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IN THE COURT OF COMMON PLEAS
[redacted] COUNTY, OHIO
CIVIL DIVISION

[redacted]	:	**CASE NO.: [redacted]**
Plaintiff,	:	Judge [redacted]
vs.	:	
[redacted] **([redacted]), et al.**	:	
Defendants.		

DEFENDANT [redacted]'S RESPONSE TO PLAINTIFF [redacted]'S CROSS-MOTION FOR SUMMARY JUDGMENT

Defendant [redacted], now known as, [redacted] ([redacted]), through [redacted] counsel, [redacted], responds and requests that this Court deny Plaintiff [redacted]'s ("[redacted]") Cross-Motion for Summary Judgment and states as follows:

STATEMENT OF FACTS

A. Background of the Facts

The matter relates to [redacted]'s allegation that [redacted] made certain defamatory statements during a [redacted] on [redacted], to [redacted]. [redacted] is the [redacted] of [redacted]'s former [redacted], [redacted] ([redacted]). Due to [redacted] discord, there were several issues between the parties, including issues related to the visitation of [redacted]'s [redacted], [redacted] ([redacted]), [redacted] of [redacted]'s deceased [redacted]. Earlier, [redacted] had demanded that [redacted] and his [redacted] ([redacted]) stay away from [redacted] in another court proceeding. The court denied the [redacted]'s visitation which was appealed

and affirmed. (Transcript of Proceedings in Case No. [redacted], (Tr.) Statement by the Court, [redacted]). [redacted]'s contention that the protection order was denied is incorrect as the court observed that "[redacted]." (Id. 12:1-6). The case was dismissed with an observation that [redacted] should stay away from [redacted] and [redacted].

[redacted] was aware that [redacted] and [redacted] sought visitation with [redacted], and it was not granted. (Tr. Testimony of [redacted], [redacted]). [redacted] knew that [redacted] did not want to see [redacted] or did not want [redacted] to see [redacted]. (Def.'s First Set of Admissions to Pl., Admission 3). [redacted] also knew that [redacted] had informed [redacted] and [redacted] that she did not want them near [redacted]. (Tr. Testimony of [redacted], [redacted]). [redacted]'s [redacted] invited [redacted] to the [redacted] because he knew [redacted] would be there. (Def.'s First Set of Admissions to Pl., Admission 4). [redacted] took [redacted] and [redacted] along with [redacted] knowing that [redacted] would be there in the meet. (Id.).

At the swim meet, [redacted] ([redacted]) observed [redacted] walking past their table a few times staring awkwardly, and [redacted] appeared to be visibly shaken and covered himself under the picnic table. (Tr. Testimony of [redacted], [redacted]). [redacted] [redacted] reminded [redacted] about the court's observation to stay away from [redacted]. [redacted] was standing three feet away from [redacted] when [redacted] spoke to [redacted]. (Tr. Testimony of [redacted], [redacted]). [redacted] did not interact with [redacted] at all or say anything to [redacted] at the [redacted] because the protection was against [redacted]'s [redacted], not [redacted]. [redacted]'s admission that [redacted] was not within earshot of [redacted] when [redacted] spoke the words to [redacted] is patently false. (See Def.'s First Set of Admissions to Pl., Admission[redacted]

[redacted] also testified to have heard [redacted] say regarding [redacted] and [redacted] that [redacted] had already stated that [redacted] does not want [redacted] and [redacted] there. (Tr. Testimony of [redacted], [redacted]). [redacted] testified that [redacted] asked them what they were doing there. (Tr. Testimony of [redacted], [redacted]). While [redacted] talked to [redacted] and [redacted], [redacted] intervened in between. (Tr. Testimony of [redacted], [redacted]). [redacted] testified, "[redacted]." (Id.). The testimony is clear that while [redacted] talked to [redacted] and [redacted] who was standing three feet away from [redacted], [redacted], for reasons best known to [redacted], intervened in between the conversation. Most importantly, [redacted] knew when [redacted] told [redacted] would call the police that it was directed at [redacted] and [redacted]. (Tr. Testimony of [redacted], [redacted]). [redacted] said [redacted] was behind them for a purpose and so she immediately approached [redacted], who was just three feet away from [redacted], and told they should leave because [redacted]'s statements were meant for them. (Tr. Testimony of [redacted], 7[redacted]). Contrary to [redacted]'s version of the alleged facts, any reasonable observer would only be able to have determined that [redacted] was speaking to [redacted] and [redacted] as [redacted] observed.

[redacted] petitioned for a Civil Stalking Protection Order in Case No. [redacted] against [redacted] and [redacted] after the incident on [redacted] which was granted on March [redacted], and is effective for [redacted] years. (Tr. Statement of the Court, [redacted]).

B. The Alleged Inconsistent Defamatory Statements

In her the Complaint Woolum alleges that:

[redacted]

(Am. Compl. ¶ [redacted]).

The Complaint or Amended Complaint do not allege any other statements by [redacted]. The Cross-Motion for Summary judgment, however, alleges additional statements than the aforesaid initial pleadings as follows:

[redacted]

Pl.'s Cross-Motion for Summary Judgment, p. [redacted] (emphasis added).

The statements quoted as stated by [redacted] to [redacted] are inconsistent in the Complaint and the Cross-Motion for Summary Judgement.

C. Untenable Allegations of Panic Attacks

[redacted]'s Cross-Motion for Summary Judgement states that "in an action for slander per quod, the plaintiff must plead special damages." (Cross-Motion for Summary Judgment, p. [redacted]). She says she [redacted] (Id. p. [redacted]). The complaints, however, plead only slander per se. [redacted] claims to have suffered from panic attacks due to the alleged defamatory incident for which [redacted] has had to seek medical treatment and medication. (Cross-Motion for Summary Judgment, p. [redacted]). She pleads "[redacted]." (Id. p. [redacted]). [redacted] attaches medical records supporting that contention as Exhibit C. The Cross-Motion says, "[redacted]." (Id.). Contrary to this, [redacted], however, admits that [redacted] "[redacted]." (Def.'s First Set of Admissions to Pl., Admission [redacted]). Factually, [redacted] admits that [redacted] has [redacted]

[redacted]." (Id.). Besides, the alleged defamatory incident happened on [redacted]. [redacted] has produced medical records as Exhibit C reflecting [redacted] doctor's visit on [redacted] i.e., after almost seven months after the alleged defamatory incident which is not specifically described in the medical notes.

D. Procedural History

The Complaint filed on [redacted], alleged cause of action for slander and slander per se seeking compensatory damages and punitive damages and other reliefs. [redacted] filed an answer and first set of requests for admissions, interrogatories, and requests for production of documents on [redacted]. Thereafter, [redacted] filed unsigned and unnotarized responses to the discovery requests. A hearing was held on [redacted], in which [redacted], under oath, stated that [redacted] remarks [redacted], were directed towards [redacted] and not [redacted]. A transcript was ordered to present objections. The transcript was prepared on [redacted]. [redacted] filed a Motion for Summary Judgment on [redacted]. On [redacted], [redacted]'s Counsel filed for an extension of time to respond to the motion under Civil Rule 56(F) to seek the transcript of testimonial evidence that supports [redacted]'s claims. The motion also stated that [redacted] was an indispensable party. The transcript had been submitted to Judge [redacted] before the hearing for review. Undoubtedly, the transcript was available to [redacted]'s Counsel before the filing of the motion for extension of time to file a response to the motion for summary judgment on [redacted].

[redacted] filed a motion to amend the original complaint and no attempt was made to make [redacted] an indispensable party. The amended complaint requests for "special damages" of medical expenses and lost wages. (See Pl.'s Motion to File Amended Complaint Instanter). [redacted] filed a Response to the Motion to Amend complaint seeking sanctions for misleading

the court regarding the availability of the transcript on [redacted]. [redacted] filed her response to the Motion along with a Cross-Motion for Summary Judgment.

Thus, this response.

STANDARD OF REVIEW

Civ.R. 56(C) provides, in pertinent part:

> Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. * * * A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor.

Cairelli v. Brunner, 10th Dist. Franklin No. 18 AP 000164, 2019-Ohio-1511, ¶ 43.

> The party moving for summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of materia (sic) fact. The moving party may not make a conclusory assertion that the non-moving party has no evidence to prove its case. The moving party must specifically point to some evidence which demonstrates the non-moving party cannot support its claim. If the moving party satisfies this requirement, the burden shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue of material fact for trial.

Id. at ¶ 44 (citing *Vahila v. Hall*, 77 Ohio St.3d 421, 429, 1997-Ohio-259, 674 N.E.2d 1164).

A. Slander Per Se and Slander Per Quod.

"Slander consists of oral defamatory statements." *McCartney v. Oblates of St. Francis deSales*, 80 Ohio App.3d 345, 353, 609 N.E.2d 216 (6th Dist.1992) (citing Restatement of the Law 2d, Torts (1977) 177, Section 568). "There are two actionable types of slander: slander per se and slander per quod." *Id*. (citing *Rainey v. Shaffer*, 8 Ohio App.3d 262, 264, 456 N.E.2d 1328, 1331 (11th Dist.1983)). "Slander per quod is defined as slander determined by the

nterpretation of the listener, through innuendo, as between an innocent or harmless meaning and a defamatory one." *Id*. (citing *Rainey*, 8 Ohio App.3d at 264). "Slander per se means that the slander is accomplished by the very words spoken." *Id*. To constitute "an oral defamatory remark to be considered slander per se it must consist of words which import an indictable criminal offense involving moral turpitude or infamous punishment, imputes some loathsome or contagious disease *which excludes one from society or tends to injure one in his trade or occupation*. *Id*. (citing *Schoedler v. Motometer Gauge & Equip. Corp*., 134 Ohio St. 78, 84, 15 N.E.2d 958, 960 (1938) (emphasis added). "The determination of whether a statement is slander per se or slander per quod is a question of law for the trial court." *Id*. at 353-354 (citing *Matalka v. Lagemann*, 21 Ohio App.3d 134, 486 N.E.2d 1220 (10th Dist.1985)). "If the statements are deemed to be actionable per quod, the plaintiff must allege and prove damages." *Id*. at 34 (citing *Becker v. Toulmin*, 165 Ohio St. 549, 138 N.E.2d 391 (1956), at paragraphs three and four of the syllabus). "If the statements are found to be actionable per se, both damages, and actual malice, are presumed to exist." *Id*. (internal citations omitted).

In the Cross-Motion for Summary Judgment, [redacted] argues that [redacted] had met[redacted] burden of proving both slander per se and slander per quod. In slander per se, the slander is accomplished by the very words spoken and in slander per quod the slander results from the listener's interpretation of the words through innuendo. The facts established by testimony do not suggest that the alleged statements were directed to [redacted]. Thus, any alleged slander should be interpretation of the words through innuendo, and, therefore, may be slander per quod. [redacted]'s complaint, however, has not alleged a cause of action for slander per quod. In addition, for slander per quod, there can be no recovery absent proof of special damage.

ARGUMENT

I. [redacted] has failed to meet the elements of slander per se because none of the alleged statements are capable to import an "indictable criminal offence involving moral turpitude" against [redacted].

"To be actionable as defamation per se, the statements must 'import an indictable criminal offense involving moral turpitude[,]' 'impute a loathsome or contagious disease which excludes one from society[,] or 'tend to injure one in his trade or business occupation.'" *Pietrangelo v. Lorain Cty. PR & Pub. Co*., 2017-Ohio-8783, 100 N.E.3d 1028, ¶ 12 (9th Dist.) (citing *Dunnigan v. City of Lorain*, 9th Dist. Lorain No. 02CA008010, 2002-Ohio-5548, ¶ 35). "The crime of moral turpitude must subject the offender to 'infamous punishment[.]'" *Id*. (quoting *Gilbert v. WNIR 100 FM*, 142 Ohio App.3d 725, 742, 756 N.E.2d 1263 (9th Dist.2001)). "'When not ambiguous, whether a statement is defamation per se is a question of law for the trial court to determine.'" *Id*. (quoting *Northeast Ohio Elite Gymnastics Training Ctr., Inc. v. Osborne*, 183 Ohio App.3d 104, 2009-Ohio-2612, 916 N.E.2d 484 at ¶ 8 (9th Dist.)).

[redacted] asserts [redacted] to have falsely stated to [redacted] that [redacted] had a protection order against [redacted] in the presence of [redacted] and many other attendees of the swim meet, and that the statement was not privileged, and [redacted] knew that the statement was false because she has never even sought a restraining order against [redacted] and so [redacted] has met [redacted] burden of proving all the four elements of the claims for both slander per se and slander per quod. (Cross-Motion for Summary Judgment, pp. [redacted]. The alleged defamatory statements in the complaint "[redacted]?, [redacted]" and a threat to call the police, do not constitute defamation per se against [redacted] as a matter of law.

[redacted] took [redacted] and [redacted] along with [redacted] to the [redacted] as [redacted] knew [redacted] would be there. [redacted] also knew the prior discord between [redacted] and [redacted] in-laws and the visitation issues related to [redacted]. [redacted] had to speak to [redacted] and [redacted] seeing [redacted] walking near their table a few times staring awkwardly making [redacted] uncomfortable. (Tr. Testimony of [redacted], [redacted]). [redacted] mentioned [redacted] about confronting [redacted] separately. (Tr. Testimony of [redacted], [redacted]). [redacted], with an intent to remind [redacted] and [redacted] about the court's observation to stay away from [redacted], went to [redacted] and [redacted] when [redacted] was also with them. [redacted] did not have any reason to talk to [redacted] under the circumstance. According to [redacted], [redacted] made [redacted] statement when [redacted] and [redacted] were standing together. (Tr. Testimony of [redacted], [redacted]). [redacted] was standing three feet away from [redacted]. (Id. [redacted]). [redacted] observed [redacted] and [redacted] felt [redacted] was trying to confront [redacted] in the presence of [redacted] and [redacted] intervened in the conversation. (Tr. Testimony of [redacted], [redacted]). [redacted] also does not dispute that [redacted] spoke while both [redacted] and [redacted] were standing together. (Tr. Testimony of [redacted], [redacted]).

[redacted]'s testimony is inconsistent with [redacted]'s testimony as [redacted] said that [redacted] followed her when she was walking over to the pool and spoke these statements to [redacted]. (Tr. Testimony of [redacted], [redacted]). After which [redacted] turned to [redacted] and asked her to go get [redacted]. (Id. 62:24-25). [redacted]s testimony is clear that [redacted] was standing just three feet away from her and after [redacted] spoke to them, [redacted] approached [redacted] and told they should leave. (Tr. Testimony of [redacted], [redacted]). [redacted] testified that [redacted] asked them what they were doing there while they were standing together. (Tr. Testimony of [redacted], [redacted]). The oral evidence is clear that while [redacted] talked to [redacted] and [redacted] who was standing three feet away from her, [redacted], for reasons best known to her, intervened in between the conversation.

So, there is no evidence or reason whatsoever to show that [redacted] spoke directly to [redacted] as [redacted] was worried about [redacted]'s [redacted] seeing [redacted] and spoke to them about it.

Next, regarding the challenged statements (i.e., "[redacted]?, [redacted].") [redacted]), these statements do not import an indictable criminal offense involving moral turpitude that subjects [redacted] to infamous punishment, impute a loathsome or contagious disease, or tend to injure her trade or business occupation. Thus, it is ridiculous to argue that [redacted] falsely claimed that "[redacted] (or Mrs. [redacted] and [redacted])" had a restraining order against them and this means "[redacted]" already committed an indictable criminal offense involving moral turpitude and was committing another one by violating the restraining order. How can anyone who sees someone speaking to two persons standing together exclude the other person and think about one person to portray her as a troublemaker? The statements do not reflect upon [redacted]'s character in a manner that would cause her to be ridiculed, hated, or held in contempt. ("[S]poken words accusing a person of committing a crime are slanderous per se[.]" *Osborne*, supra, at ¶ 8). Pertinently, [redacted] testified that she knew [redacted] was behind them for a purpose and when [redacted] made that statement and told [redacted] would call the police she knew it was directed at her and [redacted]. (Tr. Testimony of [redacted], [redacted]). Also, [redacted]'s statement is clear that [redacted] intervened in [redacted]'s conversation. So, it was [redacted] who intervened in the conversation and tried to create a confrontation to turn around and allege defamation against her in front of others. [redacted] has failed to show that the alleged statements were directed towards her alone and that the statement accused her of committing a crime. [redacted] admitted that she was standing with [redacted] when [redacted] spoke to her, and [redacted] stated that [redacted] was three feet away from them. None of the testimony or evidence shows that

[redacted] spoke the alleged statements directly to [redacted]. Thus, the challenged statements do not constitute slander per se for the same reasons.

II. The Complaint does not specifically plead a cause of action for slander per quod and there is no evidence to support that [redacted] had to seek medical treatment because of the alleged incident.

"When a statement is defamation per se, some damages are presumed, and the plaintiff is not required to prove special damages." *Osborne*, supra, at ¶ 9 (citing *Shoemaker v. Community Action Org. of Scioto Cty., Inc*., 4th Dist. Scioto No. 06CA3121, 2007-Ohio-3708, at ¶ 13). "In contrast, if the statement is defamation per quod, special damages must be pled and proven." *Id*. (citing *Murray v. Knight-Ridder, Inc.*, 7th Dist. Belmont No. 02 BE 45, 2004-Ohio-82, at ¶ 16). "Special damages are damages of such a nature that they do not follow as a necessary consequence of the [complained injury]." *Id*. (citations omitted). "Further, special damages are damages that 'result from conduct of a person other than the defamer or the one defamed.'" *Id*. (quoting *Bigelow v. Brumley*, 138 Ohio St. 574, 94, 37 N.E.2d 584 (1941)).

[redacted] argues that the challenged statements suggest that [redacted] "falsely claimed that [redacted]) [redacted]. [redacted] (Cross-Motion for Summary Judgment, [redacted] is not a party in this suit and so any argument that [redacted]'s statement was defamatory to [redacted] is unsustainable. Assuming arguendo, to the extent that the alleged false statements are directed towards [redacted] and [redacted], any such suggestions that the statement portray [redacted] as a troublemaker is not contained on the face of these statements and instead require interpretation and/or innuendo, which sounds in defamation per quod.

To constitute slander per quod, special damages must be pled and proven. [redacted] did allege, in conclusory fashion, that she suffered special damages as a result of [redacted]'s conduct. However, there is no indication in the complaint that [redacted] could have possibly suffered special damages, which have been described as an actual, temporal loss of something having economic or pecuniary value. *See, generally,* 2 Smolla, Law of Defamation (2 Ed.2003), 7-3, Section 7:2.

[redacted] affirms that [redacted] knowingly and falsely stated loudly in front of "[redacted]" that she had a restraining order against [redacted] and as a result, she "[redacted]." ([redacted]'s affidavit. ¶¶ [redacted]. She also affirms to have sought medical treatment for the same and lost work time. (Id. ¶¶ [redacted]). Interestingly, the medical reports show [redacted] visited the doctor's office only on [redacted], i.e., almost after seven months after the incident that happened on [redacted] The return to work letter shows she was advised to take sick leave starting from "[redacted]" which is eight months after the alleged incident. Clearly, this shows that [redacted] did not have any such issues after almost six months of the alleged incident. Also, [redacted] has not made a lost wage claim. (Def.'s First Set of Admissions to Pl., Admission [redacted]).

Further, [redacted] did not comply with Civ.R. 9(G), which states that "[w]hen items of special damage are claimed, they shall be specifically stated." *See Wheeler v. Yocum*, 10th Dist. Franklin No. 85AP-828, 1986 Ohio App. LEXIS 6075 (Mar. 25, 1986) (applying Civ.R. 9(G) in defamation context).

III. [redacted] is entitled to Motion for Summary Judgment against [redacted].

[redacted]'s interpretation of the case-law cited in [redacted]'s motion for summary judgment is misplaced. As noted by [redacted] in her cross-motion, in *Watson v. Highland Ridge*

Water & Sewer Assn., Inc., 2013-Ohio-1640 (Ohio App. 4th Dist. 2013), the Court found that the plaintiff had not proven the elements of slander because "no one at Higland Ridge accused appellant, himself, of theft or tampering with the water meter. . . . The mere report of a possible theft to law enforcement by Highland Ridge, without ever accusing appellant of the theft is not a false or defamatory statement." *Id*. at ¶40. The same fact can be applied in this case because none of the statements made by [redacted] "falsely accused [redacted]" of anything and the mere statement about the restraining order was directed to [redacted] and [redacted]. [redacted] herself stated to have understood that the statements were meant to [redacted] and [redacted]. Regarding the falsity of the restraining order, it is undisputed that [redacted] and [redacted] were not granted visitation over [redacted]. That simply means they were not allowed to visit [redacted]. [redacted]'s observation that using the pronoun "[redacted]" admittedly is singular and meant towards her is absurd as [redacted] was standing with her and the statements were related to [redacted]'s and [redacted]'s conduct to see [redacted]. Further, [redacted] failed to provide any evidence to show that [redacted] was talking directly to her apart from her interpretation of the whole incident. On the contrary, the evidence is clear that [redacted] was concerned about [redacted]'s behavior on the day of the incident and wanted to let them know that they are not supposed to do anything that could cause trouble to her son. There is no intention or reason for [redacted] to speak to [redacted] under the circumstance and she intervened in the conversation for reasons best known to her.

Given the foregoing, the Court should grant [redacted]'s Motion for Summary Judgment against [redacted].

CONCLUSION

WHEREFORE, Defendant [redacted], now known as, [redacted] respectfully requests that this court deny Plaintiff [redacted] Cross-Motion for Summary

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udgement in its entirety and grant Defendant [redacted] Motion for Summary Judgement against Plaintiff [redacted].

Respectfully Submitted,

[redacted]

[redacted], Trial Attorney for
Defendant [redacted] nka [redacted]
Ohio Supreme Court Reg. #[redacted]
[redacted]
[redacted]
Cincinnati, Ohio [redacted]
[redacted]
FAX [redacted]
[redacted]

LC
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon [redacted]., [redacted]., [redacted], Suite [redacted], P.O. Box [redacted], Cincinnati, Ohio [redacted] by regular U.S. Mail, first class, prepaid, on the ____ day of [redacted] 2020.

_____
[redacted], Trial Attorney for Defendant [redacted] nka [redacted]