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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

WILLIAM F. ROUSH, a single man, Plaintiff/Appellant, v. SOUTHERN ARIZONA EAR, NOSE & THROAT; and AFSHIN J. EMAMI, M.D., and JANE DOE EMAMI, husband and wife, Defendants/Appellees.	2 CA-CV 2008-0049 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20071960

Honorable John E. Davis, Judge

AFFIRMED

William F. Roush — Buckeye
In Propria Persona

Cavett & Fulton
By Anne M. Fulton-Cavett — Tucson
Attorneys for Defendants/Appellees

V Á S Q U E Z, Judge.

¶1 In this defamation action, appellant William Roush, an inmate with the Arizona Department of Corrections, appeals from the trial court's summary judgment in favor of appellees, Southern Arizona Ear, Nose & Throat, Afshin J. Emami, M.D., and Jane Doe Emami (collectively, "Emami"). For the reasons stated below, we affirm.

Facts and Procedural Background

¶2 We view the facts "in the light most favorable to the party opposing the summary judgment motion below." *Keonjian v. Olcott*, 216 Ariz. 563, ¶ 2, 169 P.3d 927, 928 (App. 2007). In 2005, Roush began receiving medical and surgical treatment from Emami for problems with his left ear. According to Roush, during a "telemedicine consultation" on June 7, 2006, Emami stated in the presence of two medical assistants that Roush's "problem was never an ear problem" but a "brain disorder" and that his "ear problem was all in his head." In April 2007, Roush filed this action against Emami in Pima County Superior Court alleging "tortious slander" and negligence and seeking punitive damages.[1]

¶3 Roush subsequently filed numerous discovery-related motions, and the parties filed cross-motions for summary judgment. The trial court denied Roush's motions and granted summary judgment in favor of Emami, finding Roush's claims all hinged on his

[1]In his complaint, Roush also alleged that his injuries included "unnecessary surgery," "unnecessary medication," and "unnecessary medical treatment." However, in response to Emami's subsequent motion for the trial court to order Roush to serve a preliminary opinion affidavit from a qualified medical expert pursuant to A.R.S. § 12-2603(B), Roush asserted his complaint was "not a medical malpractice suit, but . . . bas[ed] o[n] tortious slander." He repeated this assertion in numerous subsequent motions.

claim of slander and he had failed to "plead, allege or request special damages." Roush timely appealed the court's final judgment dismissing the case with prejudice.

Discussion

¶4 Roush argues the trial court erred in granting summary judgment because there was the "'slightest doubt' or reasonable in[]ference(s)" to support his claim. We review a trial court's grant of summary judgment de novo. *Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, ¶ 15, 165 P.3d 173, 177 (App. 2007). In reviewing the court's decision, we determine whether there is a "genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(c)(1). Summary judgment is appropriate if the moving party demonstrates that "no evidence exist[s] to support an essential element of the claim." *Orme Sch. v. Reeves*, 166 Ariz. 301, 310, 802 P.2d 1000, 1009 (1990). And, "[i]f the party with the burden of proof on the claim or defense cannot respond to the motion by showing that there is evidence creating a genuine issue of fact on the element in question, then the motion for summary judgment should be granted." *Id.*; *see* Ariz. R. Civ. P. 56(e) (adverse party's response "must set forth specific facts showing that there is a genuine issue for trial").

¶5 To support a claim for slander, Roush was required to plead and prove either the existence of "special damages" or that "the utterance falls within one or more specified categories [of slander per se], damages in such case being assumed." *Modla v. Parker*, 17 Ariz. App. 54, 56, 495 P.2d 494, 496 (1972) (footnote omitted). An utterance constitutes slander per se if it "prejudice[s] the person in the profession, trade or business in which he

is actually engaged. This means that the statement must be of or concerning one in his business capacity."[2] *Id.*

¶6 In his motion for summary judgment, Emami argued Roush had failed to plead special damages in his complaint or otherwise present any evidence that such damages existed. Emami further argued the alleged statement, even if made, did not fall into the category of slander per se because Roush was not a "professional." Thus the statement could not have injured Roush in his professional capacity. Roush responded that he "need not plead or allege special damages in his complaint, nor d[id] he need to present evidence to support a claim for special damages" because he had been "a standing professional even during his incarceration" and "[t]he statement made by Dr. Emami . . . injured [his] profession."[3] As noted above, the trial court expressly found that Roush had failed to plead or prove special damages. And in granting summary judgment in favor of Emami, the court implicitly also found Roush had failed to establish a claim for slander per se.

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[2]Other categories of slander per se not applicable here encompass statements that "charge[] a contagious or venereal disease, or charge[] that a woman is not chaste, . . . or impute[] the commission of a crime involving moral turpitude." *Modla*, 17 Ariz. App. at 56 n.1, 495 P.2d at 496 n.1. "Slander per quod are all slanderous utterances which are not slanderous per se. While slander per se is actionable without proof of pecuniary damages, slander per quod is not actionable unless pecuniary damages are pled and proved." *Boswell v. Phoenix Newspapers, Inc.*, 152 Ariz. 1, 6, n.4, 730 P.2d 178, 183 n.4 (App. 1985) (citation omitted), *approved as supplemented*, 152 Ariz. 9, 730 P.2d 186 (1986).

[3]Roush appended to his response an excerpt of the transcript from his 1997 criminal trial, in which he testified that he had "two professions[, o]ne, over 31 years in the floor covering industry[,] and in the past ten years as a licensed ordained minister." He also appended a copy of a certificate indicating he was an ordained minister in the Universal Life Church, a church which apparently issues such credentials to anyone upon request.

¶7 On appeal, Roush fails entirely to address the issues of special damages and slander per se. He has therefore waived any argument that his mere assertion of professional status was sufficient to create a genuine issue of fact precluding summary judgment. *See Carrillo v. State*, 169 Ariz. 126, 132, 817 P.2d 493, 499 (App. 1991) ("Issues not clearly raised and argued on appeal are waived."). And, even assuming the argument had not been waived, it is without merit. "In order to fit within the business category, the slanderous utterance must prejudice the person in the profession, trade or business in which he is actually engaged. This means that the statement must be of or concerning one in his business capacity." *Modla*, 17 Ariz. App. at 56, 495 P.2d at 496. Emami's alleged comments were not directed at Roush in any professional capacity. "Words which are merely injurious to one regardless of his occupation do not qualify as slander [p]er se." *Id.* at 57, 495 P.2d at 497.

¶8 This distinction is illustrated by *Modla* and *Hirsch v. Cooper*, 153 Ariz. 454, 737 P.2d 1092 (App. 1986), *disapproved on other grounds by Godbehere v. Phoenix Newspapers, Inc.*, 162 Ariz. 335, 783 P.2d 781 (1989). In *Hirsch*, Division One of this court found an ophthalmologist's statement that he "'wouldn't send his dog or cat'" to another ophthalmologist was "a statement which tend[ed] to injure a person in his profession." *Id.* at 457, 737 P.2d at 1095. By contrast, in *Modla* the court concluded that the statement, "'do me a favor and see a psychiatrist,'" purportedly made to a patient by a hospital administrator, "clearly d[id] not pertain to [the patient] in any business capacity" and thus did not constitute slander per se. 17 Ariz. App. at 55, 57, 495 P.2d at 495, 497.

¶9 Of the two, we find *Modla* more closely resembles this case factually, and supports our conclusion. Roush has thus failed to "set forth specific facts showing that there is a genuine issue for trial." Ariz. R. Civ. P. 56(e); *see also Burrington v. Gila County*, 159 Ariz. 320, 325, 767 P.2d 43, 48 (App. 1988) ("mere existence of some alleged factual dispute between the parties" insufficient to defeat motion for summary judgment).

¶10 In a related argument, Roush asserts the trial court "violated due process" because it "failed to order and allow discovery" before granting summary judgment. But the court's resolution of the issues turned on Roush's own failure to either plead special damages or show he was engaged in a profession which would have been prejudiced by Emami's alleged comments. Consequently, there was no basis on which the court could have found such discovery was necessary. *See Orme Sch.*, 166 Ariz. at 309 n.10, 802 P.2d at 1008 n.10 ("Discovery is complete when . . . considering the case as a whole, the court can say that all discovery necessary for the purposes of the motion [for summary judgment] has been completed."); *see also Klingele v. Eikenberry*, 849 F.2d 409, 412 (9th Cir. 1988) (burden on party opposing motion to show what material facts would be discovered to preclude summary judgment).

¶11 Roush also argues the trial court "failed to hear [his] motions or respond to them," which "violated due process." However, to the extent this differs from the preceding argument, he presents it "wholly without supporting argument or citation of authority," and

we therefore do not consider it.[4] *Brown v. U.S. Fid. & Guar. Co.*, 194 Ariz. 85, ¶ 50, 977 P.2d 807, 815 (App. 1998); *see* Ariz. R. Civ. App. P. 13(a)(6) (opening brief shall include argument containing "the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities [and] statutes . . . relied on"). Nor do we consider numerous other, wholly unsupported arguments, including his contentions that Emami's "use of false and untruthful argument constitute[d] prejudice and misconduct depriving [Roush of] due process and [his] fundamental right to a fair trial by jurors," that the trial court's failure to hold an evidentiary hearing "den[ied him] due process of law," and that the court erred by "grant[ing] attorney cost[s] when no notice of cost[s] was presented to [him]."

Disposition

¶12 Because the court did not err, we affirm its order granting summary judgment in favor of Emami.

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GARYE L. VÁSQUEZ, Judge

[4]The motions Roush alleges were not addressed by the court include his motion for summary judgment, his opposition to Emami's motion for summary judgment, and related motions which were either explicitly or implicitly addressed and ruled upon when the court denied Roush's motion for summary judgment and granted Emami's. Furthermore, many of Roush's motions failed to "indicat[e], as a minimum, the precise legal points, statutes and authorities relied on, citing the specific portions or pages thereof," as required by Rule 7.1(a), Ariz. R. Civ. P.

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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J. WILLIAM BRAMMER, JR., Judge