MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

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IN THE
COURT OF APPEALS OF INDIANA

Janie Givens, et al.,
Appellants,

v.

Estachia Eberle, et al.,
Appellees.

October 28, 2021

Court of Appeals Case No. 21A-PL-925

Appeal from the Owen Circuit Court

The Honorable Erik C. Allen, Special Judge

Trial Court Cause No. 60C02-1803-PL-115

Brown, Judge.

[1] Janie Givens ("Givens"), James Kindred ("Kindred"), and Kindred's son, B.K., (collectively, "Plaintiffs") appeal the entry of summary judgment in favor of Suella Ferrand and Estachia Eberle. We affirm.

Facts and Procedural History

[2] On March 22, 2018, Kindred, *pro se*, filed a "Complaint for Defamation Per Se" against Charlotte Church, a family case manager with the Department of Child Services ("DCS"), and Rebel Rich, who Kindred alleged communicated to Church that he had a history of abuse and sexual abuse against his family members. Appellants' Appendix Volume 9 at 145 (capitalization omitted). In April 2018, Kindred twice amended his complaint; added his son, B.K., Givens, and Givens's children, M.G. and S.G., as plaintiffs;[1] and added DCS and multiple individuals as defendants.

[3] On October 26, 2018, Plaintiffs filed a sixty-page "Joinder of Defendant Party's [sic], Amended Complaint with Supplemental Claims" which added multiple defendants including Eberle and Ferrand. Appellants' Appendix Volume 8 at 46. Plaintiffs raised federal and state law claims and asserted that certain allegations were found to be unsubstantiated. With respect to Eberle, the complaint alleged she was

> a private citizen using the Defendant Department as a vehicle to annoy, harass, and retaliate against and invade the privacy of Plaintiffs, and infringe upon Plaintiffs [sic] constitutional rights, by acting by agreement and in concert with malicious intent, under color of state law. Inclusive of perjury, subornation or perjury, extrinsic fraud upon a court, manufacturing false evidence intent to cause and while conspiring to cause malicious

[1] Before the filing of the second amended complaint, counsel filed a notice of appearance for Givens, B.K., M.G., and S.G.

> prosecution. [She] acted both in concert and independently, with private parties and state defendants.

Id. at 50-51. The complaint made similar allegations against Ferrand. Under the heading "Cause of Action," Plaintiffs referenced Eberle and Ferrand under Count VIII, false reporting; Ferrand under Count XV, "defamation per se"; and Eberle under Count XVIII, "defamation per se." *Id.* at 87, 99-100 (capitalization omitted).[2]

[4] On August 12, 2019, Ferrand filed a motion for summary judgment and asserted that her statements were privileged under Indiana law and did not give rise to a cause of action. On September 11, 2019, Plaintiffs filed a response to Ferrand's motion.

[5] On February 25, 2021, Plaintiffs filed a motion for summary judgment against Eberle. On March 26, 2021, Eberle filed a response in opposition to the motion for summary judgment and a cross-motion for summary judgment. On April 2, 2021, Plaintiffs filed an answer to Eberle's response and motion.

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[2] The complaint referred to "Defendants" generally under a number of other counts including: Count I, "Section 1983"; Count II, "18 U.S. Code § 241 Conspiracy against Rights"; Count III, "Conspiracy and Series of Interlocking Conspiracies"; Count IV, "Violation of Civil Rights Pursuant to Title 42 U.S.C. §§ 1983 (Failure to Implement Appropriate Policies, Customs and Practices)"; Count IX, "False Arrest and Imprisonment," Count X, "Intentional Infliction of Emotional Distress"; and Count XI, "False Light." Appellants' Appendix Volume 8 at 87-90, 96 (capitalization omitted). With respect to Count II, "18 U.S. Code § 241 Conspiracy against Rights," the complaint asserted that "18 U.S.C. § 241, does not exempt any state or private party from civil liability damages for acting as a part and joining into a conspiracy to violate civil rights, and federal prosecution is not the exclusive remedy." *Id.* at 88. Under Count III, "Conspiracy and Series of Interlocking Conspiracies," the complaint asserted that "state Defendants agreed upon, acted in concert therewith and with private individuals . . . ." *Id.* at 89 (capitalization omitted).

[6] On May 7, 2021, the court denied Plaintiffs' motion for summary judgment against Eberle, granted Eberle's motion for summary judgment, specified there was no just reason for delaying entry of judgment, and entered a final appealable judgment. The court also entered an order granting Ferrand's motion for summary judgment, found there was no just reason for delaying entry of judgment, and entered judgment in her favor as a final appealable judgment.

Discussion

[7] We review an order for summary judgment de novo, applying the same standard as the trial court. *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014). The moving party bears the initial burden of making a *prima facie* showing that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. *Manley v. Sherer*, 992 N.E.2d 670, 673 (Ind. 2013). Summary judgment is improper if the moving party fails to carry its burden, but if it succeeds, then the nonmoving party must come forward with evidence establishing the existence of a genuine issue of material fact. *Id.* We construe all factual inferences in favor of the nonmoving party and resolve all doubts as to the existence of a material issue against the moving party. *Id.* The review of summary judgment is limited to the materials designated to the trial court. *Siwinski v. Town of Ogden Dunes*, 949 N.E.2d 825, 827 (Ind. 2011). In reviewing a trial court's ruling on a motion for summary judgment, we may affirm on any grounds supported by the Indiana Trial Rule 56 materials. *Catt v. Bd. of Comm'rs of Knox Cty.*, 779 N.E.2d 1, 3 (Ind. 2002). The fact that the parties make cross-

motions for summary judgment does not alter our standard of review. *Huntington v. Riggs*, 862 N.E.2d 1263, 1266 (Ind. Ct. App. 2007), *trans. denied*.

[8] We first address Plaintiffs' procedural argument that the trial court failed to designate the issues or claims upon which it found no genuine issue as to any material facts. Ind. Trial Rule 56(C) provides in part:

> A summary judgment upon less than all the issues involved in a claim or with respect to less than all the claims or parties shall be interlocutory unless the court in writing expressly determines that there is no just reason for delay and in writing expressly directs entry of judgment as to less than all the issues, claims or parties. The court shall designate the issues or claims upon which it finds no genuine issue as to any material facts.

[9] We have previously determined the requirement that the trial court designate the issues or claims upon which it finds no genuine issue as to any material facts is triggered only when the trial court grants summary judgment on less than all of the issues. *See Shepherd v. Truex*, 819 N.E.2d 457, 462 (Ind. Ct. App. 2004) (citing *Wolfe v. Stork RMS-Protecon, Inc.*, 683 N.E.2d 264, 267 (Ind. Ct. App. 1997)). Otherwise, Trial Rule 56 imposes no obligation upon the trial court to specifically state the legal basis for granting summary judgment. *Id.* *See also Richardson v. Citizens Gas & Coke Util.*, 422 N.E.2d 704, 713 (Ind. Ct. App. 1981) ("[W]here a trial court disposes of all issues and claims in a case by entering summary judgment in favor of one of the parties, the court is not obligated to make findings of fact and conclusions of law on such issues and claims upon which the summary judgment was granted."). We cannot say that

the trial court's orders granting summary judgment to Ferrand and Eberle constituted entry of partial summary judgment with respect to them or that the trial court was required to designate the issues or claims upon which it found no genuine issue as to any material facts.

[10] Turning to Plaintiffs' other arguments, we note that their initial brief does not mention many of the counts included in their initial complaint including allegations under 18 U.S. Code § 241 or conspiracy against rights, false arrest, false imprisonment, emotional distress, or false light. To the extent they mention § 1983, false reporting, or conspiracy, Plaintiffs do not present or develop a cogent argument and accordingly we find waiver as to those issues.

[11] To the extent Plaintiffs develop an argument regarding defamation, we note that "[a] defamatory communication is one that 'tend[s] to harm a person's reputation by lowering the person in the community's estimation or deterring third persons from dealing or associating with the person.'" *Kelley v. Tanoos*, 865 N.E.2d 593, 596 (Ind. 2007) (quoting *Rambo v. Cohen*, 587 N.E.2d 140, 145 (Ind. Ct. App. 1992), *reh'g denied*, *trans. denied*). A communication is defamatory *per se* if it imputes: (1) criminal conduct; (2) a loathsome disease; (3) misconduct in a person's trade, profession, office, or occupation; or (4) sexual misconduct. *Id.* All other defamatory communications are defamatory *per quod*. To maintain an action for either *per se* or *per quod* defamation the plaintiff must demonstrate (1) a communication with defamatory imputation; (2) malice; (3) publication; and (4) damages. *Id.* at 596-597. "Whether a communication is defamatory or not is a question of law for the court, unless

the communication is susceptible to either a defamatory or nondefamatory interpretation – in which case the matter may be submitted to the jury." *Id.* at 596.

[12] Indiana courts have recognized "what section 598 of the Restatement (Second) of Torts (1977) calls a 'public interest privilege.'"[3] *Id.* at 599. "This so-called public interest privilege is intended to encourage private individuals to assist law enforcement with investigating and apprehending criminals." *Id.* at 600. "[T]he public interest privilege, under a limited number of circumstances, protects communications to private citizens." *Id.* Statements reporting criminal activity to law enforcement are privileged to enhance public safety by facilitating the investigation of suspected criminal activity, and "certain statements to private citizens may further the same end." *Id.*

[13] A communication otherwise protected by a qualified privilege "may lose its protection if it is shown that: '(1) the communicator was primarily motivated by ill will in making the statement; (2) there was excessive publication of the

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[3] Section 598 of the Restatement provides:

> § 598. Communication to One Who May Act in the Public Interest
>
> An occasion makes a publication conditionally privileged if the circumstances induce a correct or reasonable belief that
>
> > (a) there is information that affects a sufficiently important public interest, and
> >
> > (b) the public interest requires the communication of the defamatory matter to a public officer or a private citizen who is authorized or privileged to take action if the defamatory matter is true.

Restatement (Second) of Torts § 598 (1977).

defamatory statements; or (3) the statement was made without belief or grounds for belief in its truth.'" *Id.* at 601 (quoting *Bals v. Verduzco*, 600 N.E.2d 1353, 1356 (Ind. 1992)).[4] "If a communication is found to be qualifiedly privileged, the burden is on the plaintiff to show that the privilege has been abused." *Id.* Unless only one conclusion can be drawn from the evidence, the question of whether the privilege has been abused is for the jury. *Id.*

[14] "A qualified privilege defense to defamation will shield the reporting citizen from liability for a false report unless the speaker has abused the privilege by exceeding 'the scope of the purposes for which the privilege exists.'" *Williams v. Tharp*, 914 N.E.2d 756, 765 (Ind. 2009) (quoting *Elliott v. Roach*, 409 N.E.2d 661, 673 (Ind. Ct. App. 1980) (internal quotation marks omitted)). "Protecting unverified and even speculative reports of suspected wrongdoing to law enforcement is . . . supported by ample reasons of social advantage." *Id.* "It is

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[4] In *Bals*, the Indiana Supreme Court noted:

> By utilizing the "made without belief or grounds for belief" standard for abuse of the qualified privilege, Indiana courts depart from the standard suggested in Restatement (Second) of Torts, § 600, that abuse occurs when one "(a) knows the matter to be false, or (b) acts in reckless disregard as to its truth or falsity." In so doing, we prefer a broader latitude to be given by the qualified privilege.

600 N.E.2d at 1356. In *Williams v. Tharp*, the Indiana Supreme Court held:

> We embrace the "broader latitude" described in *Bals* as to the qualified privilege applicable to communications made to law enforcement, finding that a recklessness standard is ill-suited to this aim. A reckless-disregard state of mind would subject a person reporting criminal conduct to liability not only when the speaker actually knew the statement was false but also when if it could be shown that the speaker should have known the statement was false.

914 N.E.2d 756, 765 (Ind. 2009).

important that citizens not opt for inaction, chilled from communicating with police in all but the most certain of situations." *Id.*

[15] "[T]here is no social advantage to the publication of a deliberate lie." *Id.* (quoting *Weenig v. Wood*, 169 Ind. App. 413, 438, 349 N.E.2d 235, 250 (1976) (internal quotation marks omitted)). "Indeed, a deliberate lie in this context imposes significant costs and plainly exceeds 'the scope of the purposes for which the privilege exists.'" *Id.* at 766 (quoting *Elliott*, 409 N.E.2d at 673). "A citizen who reports wrongdoing to police knowing that the information is faulty fails to earn protection against a later civil action." *Id.* "But merely arguing about what the speaker should have known is insufficient to show that the speaker made a statement 'without belief . . . in its truth.'" *Id.* (quoting *Bals*, 600 N.E.2d at 1356).

[16] The designated evidence reveals that Ferrand stated in her affidavit that she was Kindred's niece, he molested her multiple times in either late 1983 or early 1984 when she was fourteen years old, and she wrote a letter to him in 1991 advising him that she had "full recollection of his sexual molestation," telling him that she hated him, and questioning why he would do such a thing to her. Appellants' Appendix Volume 3 at 10. She asserted she made statements about what had happened to her therapist and psychiatrist while in treatment and did not make any statements to any other individual until March 22, 2018, when she was contacted by Charlotte Church of the Owen County Office of Family and Children, who inquired about what had happened and asked her to make a statement to law enforcement. She asserted that she made a statement

reporting the circumstances of what happened to a detective or law enforcement official shortly after March 22, 2018. She stated: "Other than writing the letter to James Kindred, I have not sought any retribution or conspired with any other individual, enterprise, or agency to punish him." *Id.* at 11. She also stated: "While I do hate Mr. Kindred for what he did, I have not taken any steps to punish him in any fashion, and the truthful statements that I made to the OFC and to law enforcement were not motivated by my ill will toward him, nor any desire for retribution against him." *Id.*

[17] In response to Ferrand's motion for summary judgment, Plaintiffs designated an affidavit of Givens in which she asserted that Ferrand made verbal accusations following a funeral in November 2005 that Kindred had molested her in 1980, "several private parties were present and listening," Ferrand's brother and mother were present, and two "other male parties who chose to remain in a vehicle" were present. Appellants' Appendix Volume 2 at 213-214. Plaintiffs also designated an affidavit of Susan Barnett who stated she and her husband were at a crowded restaurant in the summer of 2018 when Ferrand approached them and proclaimed in a loud voice that Kindred had molested her when she was a child in 1980. She also stated that "[s]everal other people seated in the restaurant heard her diatribe of accusations about [] Kindred." *Id.* at 215. Plaintiffs also designated an affidavit of Kindred in which he asserted that Ferrand accused him of molesting her after his father's funeral in November 2005 and that her "tirade took place in front of several other

people." *Id.* at 216. He also asserted that he "never once touched [Ferrand] – inappropriately or otherwise." *Id.* at 217.

[18] As for Ferrand's statements made to Church or law enforcement, we conclude the statements were made pursuant to the qualified privilege. The designated evidence reveals that Ferrand asserted that her true statements were not motivated by any ill will toward Kindred. Ferrand's statements to Church and law enforcement occurred only after she was contacted by Church regarding Kindred and approximately thirty-four years after the alleged molestation. We also note that Plaintiffs' October 26, 2018 complaint asserted that "Ferrand may, or may not know her allegations are false due to mental aberrations and subsequent treatments occurring since the year 1988." Appellants' Appendix Volume 8 at 77. We conclude that Plaintiffs have not raised an issue of fact regarding whether the qualified privilege was abused. As for Ferrand's statements to others, there is no issue of material fact regarding whether the statements were made with malice. The trial court properly entered summary judgment in favor of Ferrand.

[19] With respect to Eberle, Plaintiffs designated an affidavit of Zachary Kindred who asserted he was Eberle's brother, lived with Eberle at Kindred's home during the weekdays from late 2003 through mid-2008, he was usually around his sister almost all the time and never saw Kindred "touch [her] inappropriately," Kindred "certainly never sexually abused her to my knowledge," and "[t]hose statements of [Eberle] are false." Appellants' Appendix Volume 10 at 94. They also designated the affidavit of Tyler Kindred

who asserted he was Eberle's brother, he lived with her at Kindred's residence during the weekdays from late 2003 through mid-2008, he never saw Kindred touch Eberle inappropriately, and Kindred "certainly never sexually abused her to [his] knowledge." *Id.* at 96. The record contains a redacted version of Kindred's affidavit. In his affidavit, Kindred asserted in part that he "was made aware" in December 2009 and January 2010 "that [redacted] had made allegations to [DCS] and a Detective with the Bloomington Police Department" that he had sexually and physically abused her. *Id.* at 98. He asserted he was informed in January 2010 by DCS and its counsel that "the allegations made by [redacted] (Kindred) had been determined to be false." *Id.* He also asserted that he had read the statement "given by [redacted] (Kindred) to Charlotte Church on May 30, 2018, and in that statement she repeats the same facts alleged, investigated, dismissed and ordered expunged in the year 2010." *Id.* at 99.

[20] Eberle designated her own affidavit in which she asserted that Kindred is her uncle, he was married to her mother for a period of time when she was a minor, Kindred regularly touched her in sexually inappropriate ways, DCS agents contacted her after her mother divorced Kindred, she informed DCS of the inappropriate sexual contact, and the allegations she made relative to Kindred were true.

[21] Plaintiffs do not point to any designated evidence suggesting that Eberle made any statements outside the context of discussions with DCS. We conclude that the qualified privilege is applicable to Eberle's statements.

[22] For the foregoing reasons, we affirm the trial court's grant of the motions for summary judgment filed by Ferrand and Eberle.

[23] Affirmed.

Riley, J., and Mathias, J., concur.