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Case Number 218,2024

IN THE SUPREME COURT OF THE STATE OF DELAWARE

SEAN MCMAHON,	)	
	)	
Plaintiff Below/Appellant,	)	
	)	
v.	)	C.A. No. 218, 2024
	)	
TIFFANY MCMAHON,	)	On appeal from the Superior Court
	)	in C.A. No. S22C-06022 MHC
Defendant Below/Appellee.	)	

ANSWERING BRIEF OF DEFENDANT-BELOW/ APPELLEE TIFFANY MCMAHON

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Dated: September 26, 2024

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NATURE AND STAGE OF THE PROCEEDINGS

On June 29, 2022, Plaintiff-Below/Appellant Sean McMahon filed an action against his sister-in-law, Defendant-Below/Appellee Tiffany McMahon, in the Superior Court of the State of Delaware alleging, among other things, a count for slander and a count for libel. On July 29, 2022, Tiffany, acting *pro se*, filed an Answer to the Complaint. On September 7, 2022, counsel for Sean filed an Entry of Appearance.

On November 28, 2022, the parties filed a Stipulation and Proposed Order Granting Plaintiff Leave to File Amended Complaint. The Court entered that Order on November 29, 2022. That same day, Sean filed his Amended Complaint.

On December 7, 2023, Tiffany, now represented by counsel, filed a Motion to Dismiss the Amended Complaint Pursuant to Superior Court Civil Rule 12(b)(6) (the "Motion"). The Court held a hearing on the Motion on January 20, 2023. At the end of the hearing, the Court granted leave to file supplemental briefs. Briefing was completed by May 10, 2023.

The Court again heard argument on April 16, 2024. On April 30, 2024, the Court issued an Opinion and Order dismissing the Complaint.

Sean filed the present appeal on May 29, 2024. Sean filed his Opening Brief on appeal on August 28, 2024. This is Tiffany's Answering Brief on appeal.

SUMMARY OF ARGUMENT

1. Denied. The claim of slander arising from the accusation that Sean filed a false police report fails because the Amended Complaint did not allege all of the essential elements of the crime, which is required in slander claims, which are disfavored by Delaware courts. The claim of slander also fails because the Amended Complaint did not identify with specificity the identities of those persons to whom the alleged slander was uttered. The claim of libel fails because the Amended Complaint does not identify the defamatory statement, but merely asks the Court to assume that there was one.

2. Denied. The trial court did not abuse its discretion in denying a motion to amend the Amended Complaint because Sean did not identify the proposed amendments or how such amendments would cure the deficiencies of the current Amended Complaint, and the claims amounted to nothing more than a petty family dispute. De Minimus Non Curat Lex.

STATEMENT OF FACTS ALLEGED IN THE AMENDED COMPLAINT

Sean McMahon is an individual residing in Lincoln, Delaware 19960. (A0067 ¶1).

Defendant Tiffany McMahon is an individual residing in Lewes, Delaware. (A0067 ¶2).[1] Tiffany was married to Darin McMahon ("Darin), Sean's brother, making Sean and Tiffany siblings-in-law. (A0068 ¶4). Darin has since passed away.

On September 15, 2019, Darin was involved in a tragic gun incident that required him to receive continuous medical care, including administering medications, assistance in daily activities and constant attendance by a caretaker. (A0068 ¶5). Subsequent to that, the relationship between Sean and Tiffany deteriorated. (A0068-69 ¶¶6-12).

Tiffany, who works at a local elementary school with Sean's wife, Kathy McMahon, began making comments about the situation at work and posted a message on Facebook directed at Kathy McMahon, allegedly criticizing her for how she has handled the situation with Darin and claiming Kathy has not done enough to help. (A0070 ¶13).

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[1] Because the parties each have the same last name, they are referred to in this brief by their first names. No familiarity or disrespect is intended.

On multiple occasions throughout 2021, Tiffany voiced concerns about her husband's health and indicated to multiple people, including Sean's sister Olivia Robb, and Missy Dawson, a fellow teacher, that it caused her severe and continuing stress. (A0070 ¶14).

Sean allegedly grew increasingly concerned about Tiffany and Darin's home situation. Further, there was an impending snowstorm, and Sean was concerned about what may happen if Tiffany, Darin, and their children were confined in their home due to the inclement weather. (A0070 ¶16).

Instead of reaching out to Tiffany or Sean directly, Sean, a former Trooper for the Pennsylvania State Police, contacted an acquaintance who is a Delaware State Trooper for advice on the situation. The Trooper advised Sean that he should call 911, which he did. Sean spoke with dispatch, described the situation, and requested that a trooper be sent to Tiffany and Darin's home to do a welfare check. (A0071 ¶17). The Amended Complaint does not reveal whether Sean told the unnamed Delaware State Trooper that he had not attempted to contact either Tiffany or Sean before bringing in the State Police.

Trooper Robert Horton later contacted Sean to advise that he visited Tiffany's home and told Sean that it appeared that Tiffany and Darin were having

marital difficulties, but that Darin told the trooper that everything was alright. (A0071 ¶18).

On January 28, 2022, Tiffany filed a Petition for Order of Protection from Abuse ("PFA") alleging that Sean committed acts of abuse against her or her minor children. Defendant further alleged that Sean threatened that Tiffany needed consequences and that he called the police and filed a false report, and that Sean could "make good on his threats," "have her children removed," "put her job at risk with false accusations," and could "freeze her bank accounts." (A0071 ¶19).

Further, Tiffany allegedly told multiple unidentified individuals at her work that Sean filed a false police report. (A0071 ¶20).

Due to the PFA filed by Tiffany, the Family Court ordered that it was unlawful for McMahon to purchase, receive or possess firearms. Accordingly, Sean, who has been a lifelong hunter and competitive shooter, had to relinquish his firearms. (A0072 ¶24). Further, due to a clerical error regarding the serial numbers, one of Sean's firearms was reported stolen. Because of this, Sean was required to stay at the police station for hours and endure questioning until Sean produced the receipt for the firearm and the police determined that the store owner who had reported the firearm stolen had given the police the wrong serial number for one of the missing guns. (A0072-73 ¶25).

Ultimately, Tiffany and Sean agreed to resolve their dispute and Tiffany withdrew the Petition with the understanding that the two would not contact one another. (A0074 ¶31, A0075 ¶38).

In the fall of 2021, Sean received a text message from Erin Bailey, a coworker of Tiffany. The text message showed an image of a black truck, which is similar in appearance to Sean's truck, and read "want to make sure they aren't here to talk to you/ambush." (A0073 ¶29).

On or around February 28, 2022, Tiffany sent a text message to her husband with an image of a truck outside of their house and with the question "reason for this? Or should we just deny it?" (A0073-74 ¶30).

During the course of this action, Sean was arrested on charges of harassment against Tiffany and her daughter. Those charges were subject to a nolle prosequi agreement where Sean agreed to have no contact with Tiffany or her daughter for a period of one year, and also to not contact anyone about Tiffany or her daughter with the intent to harass Tiffany or her daughter for a period of one year. (Ex. A hereto).[2]

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[2] The Nolle Prosequi was not part of the record below, although it was discussed. (A0229). However, a Nolle Prosequi is subject to judicial notice under D.R.E. 202(d)(1)(c). *See also Johnson v. State*, 2012 WL 5177792 at *1 n.4, *reported at* 55 A.3d 839 (Del. Oct. 18, 2012) ("The Court takes judicial notice of

ARGUMENT

I. THE TRIAL COURT PROPERLY DISMISSED THE DEFAMATION CLAIMS FOR FAILING TO PLEAD THE REQUIRED ELEMENTS.

A. QUESTIONS PRESENTED.

1. Did the Superior Court properly dismiss the slander claim because the Complaint (i) failed to include all essential elements of the alleged crime, and (ii) the Complaint failed to identify those who heard the spoken statement.

Initially, Tiffany is not required to preserve issues on appeal as Tiffany is not arguing that the trial court erred. Tiffany may argue any grounds for affirmance on appeal and this Court can uphold the trial court's decision if it is legally mandated, whether or not the trial court's rationale was wrong. *Bruch v. CNA Ins. Co*., 870 P.2d 749, 750 (N.M. 1994), *rev'd on other grounds sub nom.*, *Padilla v. State Farm Mut. Auto. Ins. Co.*, 68 P.3d 901 (N.M. 2003); *Sullivan v. Com., Dept. of Transp., Bureau of Driver Licensing*, 708 A.2d 481, 483 (Pa. 1998); *Praytor v. Ford Motor Co*., 97 S.W.3d 237, 242 (Tex. App. 2002).

In any event, Tiffany raised the issue of the insufficiency of the alleged statement to qualify as slander in her Motion to Dismiss. (A0106). The issue of

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Johnson's unrelated criminal matter"); *Fulton v. Bartik*, 547 F.Supp.3d 799, 821 n.6 (N.D. Ill. July 1, 2021) (Nolle Prosequi). Tiffany requests that the Court take judicial notice of it. D.R.E. 201(c)(2).

Sean's failure to identify anyone who heard the alleged statement was raised by the trial court *sua sponte* at a hearing (A0281, A0292), and was part of the reasoning for dismissing the Amended Complaint (A0237-38), and so is deemed preserved for appeal. *State v. DuValt*, 961 P.2d 641, 644 (Idaho 1998); *Kell v. State*, 285 P.3d 1133, 1136 (Utah 2012).

2. Did the Superior Court properly dismiss the libel claim on the ground that it failed to identify any libelous statement and relied exclusively on rank speculation?

B. SCOPE OF REVIEW.

This Court reviews *de novo* the grant of a motion to dismiss for failure to state a claim for defamation. *Cousins v. Goodier*, 283 A.3d 1140, 1147 (Del. 2022); *Page v. Oath Inc*., 270 A.3d 833, 842 (Del. 2022).

C. MERITS OF THE ARGUMENT.

1. The Amended Complaint Does Not State a Claim for Slander Because the Alleged Accusation of a Crime Does Not Include All Essential Elements of the Alleged Crime and Does Not Identify the Persons to Whom the Alleged Accusation Was Made.

Count III of the Amended Complaint is for slander, *i.e*., spoken defamation. *Spence v. Funk*, 396 A.2d 967, 970 (Del. 1978). The courts of this state disfavor slander claims. *Ward v. Blair,* 2013 WL 3816568 at *8 (Del. Super. July 16, 2023)

(citing *Danias v. Fakis*, 261 A.2d 529, 532 (Del. Super. 1969)); *Lorenzetti v. Hodges*, 2012 WL 1410103 at *5 (Del. Super. Jan. 27, 2012); *Brooks-McCollum v. Shareef*, 2006 WL 3587246 at *3 (Del. Super. Nov. 1, 2006); *Read v. Carpenter*, 1995 WL 945544 at *5 (Del. Super. June 8, 1995), *aff'd mem.*, 670 A.2d 1340 (Del. 1995).

Consequently, Delaware courts impose stricter pleading requirements for slander. *Lorenzetti*, WL Op. at *5; *Read*, WL Op. at *2. *See also Spence*, 396 A.2d at 970 ("the pleading requirements for libel are less strict [than for slander]"). This standard is not unique to Delaware. *E.g.,* 5 Charles Wright & Arthur Miller *et al., Federal Practice and Procedure* § 1245 (3d ed.) ("Although special pleading requirements have not been set out in the federal rules for libel and slander actions, the standard for successfully pleading defamation tends to be more stringent than that applicable to most other substantive claims because of the historically unfavored nature of this type of action, the First Amendment implications of many of these cases, and the desire to discourage what some believe to be all too frequently vexatious litigation. Thus, many of the somewhat inhibiting traditional attitudes toward pleading in the context of defamation have survived the adoption of the federal rules"); *Bushnell Corp. v. ITT Corp*., 973 F. Supp. 1276, 1287 (D. Kan. 1997) ("In the context of a defamation claim, Fed. R. Civ. P. 8(a) requires

that the complaint provide sufficient notice of the communications complained of to allow [the defendant] to defend itself. There is a significant exception to the general rule of liberally construing a complaint in applying rule 12(b)(6): when the complaint attempts to state a 'traditionally disfavored' cause of action, such as defamation, courts have construed the complaint by a stricter standard") (internal quotations omitted); *Janklow v. Viking Press*, 378 N.W.2d 875, 877 & n.2 (S.D. 1985) (citing Wright & Miller); *Willis v. United Family Life Ins*., 487 S.E.2d 376, 379 (Ga. App. 1997); *Andrews v. Stalllings*, 892 P.2d 611, 624 (N.M. App. 1995) (citing Wright & Miller).[3]

The trial court dismissed the slander claim because (i) the alleged statement did not qualify as an accusation of criminal conduct, and (ii) the Amended Complaint failed to identify the parties to whom the statement was allegedly published. As shown below, the absence of these allegations means that Tiffany was not put on faire notice of the claims against her.

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[3] Sean relies heavily on *Wright v. Pepsi Cola Co.*, 243 F.Supp.2d 117 (D. Del. 2003), to get around the pleading stricter pleading standards for slander. (Appellant's Opening Brief at 14-15 & n.2). That case, however, is against the weight of Delaware authorities (which Sean does not address at all). Further, federal cases subsequent to Wright have recognized that stricter standards apply to slander cases. *E.g., Lamplugh v. PBF Energy*, 2020 WL 434204 (D. Del. Jan. 28, 2020) (quoting *Optical Air Data Sys., LLC v. L-3 Commc'ns Corp*., 2019 WL 328429 (Del. Super. Jan. 23, 2019)).

a. The Accusation of Filing A False Police Report Did Not Constitute Slander Per Se Because It Did Not Allege the Essential Elements of the Crime.

Sean argues that Tiffany accused Sean of filing a false police report, which he claims constituted slander *per se*, and so could be brought without alleging special damages. However , for an accusation of a crime to qualify as slander *per se*, the statement must include all of the essential elements of the crime. *Marcil v. Kells*, 936 A.2d 208, 214 (R.I. 2007); *Savannah News-Press, Inc. v. Harley*, 111 S.E.2d 259, 263 (Ga. App. 1959); *Rednick v. Messemer*, 181 S.W.2d 1014, 1015 (Tex. Civ. App. 1944); *Cohen v. Eisenberg*, 19 N.Y.S.2d 678, 682 (N.Y. Supr.), *aff'd mem.*, 24 N.Y.S.2d 1004 (N.Y.A.D. 1st Dept. 1940).

The crime of filing a false police report requires that it be done (i) knowingly, and (ii) with intent to prevent, hinder or delay the investigation of any crime or offense. 11 Del. C. §1245A. Knowledge and intent are essential elements of crimes involving false statements. *E.g., U.S. v. Oppon*, 863 F.2d 141, 147 (1st Cir. 1998) (false representation of being a U.S. citizen); *U.S. v. Whaley*, 786 F.2d 1229, 1231 (4th Cir. 1981) (false statement made to a bank); *U.S. v. Martin*, 772 F.2d 1442, 1444-45 (8th Cir. 1985) (false statement to the U.S. Government).

Thus, absent allegations of knowledge and intent, the Amended Complaint fails to state a claim for slander by accusation of a crime. *Bundren v. Parriott*, 245

Fed. Appx. 822, 828 (10th Cir. 2007) (accusation of perjury); *Schmidt v. Witherick*, 12 N.W. 448, 448-49 (Minn. 1882) (in an action for slander, an accusation that someone swore falsely was not slander because "these words 'swear falsely' alone, do not necessarily include the idea of wilful intention. They may mean perfidiously or merely not truly. Swearing to that which is false, says Kent, C. J., does not necessarily imply that the party has, in judgment of law, perjured himself. It may mean that he has sworn to a falsehood without being conscious, at the time, that it was false"); *Schmidt v. Jones*, 7 Ky.L.Rptr. 224 (Ky App. 1885) (in an action for slander, accusation of crime of marking unbranded cattle did not constitute slander per se, absent an allegation of intent).

b. The Amended Complaint Failed to Satisfy the Requirement of Publication of a Slander Because It Does Not Identify with Specificity The Identities of Those Who Allegedly Heard It.

To state a claim of defamation (whether slander or libel), a plaintiff must allege that the defamatory statement was published to a third party. *Schuster v. Derocili*, 775 A.2d 1029, 1040 (Del. 2001); *Lorenzetti*, WL Op. at *5. The identity of third persons to whom the allegedly slanderous statements are made must be pleaded with specificity. *Raymond v. Marchand*, 4 N.Y.S.3d 107, 108 (N.Y.A.D. 2015); *Law Offices of Frank N. Peluso, P.C. v. Cotrone*, 2009 WL 3416247 at *3

(Conn. Super. Sept. 23, 2009) (allegation that statement was made to "diverse persons" insufficient to plead a case of slander); *Desrochers v. Tiax*, LLC, 2003 WL 21246150 at *5 (Mass. Super. 2003) (slander claim dismissed because, among other reasons, Complaint did not name a single third-party to whom the statement was uttered).

The Amended Complaint alleges that Sean "told multiple individuals at her work that Plaintiff McMahon filed a false police report...." (A0005 at ¶20). This is the equivalent of "diverse persons" in the *Law Offices of Frank N. Peluso, P.C.* case.[4] As such, the Amended Complaint is insufficient.

2. The Libel Claim Fails for Lack of Identification of a Defamatory Statement.

The Superior Court held that "[a]llegations are considered well-plead if they give the opposing party notice of the claim. Defendant is not on notice of this claim because Plaintiff is unable to state what the allegedly defamatory statements were." (A0240). That is it in a nutshell.

A complaint asserting a defamation claim must identify the defamatory statement. *Harrison v. Hodgson Vocational Technical High School*, 2007 WL 3112479 at *2 (Del. Super. Oct. 3, 2007) (slander claim); *Pazuniak Law Office*

[4] At oral argument, Sean's counsel conceded that the identities of the alleged audience for the slander was unknown. (A0292).

LLC v. Pi-Net International, Inc., 2017 WL 4019162 at *9 (Del. Super. Aug. 25, 2017); *Conley v. Conley*, 2015 WL 7747431 at *1 (Del. Super. Nov. 19, 2015); *Smith v. Delaware State Police*, 2014 WL 3360173 at *7 (Del. Super. July 8, 2014)*; Layfield v. Beebe Medical Center, Inc*., 1997 WL 716900 at *7 (Del. Super. July 18, 1997). Suggesting that there is circumstantial evidence of a defamatory statement is insufficient. *Id.*

Sean does not satisfy any of the elements of a defamation claim. The Amended Complaint does not identify a defamatory statement, either directly or by implication. It does not indicate whether the alleged statement qualified as libel or slander. If slander, it does not either alleged special damages or show how it qualifies as slander *pe se. Spence*, 396 A.2d at 970 (slander is not actionable without special damages unless it falls under one of the four categories of slander *per se*). It does not explain how the alleged defamatory statement referred to him. It does not identify anyone who allegedly heard or read the alleged defamatory statement. It does not allege that anybody who heard or read the statement understood it to have a defamatory meaning. And it does not state that any such statement is false.

This Count is simply a case of sue first, find a cause of action later. As the Superior Court stated: “At oral argument Plaintiff argued that perhaps discovery

would lead to sufficient evidence to support their claims. This is an improper use of the judicial process." (Appx. A0240).

For all these reasons, the libel claim was properly dismissed.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING SEAN'S REQUEST TO AMEND THE COMPLAINT.

A. QUESTION PRESENTED.

Did the trial court abuse its discretion an oral motion to amend the Amended Complaint in the absence of any suggestion of how an amendment would cure the deficiencies of the Amended Complaint and the surrounding circumstances indicated that the claims were thin and not an appropriate use of court and party resources..

B. SCOPE OF REVIEW.

"Generally, a trial court's order permitting or refusing an amendment to a complaint is reviewable only for abuse of discretion." *Mullen v. Alarmguard of Delmarva, Inc.*, 625 A.2d 258, 262 (Del. 1993).

C. MERITS OF THE ARGUMENT.

Other than motions made at trial, motions must be made in writing. Super. Ct. Civ. P. 7(b)(1). Further, a motion to amend must be accompanied with the proposed amendment so that the Court can determine whether amendment is appropriate. *See* Super Ct. Civ. R. 15(aa); *Sherbert v. Remmel*, 908 A.2d 622, 624 (Me. 2006).

There was no writing, and no showing of how an amendment would cure the deficiencies of the current Amended Complaint.[5] It is not an abuse of discretion to deny an oral motion to amend where no basis to determine whether the amendment will be sufficient to state a cause of action. *Urfur v. County Mut. Ins,. Co*., 376 N.E.2d 1073, 1077 (Ill. App. 1977); *Yokois v. Ryan*, 2020 WL 2736514 at *2 (Az. App. May 26, 2020).

Beyond that, this action was pending below for two years and still not beyond the motion to dismiss stage. Tiffany filed her motion to dismiss in which she set forth her reasons why the Amended Complaint was deficient. The trial court dismissed the complaint after full briefing and two hearings. Despite the opportunity to amend his Amended Complaint when put on notice by the Motion to Dismiss, Sean chose not to do so. Instead, he chose to stand in his Amended Complaint.

At oral argument, counsel for Sean could not identify an actionable defamatory statement, could not identify the exact language supposedly used or the persons who allegedly heard the slanderous statement. Notwithstanding this lack of

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[5] Sean may argue that he was not given time to explain what would change with an amendment. However, counsel for Sean did not ask to make a record on the issue for appeal, and did not file a motion for reargument raising that issue.

necessary information, Sean argued that he should be given an opportunity to take discovery to answer those questions. But Sean should have had the answers to those questions before the Complaint was ever filed.

In *Read v. Carpenter*, then-Judge Quillen stated:

> Viewed in the light most favorable to the plaintiff, this incident, notwithstanding the criminal charges, at best is a neighborhood misunderstanding, wherein the plaintiff is trying to make a slanderous mountain out of a de minimus mole hill. Courts are available for many purposes, and providing an outlet clothed with some sense of civility for minor emotional controversies is one service courts perform. But as with other causes of action, including possibly the criminal charges herein, after reflection, surely there must be "a cultural sense of [a] community standard on de minimus [claims of slander per se]." After all, we all suffer some inconvenience as the price of living. But, de minimus non curat lex.

WL Op. at *4 n.3 (citation omitted).

The trial court quoted *Read* and added: "To put the Court's eloquent wordplay more bluntly, the law does not govern trifles. One may not drain scarce judicial resources in the furtherance of petty domestic disagreements absent a cognizable claim."

Thus, there was ample justification in law and policy for denying a motion to amend the Amended Complaint, and so the trial court did not abuse its discretion.

CONCLUSION

WHEREFORE, for the for foregoing reasons, Defendant-Below/Appellee Tiffany McMahon respectfully requests that this Court affirm the decision of the trial court in all respects.

Respectfully submitted,

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Words: 3,536/10,000

Dated: September 26, 2024

IN THE SUPREME COURT OF THE STATE OF DELAWARE

SEAN MCMAHON,	)	
	)	
Plaintiff Below/Appellant,	)	
	)	
v.	)	C.A. No. 218, 2024
	)	
TIFFANY MCMAHON,	)	On appeal from the Superior Court
	)	in C.A. No. S22C-06022 MHC
Defendant Below/Appellee.	)	

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. This brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Time New Roman 14-point typeface using Microsoft Word 365.

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