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IN THE SUPREME COURT OF THE STATE OF DELAWARE

SEAN MCMAHON, Plaintiff Below, Appellant, v. TIFFANY MCMAHON, Defendant Below, Appellee.	No. 218, 2024 On Appeal from a Decision of the Superior Court of the State of Delaware C.A. No. S22C-06-022 MHC

APPELLANT'S REPLY BRIEF

OFFIT KURMAN

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I. STATEMENT OF FACTS

Appellee Tiffany McMahon ("Defendant") submits in her Answering Brief ("Ans. Br.") that during the course of this litigation, Appellant Sean McMahon ("Plaintiff") was arrested on charges of harassment which were ultimately subject to a nolle prosequi. Ans. Br. at 6. Defendant appended the relevant charge and police report to her brief as Exhibits A and B, respectively, and contends that this Court should take judicial notice under DRE 202(d)(1)(c), despite the fact that the charges were not part of the record below.

As a general rule, "this Court will not judicially notice proceedings in other causes, even though such proceedings are in the same court" because the evidence becomes conclusive against the opposing party, who cannot effectively rebut the evidence. *Frank v. Wilson & Co.,* 32 A.2d 277, 280 (Del. 1943). The Court does recognize an exception when the complainant's right of action is based specifically in the referenced proceeding, of which she requests the court take judicial notice. *Id.* Even *assuming arguendo* that the Court may take judicial notice of these separate proceedings, Defendant may not raise new facts for the first time on appeal which she failed to adequately raise in the court below. *Bossert v. Div. of Unemployment Ins.,* No. N22A-03-005 JRJ, 2022 WL 17249305, at *3 (Del. Super. Ct. Nov. 22, 2022); *See also* Delaware Supreme Court Rule 8.

Defendant argues that she "discussed" the nolle prosequi in the court below. Ans. Br. at 6. However, a brief mention of the unrelated charges at a hearing, with no corresponding argument, certainly does not amount to fairly presenting an issue that is preserved for appeal. *See Clark v. Clark,* 47 A.3d 513, 518 (Del. 2012) (holding that mother's exchange at the end of her direct examination did not sufficiently present the legal question she attempts to raise on appeal, because neither the judge nor the opposing party "had the opportunity to squarely address this question in the context of a distinct issue").

Finally, Defendant's request that this Court take judicial notice of the charges against Plaintiff are nothing more than an attempt to confuse the issues at hand. *See* DRE 403 ("the court may exclude relevant evidence if its probative value is substantially outweighed by a danger of….confusing the issues); *Kiser v. State,* 769 A.2d 736, 741 (Del. 2001). Both at oral argument in the court below, and her in Answering Brief, Defendant merely references the charges against Plaintiff without any connection back to her argument or providing context as to the relevancy of the nolle prosequi.

For the foregoing reasons, Plaintiff respectfully requests that this Court decline to take judicial notice of the charges and nolle prosequi, appended in Defendant's Answering Brief as Exhibits A and B.

II. ARGUMENT

A. QUESTION PRESENTED

Did the Superior Court err in granting Defendant's Motion to Dismiss Counts III and IV of Plaintiff's Complaint on the grounds that Plaintiff failed to plead his claims with specificity and/or failed to provide evidence for his allegations?

B. MERITS OF ARGUMENT

1. The Superior Court's decision to dismiss Count III of Plaintiff's Amended Complaint for failure to plead with specificity was reversible error.

Defendant argues in her Answering Brief that while the courts typically liberally construe a complaint in application of Rule 12(b)(6), an exception exists when the complaint alleges a "traditionally disfavored" cause of action. Ans. Br. at 10.

The flaw in Defendant's argument is a conflation of the general pleading standard for a claim to survive a motion to dismiss pursuant to Del. Super. Ct. R. Civ. P. 12(b)(6) with the specific elements that must be satisfied for a plaintiff to allege a valid libel claim. While the Defendant correctly notes that the pleading requirements for a valid slander claim are stricter than those for a valid libel claim, because the former holds a more narrow scope of liability,[1] this standard relates to the *elements* that must be pled for a defamation claim to survive, rather than the level of specificity with which those elements must be pled. It is well-established under Delaware law that a plaintiff bringing an action for slander must plead the general elements requisite for a defamation claim *as well as* special damages. *Lamplugh*, 2020 WL 434204 at *5 (n.1, *supra*). However, the pleading of special damages is not required of a plaintiff making a claim of slander *per se*. *Id.*

[1] *See Lamplugh v. PBF Energy,* No. CV 19-218 (MN), 2020 WL 434204, at *5 (D. Del. Jan. 28, 2020).

On the other hand, the applicable pleading standard in evaluating a motion to dismiss under Del. Sup. Ct. Civ. R. 12(b)(6) is "reasonable conceivability", such that "even vague allegations are considered well pleaded if they give the opposing party notice of a claim." *Owens v. Lead Stories, LLC,* No. CV S20C-10-016 CAK, 2021 WL 3076686, at *11 (Del. Super. Ct. July 20, 2021), *aff'd,* 273 A.3d 275 (Del. 2022); *see Cent. Mortg. Co. v. Morgan Stanley Mortg. Cap. Holdings LLC,* 27 A.3d 531, 536 (Del. 2011) ("it may, as a factual matter, ultimately prove impossible for the plaintiff to prove his claims at a later stage of a proceeding, but that is not the test to survive a motion to dismiss"). Plaintiff is unaware of – and Defendant fails to cite – any case law which is persuasive or binding in this Court in support of her contention that the applicable pleading standard for a 12(b)(6) motion is heightened for claims of defamation. In fact, the Delaware Supreme Cour has held that even an "impl[ied] assertion of objective fact" may serve as the basis for a defamation action. *Ramunno v. Cawley,* 705 A.2d 1029, 1036 (Del. 1998) (internal citations omitted).[2]

[2] In fact, the very case law cited by the Defendant to support her contention that defamation claims carry a heightened pleading standard under Rule 12(b)(6) actually supports the Plaintiff's contentions here. In *Lorenzetti v. Hodges*, 2012 WL 1410103, *5 (Del. Super. Jan. 27, 2012), the Superior Court found that under the basic and general allegations made by the plaintiff, "a slander claim could be made;" it did not dismiss the plaintiff's slander claim for deficiency of substance but rather because the plaintiff alleged it against a John Doe defendant, which is improper under Delaware law. Likewise, in *Brooks-McCollum v. Shareef*, 2006 WL 3587246, *3 (Del. Super. Nov. 1, 2006), the plaintiff's slander claims were dismissed not on a finding that the substance of the allegations failed to meet a heightened pleading standard, but rather on the grounds that they were slander "by proxy" for publishing slanderous statements on their website

Instead, for the Plaintiff's Complaint to survive under Delaware's "notice pleading" standard, it must only place the Defendant on fair notice of the claims against her when the Plaintiff's claims are construed liberally. *VLIW Tech., LLC v. Hewlett-Packard Co.,* 840 A.2d 606, 611 (Del. 2003). At this nascent stage in the proceedings, prior to the parties having had any opportunity to conduct discovery, the Plaintiff is not required to "plead specific facts to state an actionable claim", nor is he required to plead evidence. *Id.* Rather, the Plaintiff need only to have sufficiently alleged that Defendant made "a harmful and untrue statement" about him, and his Complaint in this instance has clearly done that. *Wright v. Pepsi Cola Co.,* 243 F. Supp. 2d 117, 125 (D. Del. 2003)[3]; *see also Esposito v. Townsend,* No. CIV.A. 12C-08-006RBY, 2013 WL 493321, at *11 (Del. Super. Ct. Feb. 8, 2013) (denying a motion to dismiss prior to the exchange of discovery and stating that the "parties need…to determine, through discovery, the details of the cause of action"); *Klein v. Sunbeam Corp.,* 94 A.2d 385, 391 (Del. 1952), *opinion adhered*

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in spite of the fact that there was no dispute that the moving defendants did not author these statements themselves. In neither of these situations was the Court actually addressing the adequacy with which the plaintiffs' pleading(s) demonstrated that the statements themselves were slanderous.

[3] Defendant suggests in her Answering Brief that the *Wright* decision is "against the weight of Delaware authorities" in that it does not address the stricter pleading standards for slander. Ans. Br. at 10, fn 3. The oral defamation alleged in *Wright* did not fit in one of the slander *per se* categories; however, the plaintiff had alleged special damages. In contrast, Plaintiff here has alleged slander *per se*, which eliminates the need to plead special damages. The *Wright* decision is in line with Delaware precedent cited throughout the briefing, in that the courts have consistently held that oral defamation requires allegations of *either* special damages or slander *per se*. The decisions cited by Defendant in her brief do not support her contention that Delaware's notice pleading requirement is heightened in slander actions.

to on reargument, 95 A.2d 460 (Del. 1953) (citing *Pfeifer v. Johnson Motor Lines, Inc.,* 47 Del. 191, 89 A.2d 154 (Del. Super. Ct. 1952)) (once a "plaintiff put[s] a defendant on fair notice in a general way of the cause of action asserted, [the burden] shifts to the defendant…to determine the details of the cause of action by way of discovery for the purposes of raising legal defenses.").

a. Plaintiff's Complaint properly pled slander *per se*.

Defendant argues that Plaintiff failed to properly plead slander *per se* because "essential elements" of the crime are not alleged. Ans. Br. at 11. Defendant does not support this contention with any case law that is upon this Court; beyond that, the case law Defendant utilizes – consisting of decisions from Rhode Island, Georgia, Texas, and New York – cannot even be considered persuasive in light of the fact that Courts in this state have, on multiple occasions, permitted slander *per se* claims to continue past the motion to dismiss stage in spite of the fact that the plaintiff did not plead all essential elements of the crime. For instance, in *Gilliland v. St. Joseph's at Providence Creek*, No. 04C-09-042, 2006 WL 258259, at *20 (Del. Super. Ct. Jan. 27, 2006), the Superior Court declined to dismiss the plaintiff's slander *per se* claim where the Plaintiff's only allegation was that the defendant stated to a third party that plaintiff "misappropriated $5,000 of funds…while Defendant…knew or had reason to know that $5,000 was in possession of Defendant" but otherwise failed to allege that the plaintiff

"intentionally" or "knowingly" possessed these funds and thus had the requisite mental state for the crime of misappropriation. Likewise, in *Read v. Harding,* C.A. No. 1994-0, 1994 WL 1547775, at *2 (Del. Com. Pl. Aug. 1, 1994), the Court of Common Pleas held that alleged statements by the defendant that the plaintiff was a trespasser and a peeping tom both imputed a crime on plaintiff and would constitute slander *per se*; the Court did not require that the statement allege the essential elements of the crime of trespass, including that the entry was made "knowingly" or "without permission."

b. The Amended Complaint sufficiently pleads publication of the slanderous statement.

There is no support under Delaware law for Defendant's contention that Plaintiff must plead the "identity of third persons to whom the slanderous statements are made" with specificity. *See* Ans. Br. at 12. In fact, the Delaware Supreme Court has held that "it is not necessary that the individual defamed….need be positively identified in the defamatory language itself" as extraneous evidence may show that the plaintiff was the intended subject of the defamatory language, and the audience understood the plaintiff as the subject. *Klein v. Sunbeam Corp.,* 94 A.2d 385, 391 (Del. 1952).

Plaintiff states in his Amended Complaint that Defendant told multiple colleagues at Rehoboth Elementary School that Plaintiff filed a false police report. D.I. 13, ¶ 58 [A0079]. Identification of the substance of the defamatory statement,

along with Plaintiff's contention that the statement was published within a specific group of individuals, is sufficient to overcome a Rule 12(b)(6) motion to dismiss because alleges at least a base set of facts upon which a jury could conceivably find for the Plaintiff. *See Ciabattoni v. Teamsters Loc. 326,* No. N15C-04-059 VLM, 2020 WL 4331344, at *3 (Del. Super. Ct. July 27, 2020).

2. The Superior Court's decision to dismiss Count IV of Plaintiff's Amended Complaint for failure to provide proof and/or evidence of Defendant's alleged defamatory statements was reversible legal error.

Defendant argues in her Answering Brief that Count IV of Plaintiff's Amended Complaint fails to identify a defamatory statement. Ans. Br. at 13-14. In support of her proposition that circumstantial evidence is insufficient to make a *prima facie* case of defamation, Defendant cites to case law which is clearly distinguishable from the present matter.

To begin with, in contrast to at least two of the cases upon which Defendant relies, the Plaintiff in the present action was not afforded the opportunity to conduct discovery in order to obtain evidentiary support for his claims. *Contra Smith v. Delaware State Police,* No. CV 12C-01-016 (RBY), 2014 WL 3360173, at *7 (Del. Super. Ct. July 8, 2014) (granting summary judgment because *despite* the exchange of discovery, plaintiff failed to produce evidence of the alleged defamatory letter) (emphasis added); *Layfield v. Beebe Med. Ctr., Inc.,* No. CIV.A. 95C-12-007, 1997 WL 716900, at *7 (Del. Super. Ct. July 18, 1997), *on*

reargument, No. 95-C-12007, 1997 WL 817994 (Del. Super. Ct. Nov. 24, 1997) (dismissing on summary judgment because despite conducting discovery, plaintiff was unable to identify the substance of the defamatory communication, who it was made to, nor who it came from).

Additionally, Defendant's assertion here that circumstantial evidence is insufficient to allege defamation is simply false. Even at the summary judgment phase, which holds the moving party to a higher standard than a 12(b)(6) motion to dismiss, this Court permits a party to present direct *or circumstantial* evidence to support the elements of its claims. *Ciabattoni v. Teamsters Loc. 326,* No. N15C-04-059 VLM, 2020 WL 4331344, at *3 (Del. Super. Ct. July 27, 2020) (emphasis added).

Moreover, and again in stark contrast to at least two additional cases upon which the Defendant relies, the Plaintiff here has identified the substance of the defamatory communications, in that he alleged that Defendant falsely communicated the Plaintiff was stalking her. D.I. 13, ¶¶ 62-65 [A0079-A0080]. *Contra Harrison v. Hodgson Vocational Technical High School*, 2007 WL 3112479 at *2 (Del. Super. Ct. Oct. 3, 2007) (plaintiff fails to identify what plaintiff said or with whom he spoke, and thus "fail[ed] to plead the defamatory character of the communication and the third party's understanding of the communication's defamatory character")*; Pazuniak L. Off. LLC v. Pi-Net Int'l,*

Inc., No. CV N14C-12-259 EMD, 2017 WL 4019162, at *9 (Del. Super. Ct. Aug. 25, 2017) (plaintiff does not identify any statements which were allegedly defamatory). Erin Bailey is identified as the individual to whom the defamatory statement was published. D.I. 13, ¶¶ 62-63 [A0079-A0080]. *Cf. Conley v. Conley*, No. CV S15C-01-004 ESB, 2015 WL 7747431, at *1 (Del. Super. Ct. Nov. 19, 2015) (holding that plaintiff must at a minimum "identify the substance of the defamatory statements and whether they were actually published"; granting motion to dismiss because the complaint fails to comply with Superior Court Civil Rule 8); *Layfield v. Beebe Med. Ctr., Inc.,* 1997 WL 716900, at *7 (Del. Super. Ct. July 18, 1997) (no identification of the party publishing defamatory statement nor the audience).

Finally, despite Defendant's assertions, Plaintiff has pled the requisite elements of a libel claim.[4] The Amended Complaint alleges that Defendant's defamatory statement, published to Erin Bailey, referred to Plaintiff and falsely implicated that he was stalking Defendant. D.I. 13, ¶¶ 62-65 [A0079-A0080]. *See Kanaga v. Gannett Co.,* 687 A.2d 173, 179 (Del. 1996) (holding that even a statement of opinion may be actionable if it "implies the allegation of undisclosed defamatory facts as the basis for the opinion"). Count IV also explicitly states that

[4] Defendant claims that Plaintiff "does not indicate whether the alleged statement qualified as libel or slander", however Count IV of Plaintiff's Amended Complaint both titled "libel" and alleges written communications in the form of text messages as the basis for Defendant's defamatory conduct. *See generally,* Count IV of Amended Complaint [A0079-A0080].

the defamatory communication was false and that Defendant was aware of its false nature. D.I. 13, ¶¶ 63-66 [A0080].

The Superior Court's analysis focused on whether the Plaintiff sufficiently pled the five elements of a libel claim – that is, (1) the defamatory nature of the communication; (2) publication; (3) reference to the plaintiff; (4) the third party's understanding of the defamatory nature of the communication; and (5) injury. D.I. 31 at *12-13 [A0238-A0239]. The Court ultimately dismissed Count IV of Plaintiff's Amended Complaint upon a finding that the Plaintiff failed to provide actual evidence and/or proof of Defendant's alleged defamatory statements. *Id.* at *14 [A0240].

For the reasons stated above, the failure of the Superior Court to apply the Rule 12(b)(6) standard in accordance with Delaware law, and require evidence and/or proof prior to discovery, was legal error warranting reversal of its dismissal of Count IV of the Amended Complaint.

III. ARGUMENT

A. QUESTION PRESENTED

Did the Court err in denying Plaintiff's request for leave to file a second amended complaint under Superior Court Rule 15(a)?

B. MERITS OF ARGUMENT

1. The decision of the Superior Court to deny Plaintiff's request for leave to file a second amended complaint pursuant to Superior Court Civil Rule 15(a) was an abuse of discretion and reversible error.

As an initial matter, Defendant's reliance on Superior Court Rule 15(aa) in support of its contention that a proposed amendment must accompany a motion to amend is misplaced. Ans. Br. at 16. Rule 15(aa) refers to the form an amendment must taken when a party is *serving* an amended pleading. *See* Super. Ct. R. 15(aa).[5] In her Answering Brief, Defendant does not address Plaintiff's argument that this Court is required to liberally grant amendments and to exercise its discretion in favor of granting leave to amend, but for prejudice to the non-moving party. *See* Op. Br. at 22; *Mullen v. Alarmguard of Delmarva, Inc.,* 625 A.2d 258, 263 (Del. 1993) (citing *Ikeda v. Molock,* 603 A.2d 785 (Del. 1991)).

The only additional assertion Defendant presents is that this action had been pending for two years and still at the motion to dismiss stage. Ans. Br. at 17. As detailed in Plaintiff's Opening Brief, mere delay is an insufficient basis for the Court to deny a party leave to amend a pleading. *Chrysler Corp. v. New Castle Cnty.,* 464 A.2d 75, 84 (Del. Super. Ct. 1983); Op. Br. at 22. Moreover, Defendant

[5] Case law cited by Defendant, which is again neither binding nor persuasive in this Court, fails to support her proposition. *See Sherbert v. Remmel,* 908 A.2d 622, 624 (Me. 2006) (finding the lower court erred in dismissing the complaint before ruling on a pending motion to amend the complaint).

ignores the fact that all of the requests for extensions and reschedulings in this matter were made *jointly* by both parties in a good faith effort to resolve the dispute. *See* D.I. 8, 17-20 [A0121-A0126]; D.I. 25-26 [A0219-A0221]. There is clearly no indication of bad faith on the part of the party seeking leave to amend (i.e., Plaintiff).

Defendant suggests that the allegations in the Amended Complaint fail to put her on notice of the claims against her. Ans. Br. at 10. The standard in evaluating a 12(b)(6) motion to dismiss is broad and tests "whether a plaintiff may recover under any reasonably conceivable set of circumstances". *Crowhorn v. Nationwide Mut. Ins. Co.,* No. CIV. A00C-06-010 WLW, 2001 WL 695542, at *2 (Del. Super. Ct. Apr. 26, 2001) (internal citations omitted). To the extent that Defendant alleged the Amended Complaint was too vague and ambiguous to require Defendant to respond to the allegations, the Court should have permitted Plaintiff to correct the defects with a more definite statement. *See Id.* However, absent a showing of prejudice to the non-moving party, "the trial court is *required* to exercise its discretion in favor of granting leave to amend." *Parker v. State,* No. CIV.A.99C-07-323-JRJ, 2003 WL 24011961, at *6 (Del. Super. Ct. Oct. 14, 2003).

As neither Defendant nor the court below indicate amendment would have caused prejudice to Defendant, the Superior Court's denial of Plaintiff's request for leave to amend represents and abuse of discretion that should be reversed.

IV. CONCLUSION

For at least the foregoing reasons, Appellant respectfully requests that this Court reverse the decision of the Superior Court of Delaware and remand this matter for further proceedings consistent with its opinion.

Respectfully submitted,

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