard Marine Corp., 15 Wis. 2d 452, 460, 113 N.W.2d 135 (1962). Thus, we avoid the somewhat confusing term "slander per se" and instead refer to slander that is "actionable per se." *But see* ***Freer v. M & I Marshall & Ilsley Corp.***, 2004 WI App 201, ¶11, 276 Wis. 2d 721, 688 N.W.2d 756 (referring to slander that is actionable per se as "slander *per se*").

clarified that a mere "fine or imprisonment in the county jail" will suffice. ***Id.*** at 310.

¶20 Our supreme court reaffirmed this holding in ***Starobin v. Northridge Lakes Dev. Co.***, 94 Wis. 2d 1, 14-16, 287 N.W.2d 747 (1980). In ***Starobin***, the court considered whether a slander claim based on statements imputing the crime of disorderly conduct to the plaintiff must, like ordinary slander claims, allege special damages. ***Id.*** at 11-12, 16. The court concluded it does not, explaining:

> Under the ***Earley*** case, in Wisconsin all crimes involve moral turpitude or subject the accused to infamous punishment, because by definition a crime in this state is conduct prohibited by state law and punishable by fine or imprisonment or both.[10] Thus under the ***Earley*** decision anyone who publishes a slander which imputes any criminal offense (even one punishable by fine or imprisonment in county jail or both) is subject to liability without proof of special damages.

Starobin, 94 Wis. 2d at 15-16 (footnote and citations omitted). The court reasoned that "[e]ven if there might be criminal offenses imputed to persons which would not be capable of harming their reputations, we do not view disorderly conduct as such an offense, and we have no reason to depart from the ***Earley*** case which is a precedent of long standing." ***Starobin***, 94 Wis. 2d at 16. Therefore—because disorderly conduct could be punished by a fine, imprisonment, or both—the court concluded that falsely claiming that a person committed the offense of disorderly conduct is actionable without proving special damages. ***Id.***

[10] The court cited to WIS. STAT. § 939.12 (1975), which defined "Crime" as "conduct which is prohibited by state law and punishable by fine or imprisonment or both." ***Starobin v. Northridge Lakes Dev. Co***., 94 Wis. 2d 1, 12 n.4, 15, 287 N.W.2d 747 (1980). The current version of the statute is identical. *See* § 939.12.

¶21 ***Starobin*** is still the law. Under this rule, any statement accusing another person of criminal conduct may be actionable per se; no special damages need be alleged or proven. The basic thrust of Frost's alleged slander was that Lietz had been peeking in his windows and masturbating. Frost never disputes that the alleged remarks imputed criminal conduct to Lietz. Thus, we need not decide whether peeping in a window is punishable as disorderly conduct under WIS. STAT. § 947.01(1) (prohibiting "indecent" conduct that "tends to cause or provoke a disturbance"), lewd and lascivious behavior under WIS. STAT. § 944.20(1)(b) (prohibiting indecent exposure), or another statutory provision. The alleged defamatory remarks clearly implicate Lietz in criminal conduct and are deemed actionable per se. Therefore, we hold that Lietz's second slander claim based on the June 2015 remarks is actionable per se. He need not prove special damages, and the circuit court erred in dismissing it.

¶22 We finally decline Lietz's request that we order the circuit court to grant his motion for summary judgment. In addition to raising several affirmative defenses, Frost's answer denied all of the complaint's factual allegations "[t]o the extent responsive pleading is required." This is a denial that the allegedly slanderous statements were made and the extent of communication to others. Because material facts are disputed, Lietz is not entitled to summary judgment.

CONCLUSION

¶23 Because Lietz failed to properly support claims one, three, and four in his complaint, the circuit court properly granted Frost's motion for summary judgment on those claims. However, Lietz has provided enough on his second claim to survive summary judgment. Therefore, we reverse the circuit court's

decision to dismiss Lietz's second claim and remand for further proceedings consistent with this opinion.

By the Court.—Order affirmed in part; reversed in part and cause remanded.

Not recommended for publication in the official reports.