[Cite as *Rosado-Rodriguez v. Nemenz Lincoln Knolls Market*, 2020-Ohio-4814.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

CARMEN ROSADO-RODRIQUEZ,

Plaintiff-Appellant,

v.

NEMENZ LINCOLN KNOLLS MARKET, et al.,

Defendants-Appellees.

OPINION AND JUDGMENT ENTRY
Case No. 19 MA 0098

Civil Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 2018 CV 2673

BEFORE:
Cheryl L. Waite, Gene Donofrio, Carol Ann Robb, Judges.

JUDGMENT:
Affirmed.

Atty. Joseph A. Moro, Heller, Maas, Moro, & Magill Co., LPA, 54 Westchester Drive, Suite 10, Youngstown, Ohio 44515, for Plaintiff-Appellant

Atty. Markus E. Apelis, *Atty. Liz R. Phillips*, and *Atty. Richard C.O. Rezie*, Gallagher Sharp LLP, 1215 Superior Avenue, 7th Floor, Cleveland, Ohio 44114, for Defendants-Appellees.

Dated: September 28, 2020

WAITE, P.J.

{¶1} Appellant Carmen Rosado Rodriquez appeals the decision of the Mahoning County Common Pleas Court granting summary judgment in favor of Appellees, Nemenz Lincoln Knolls Market, Inc. ("Market"); Omaira Garcia ("Garcia"); and Shannon Minteer ("Minteer"), collectively, "Appellees". Based on the following, the judgment of the trial court is affirmed.

Factual and Procedural History

{¶2} The matter stems from an incident that occurred at the Market, a local grocery store. Garcia was a cashier and Minteer was a manager at the Market and both were at work on the day of the incident, December 6, 2015. The parties have differing versions of what transpired on that date. It is important to note that Appellant is not a native English speaker and needs the assistance of an interpreter for communication.

{¶3} According to Appellees, on the day of the incident Garcia became concerned when she saw Appellant drive into the Market parking lot. She recognized Appellant's vehicle because Garcia had previously been engaged to Appellant's son. Garcia had ended the engagement and, due to the allegedly tumultuous interactions between the parties, Garcia was apprehensive about a confrontation. Apparently, she believed she had secured a protective order against Appellant and her son. (Garcia Aff., ¶ 4.) It is not disputed that no such order existed. After seeing Appellant's car, Garcia approached Minteer and asked her to speak to Appellant and ask her to wait to enter the store for five minutes to allow Garcia to finish her work shift and leave. As Appellant was

entering the store, Minteer approached her and, according to Minteer's affidavit, quietly asked Appellant to wait five minutes before entering to give Garcia time to leave. (Minteer Aff., ¶ 5.) Minteer stated that she spoke softly and that no other customers or employees heard their conversation. (Minteer Aff., ¶ 6.) Appellant left the store and went to her car. A few minutes later the police arrived. After speaking to Appellant, the police came into the store and asked Minteer what had occurred, and she repeated that she had quietly asked Appellant to wait outside. She asked the officer to repeat the request to Appellant. (Minteer Aff., ¶ 11.)

{¶4} According to Appellant's version of events, she was approached by both Minteer and Garcia when she entered the store. Minteer approached her with her arms open wide and tried to stop her from entering the store. (Rosado-Rodriquez Depo., p. 21.) Appellant contends there were several people at the front of the store when Minteer spoke to her. (Rosado-Rodriquez Depo., p. 21.) She also stated that Minteer spoke loudly in English stating that there was a protective order against Appellant. (Rosado-Rodriquez Depo., p. 21.) Appellant became upset and returned to her car crying, where she called 911 to summon the police. When the police arrived, Appellant again began crying and told them that her civil rights had been violated. While the police went into the store to speak to Minteer, Appellant called her friend's husband to come to the scene to act as an interpreter. He arrived a short while later and helped Appellant give a statement to the police officer. Appellant contends several people gathered in the parking lot and began listening and asking what happened. (Rosado-Rodriquez Depo., p. 24.) Appellant stated she was crying the whole time and very embarrassed. (Rosado-Rodriquez Depo., pp. 21, 23.)

{¶5} Appellant originally filed a defamation complaint on December 6, 2016 naming the Market, Garcia and Minteer as defendants. In Appellees' answer to the initial complaint, they raised numerous affirmative defenses, including insufficient service of process because Appellant had served all Appellees by regular U.S. mail at the headquarters for the Market in Poland, Ohio. Appellant's deposition was taken on June 30, 2017 as part of this original suit. Portions of that deposition were attached to the motion for summary judgment and are included in the record on appeal. In her deposition, Appellant said she was seeking damages for medical costs associated with nosebleeds and dental issues associated with stress caused by the incident. She also said she was seeking money to buy a new house because the embarrassment and humiliation she suffered required her to relocate to a different town. (Rosado-Rodriquez Depo., p. 40.) The complaint was dismissed voluntarily on October 31, 2017.

{¶6} The current action was refiled on October 30, 2018. This second complaint raised the same claim of defamation against the same defendants. In their answer, Appellees again raised numerous affirmative defenses, including improper service of process on Minteer and Garcia because all of the defendants were again served at the Market's Poland, Ohio headquarters. On March 12, 2019, Appellees filed a joint motion for judgment on the pleadings pursuant to Civ.R. 12(C) in which they alleged that because Appellant never properly perfected service on Garcia and Minteer, an action was not commenced within the statute of limitations and Appellant's claim was barred. On May 6, 2019, the trial court denied Appellees' motion, concluding that Civ.R. 12(C) was not proper as the evidence on which Appellees relied in their motion was outside of the pleadings.

{¶7} On June 10, 2019, Appellees filed a motion for summary judgment. They contended that: (1) Appellant's defamation claim failed as a matter of law because she could not demonstrate the alleged statements were published to a third party; (2) the statements did not rise to the level of defamation *per se;* (3) Appellant could not prove damages; and (4) the claims against Garcia and Minteer were barred by the statute of limitations for lack of service. In support of their motion, Appellees presented an affidavit from Garcia stating she was under the mistaken belief that a civil restraining order had been issued against Appellant which prevented her from coming near Garcia. (Garcia Aff., ¶ 4.) Appellees also provided an affidavit from Minteer, who asserted that she spoke to Appellant softly and no other patrons could have heard their conversation. (Minteer Aff., ¶ 6.) Appellees also cited to Appellant's deposition, in which she stated that after speaking to Minteer she left the store crying and called the police, which they contended demonstrated that it was Appellant who created a disturbance, causing others to inquire and causing Appellant to repeat Minteer's statement to them. Appellees also contended that Appellant had citied no evidence in the record demonstrating that anyone heard the statements from Minteer to Appellant, hence Appellant did not demonstrate publication of Minteer's statements to a third party. Appellees argued that Appellant did not establish that the statements by Minteer were defamatory *per se* because they did not meet any of the legal criteria and Appellant failed to prove or plead any special damages as required in a defamation *per quod* action. Finally, Appellees again argued that service was not perfected on Minteer or Garcia and the statute of limitations had run.

{¶8} In Appellant's motion in opposition, she claimed that a genuine issue of fact existed on every element of her claim. She cited to her deposition testimony, where she

stated that she was met with physical resistance when trying to enter the store. She stated that she does not speak English fluently and Minteer spoke to her in English, not Spanish, and that she suffered "special harm" because she "is a Hispanic woman living in a close-knit and predominately Hispanic community. [Appellant] found this attack on her character to be particularly offensive and has caused her to want to leave the community she has resided." (Appellant's Motion to Opposition to Summary Judgment, p. 2.) Finally, Appellant argued that because the Market had permanently closed by the time she filed her complaint, service was proper on all defendants at the Market's headquarters, as they were all represented by the same counsel. On August 13, 2019, the trial court granted Appellees' motion for summary judgment on the defamation claim. The trial court did not address the issue of whether service was obtained on Garcia and Minteer, concluding the issue was moot.

{¶9} Appellant filed this timely appeal.

ASSIGNMENT OF ERROR

The Court erred in granting summary judgment in favor of Defendants.

Standard of Review

{¶10} Summary judgment is appropriate in defamation actions because a determination of whether words are defamatory is a question of law to be decided by the trial court. *Vail v. Plain Dealer Publishing Co.,* 72 Ohio St.3d 279, 280, 649 N.E.2d 182 (1995). In order to survive a motion for summary judgment in a defamation action the plaintiff must make a sufficient showing of every element essential to her case and produce evidence on any issue for which the plaintiff bears the burden of production at

trial. *Citimortgage v. Foster,* 7th Dist. No. 11 MA 115, 2012-Ohio-6274, ¶ 5, citing *Wing v. Anchor Ltd. of Texas,* 59 Ohio St.3d 108, 570 N.E.2d 1095 (1991), paragraph three of the syllabus, citing *Celotex v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

{¶11} An appellate court conducts a *de novo* review of the granting of summary judgment. *Grafton v. Ohio Edison Co.,* 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Thus, this Court must review the trial court's decision without according it any deference. *Brown v. Scioto Cty. Bd. of Commrs.,* 87 Ohio App.3d 704, 711, 622 N.E.2d 1153 (4th Dist.1993).

{¶12} Before summary judgment can be granted, the trial court must determine that: (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most favorably in favor of the party against whom the motion for summary judgment is made, the conclusion is adverse to that party. *Temple v. Wean United, Inc.,* 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977). Whether a fact is "material" depends on the substantive law of the claim being litigated. *Hoyt, Inc. v. Gordon & Assoc., Inc*., 104 Ohio App.3d 598, 603, 662 N.E.2d 1088 (1995).

{¶13} "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." (Emphasis deleted.) *Dresher v. Burt*, 75 Ohio St.3d 280, 296, 662 N.E.2d 264 (1996). If the moving party carries its burden, the nonmoving party has a reciprocal

burden of setting forth specific facts showing that there is a genuine issue for trial. *Id.* at 293. In other words, when presented with a properly supported motion for summary judgment, the nonmoving party must produce some evidence to suggest that a reasonable factfinder could rule in that party's favor. *Brewer v. Cleveland Bd. of Edn.,* 122 Ohio App.3d 378, 386, 701 N.E.2d 1023 (8th Dist.1997).

{¶14} The evidentiary materials to support a motion for summary judgment are listed in Civ.R. 56(C) and include the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact that have been filed in the case. In resolving the motion, the court views the evidence in a light most favorable to the nonmoving party. *Temple*, 50 Ohio St.2d at 327.

Defamation

{¶15} In their motion for summary judgment Appellees asserted: (1) Appellant's defamation action failed as a matter of law because Appellant could not prove Appellees published any defamatory statements to a third party; (2) Appellant could not establish the alleged comments were defamatory *per se*; (3) Appellant could not prove damages; and (4) the defamation claim against Garcia and Minteer was barred by the statute of limitations because she failed to obtain service on them.

{¶16} Appellant responded in her brief that because the defamatory statements were made at the front of a crowded store in front of several people publication occurred. She highlights that the statements were made when Appellant tried to enter the store and were exacerbated by the language barrier between Appellant and Minteer. Appellant also contends that due to the close-knit nature of the community, the humiliation she suffered as a result of the statements caused her to want to relocate. Lastly, Appellant argued

that service on Garcia and Minteer was proper, as all of the defendants were represented by the same counsel and the location where the incident occurred was no longer operational.

{¶17} We note at the outset that Appellant is not a native English speaker and that both Minteer and the police officer responding on the scene spoke to her in English. She was able to summon a friend's husband to assist in her interview with the police, and during her 2017 deposition an interpreter was present. However, as this defamation action involves words which the parties do not dispute were spoken in English to a non-English speaker, the language barrier may be regarded as a factor and cannot be overlooked when reviewing this matter.

{¶18} Defamation can take the form of either slander or libel. Slander generally refers to spoken defamatory words, whereas libel refers to written or printed defamatory words. *Lawson v. AK Steel Corp.,* 121 Ohio App.3d 251, 256, 699 N.E.2d 951 (12th Dist.1997). The required elements to be established in a defamation action, whether slander or libel, are that the defendant made a false statement, the false statement was defamatory, the defamatory statement was published, the plaintiff was injured, and that the defendant acted with the required degree of fault. *Celebrezze v. Dayton Newspapers, Inc.,* 41 Ohio App.3d 343, 346-347, 535 N.E.2d 755 (8th Dist.1988). A plaintiff makes a prima facie case for defamation when he or she has established there was a publication to a third person for which the defendant is responsible, and that the recipient understood the defamatory meaning of the statement and its defamatory nature. *Grenga v. Vantell,* 7th Dist. No. 14 MA 0011, 2016-Ohio-4804, ¶ 32, citing *Hahn v. Kotten,* 43 Ohio St.2d 237, 243, 331 N.E.2d 713 (1975).

{¶19} Defamation is further categorized as defamation *per se* or defamation *per quod.* Defamation *per se* occurs when the statement is defamatory on its face, based on the direct meaning of the words used. *Moore v. P.W. Pub. Co.,* 3 Ohio St.2d 183, 188, 209 N.E.2d 412 (1965). In order to be defamation *per se,* the statement must satisfy one of four classes: (1) the words import the subject is or was charged with an indictable offense involving moral turpitude or infamous punishment; (2) the words impute an offensive or contagious disease, calculated to deprive the subject of society; (3) the words tend to injure the subject in his trade or profession; or (4) in cases of libel the words tend to subject a person to public hatred, ridicule or contempt. *Woods v. Capital Univ.,* 10th Dist. No. 09AP-166, 2009-Ohio-5672, ¶ 28. Defamation *per quod* occurs when the statement is defamatory through interpretation or innuendo. *Moore* at 188.

{¶20} In an action for defamation *per se* the plaintiff may maintain an action and recover damages without having to plead or prove special damages. *Woods,* ¶ 30. The law assumes the existence of some damages and the proof of the defamation itself "established the existence of some damages." *Gosden v. Louis,* 116 Ohio App.3d 195, 208, 687 N.E.2d 481 (9th Dist.1996). When the alleged defamatory statement is defamation *per quod,* a plaintiff must plead and prove special damages. *Woods,* ¶ 30. "Special damages are those direct financial losses resulting from the plaintiff's impaired reputation." *Hampton v. Dispatch Printing Co.*, 10th Dist. No. 87AP-1084, 1988 WL 96227, *2.

{¶21} In the instant matter, Minteer testified by way of affidavit that she approached Appellant quietly, asking her to wait to enter the store for five minutes to allow Garcia to finish her shift and leave. Although the exact words spoken are not in the

record, the parties do not dispute that Minteer asked Appellant to wait outside the store and erroneously told Appellant that Garcia had obtained a protective order against Appellant and her son. The parties also do not dispute that Minteer spoke in English and Appellant is not fluent in English. However, Appellant does not allege that she did not understand what Minteer was saying because of the language barrier nor did she require someone else to contemporaneously interpret the statement. Appellees do not dispute that Minteer's statement was false and that Garcia was mistaken about the existence of a protective order. Therefore, it is undisputed that Minteer's statement was false.

{¶22} Whether an unambiguous statement constitutes defamation *per se* is a question of law. *Becker v. Toulmin,* 165 Ohio St. 549, 555, 138 N.E.2d 391 (1956). Appellees argue the statement was not defamatory *per se* as it does not fall into one of the four required categories. The only relevant category asks whether the statement refers to an indictable offense involving moral turpitude. Appellees argued in their summary judgment motion that Minteer referred to a protective order, which is a civil order issued in a civil action such as in a domestic relations case, and therefore is not subject to indictment. In her affidavit attached to the motion for summary judgment, Garcia states "I also thought there was a restraining order where Ms. Rosado-Rodriquez and her son were not allowed to come near me." (Garcia Aff., ¶ 5.)

{¶23} Appellant uses the terms protective order and a restraining order interchangeably. In her 2017 deposition testimony Appellant stated through an interpreter, "she said that there was a Protection Order against me." (Rosado-Rodriquez Depo., p. 21.) Although Appellant did not address the issue of whether the statement was defamation *per se* directly in her motion in opposition to summary judgment, she

maintained that a statement that there was a valid protection order against her was made in front of others in the store, which caused her embarrassment and distress.

{¶24} In considering the statement made by Minteer, we conclude it was defamation *per se.* The distinction of whether there existed a protection order or a restraining order, and the civil versus criminal nature of each, is a legal distinction that would not easily be distinguishable by a layperson overhearing such an allegation. Notwithstanding the element of publication which is addressed below, the statement that an individual is subject to a protection or restraining order that was issued against them, at the time they are told they cannot enter the premises of a store, does not require interpretation or innuendo to establish a defamatory meaning. Utilizing the direct meaning of the words, they are defamatory on their face and not subject to an interpretation. *Moore* at 188. If, on attempting to enter a store, an individual is stopped and asked to wait to enter because a restraining/protection order was obtained to prevent that person from coming near a specific individual, the meaning is clear and unambiguous that the individual has allegedly engaged in conduct that warranted another to seek protection from them. No additional information was necessary to clarify the meaning of this statement. It was clear on its face that Minter alleged Appellant committed some action which resulted in her being forbidden from entering the Market. It would be possible for a listener to believe that Appellant was subject to the order because she was a shoplifter or had committed some physical assault which resulted in a restraining order. Thus, we conclude that the statement made by Minteer constitutes defamation *per se* as it may import an indictable criminal offense involving moral turpitude.

{¶25} The third element of defamation requires the alleged defamatory statement to be published. Publication is an essential element to establish liability in a defamation action, whether it is defamation *per se* or *per quod*. *Cooper v. Grace Baptist Church,* 81 Ohio App.3d 728, 736, 612 N.E.2d 357 (10th Dist.1992). Publication of a defamatory statement consists of communicating the statement to a person or persons other than the person who is the subject of the statement. *Hahn* at 243. The defamatory statement not only must be communicated to a third person by the defendant, the listener must understand the defamatory nature of the statement including "its actionable character." *Id.*

{¶26} The parties dispute whether a genuine issue of material fact exists regarding publication by Minteer. Appellant testified in her deposition through an interpreter:

> There were several people around. But, you know, I don't speak the language, so I couldn't defend myself. And, I told her that there was no order against me. So, I went out into the parking lot, and I started crying. And, she came out yelling at me.
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> * * *
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> Well, you know, the supermarket was full of people. * * * Well, everybody started listening to what was going on. And, everybody was, like, "What's going on?" "What's happening?"

(Rosado-Rodriquez Depo., pp. 21, 24.)

{¶27} Thus, Appellant maintains that there were several people who heard the statement and that the element of publication was evident because the statement was made in front of several people in the store.

{¶28} Appellees maintain that the presence of others is not sufficient to establish publication without additional evidence that some third person actually heard the statement and recognized it as defamatory. Minteer's affidavit states that she spoke quietly to Appellant, precluding others from hearing the statement. Additionally, Appellees argue that Appellant, herself, published the statement. Appellees contend the matter escalated only after Appellant became upset and chose to call 911 and her friend's husband from her car in the parking lot. Once her friend's husband (who acted as an interpreter) and the officers arrived, Appellant became increasingly more upset and told them what Minteer said to her. Appellees contend that, but for Appellant's conduct, the statement would not have been published to a third party.

{¶29} Although the parties disagree as to whether Minteer spoke loudly or softly, Appellant has not at any time during the action cited to any evidence in the record that any particular third party actually heard the statement. Appellant has maintained that because many people were present in the store, we can infer that the statement was heard. However, even if we were to accept Appellant's version of the events that many people were present when Minteer spoke to her, she did not bring forth any evidence from any actual person that he or she heard the statement, such as an affidavit from another shopper or employee present at the time of the incident who could corroborate the statement and how it was made. Because this proof is necessary in establishing this action and because Appellant was required to offer proof that Minteer's statement was

actually heard by a third person, simply asserting that others were present is not sufficient to satisfy the element of publication in a defamation action. "[A]bsent some evidence indicating that a third person did indeed hear the statement, there is no publication and therefore no actual defamation." *Wyrick v. Westover Retirement Community,* 12th Dist. No. 88-06-086, 1989 WL 21229, *2. Moreover, publication requires more than a showing that other people were present in the area. A plaintiff must present evidence that the statement was actually heard and that the third person or persons understood the defamatory nature of the statement and its actionable character. *Hahn* at 243; *Beim v. Jemo Assocs., Inc.,* 61 Ohio App.3d 380, 572 N.E.2d 812 (10th Dist.1989). Appellant presented no such evidence in this case. The evidence in the record demonstrates that the other people at the store did become aware of the situation after Appellant became upset and called the police. Appellant confirms that after she became upset and went to her car to call 911, several people began asking her what happened. (Rosado-Rodriquez Depo., pp. 22-24.) However, a prima facie case for defamation requires that publication be made by the defendant. Appellant has not presented any evidence of record that Minteer published the statement to a specific third party and that the third party understood its defamatory and actionable nature. Therefore, Appellant has not met her burden on the element of publication to survive summary judgment.

{¶30} Because this record is devoid of evidence that at least one other person actually heard Minteer's defamatory statement when Minteer made the statements, Appellees were entitled to summary judgment in this matter. We need not consider any other issues raised or argued by the parties. While we are sensitive to the fact that Appellant's understanding of English is limited and that, at the time of this incident, she

was clearly embarrassed and upset, she was required in summary judgment to provide more than speculation that the offending statement was published to a third party. Appellant's assignment of error has no merit and is hereby overruled.

Statute of Limitations

{¶31} As earlier discussed, Appellant's defamation action fails as a matter of law in this summary judgment action. As a result, we conclude the issue of service of process and the running of the statute of limitations regarding Garcia and Minteer is moot.

Conclusion

{¶32} In conclusion, Appellant's sole assignment of error lacks merit. A review of the record reveals the trial court did not err in granting summary judgment in favor of Appellees. The judgment of the trial court is affirmed.

Donofrio, J., concurs.

Robb, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignment of error is overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.