MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

John Lake and Mary Lake,
Appellants-Plaintiffs,

v.

City of Michigan City, Indiana,
Appellee-Defendant

August 8, 2022

Court of Appeals Case No. 22A-CT-786

Appeal from the Starke Circuit Court

The Honorable Kim Hall, Judge

Trial Court Cause No. 75C01-2110-CT-25

Vaidik, Judge.

Case Summary

[1] John Lake, the prosecutor of LaPorte County, and Mary Lake, an attorney in LaPorte County, sued the City of Michigan City ("the City") for defamation. The Lakes alleged that in 2019, Ronald Meer, then-mayor of the City, issued an official statement that contained statements defaming them and that the City is liable for the statements since Meer made them in his capacity of mayor. The City moved to dismiss the lawsuit under Indiana Trial Rule 12(B)(6), and the trial court granted the motion. We reverse and remand.

Facts and Procedural History

[2] In reviewing the dismissal of this case under Trial Rule 12(B)(6), we take the facts alleged in the complaint as true and construe them in the light most favorable to the Lakes. From 2012 to 2019, Meer was the mayor of the City, which is in LaPorte County. Meer's stepson is Adam Bray. On October 10, 2019, members of the LaPorte County Drug Task Force arrested Bray on felony drug and gun charges (Bray later pled guilty and was sentenced to prison). Four days later, on October 14, Meer issued the following statement (hereinafter referred to as his "official statement"), which was "aired by 95.1FM/AM 1420 WIMS":

> Good afternoon the following is my official statement in regards to the recent arrest of my son Adam Bray.
>
> If my son was involved in something, it will be handled through the court system. Our family is disappointed that this is

> occurring. It is important to point out that my family loves our adult son Adam very much. However, I must add that it is a very dangerous time in La[P]orte County when the prosecutor, John Lake can have your family members targeted for political retaliation and gain.
>
> It was brought to my attention by a confidential informant that he was directed by the LaPorte County prosecutor's office and a member of the drug task force to target my son. It is no coincidence this is occurring just a couple of weeks before the election.
>
> It is also no coincidence that the confidential informant was driving the vehicle that was pulled over and he was not charged with anything.
>
> There has also been false reports made on this case to the prosecutor's office and the task force from one of John and Mary Lake's known political allies. This retaliation against my family by prosecutor John Lake must cease immediately! The office of the prosecutor should not be used for personal agendas and political gain. John Lake's bias towards me and my family has been demonstrated repeatedly.
>
> This is my official statement on this matter.
>
> Thank you Mayor Meer

Appellants' App. Vol. II pp. 10, 16. The next day, the "News Dispatch" published Meer's official statement. *Id.* at 11. It was also "distributed by" The Times of Northwest Indiana and the South Bend Tribune. *Id.* at 12. The

Indiana State Police investigated Meer, and he was charged with crimes in connection with his official statement.[1] *Id.*

[3] The Lakes gave notice under the Indiana Tort Claims Act and in October 2021 sued the City for defamation. The Lakes also sued Meer personally for defamation and intentional infliction of emotional distress but later moved to voluntarily dismiss him without prejudice because he filed for bankruptcy. *See* Appellants' Br. p. 5.[2] The Lakes alleged Meer's official statement was "made in the course and scope of his position as Mayor of Michigan City, Indiana" and that the City "was responsible for [Meer's] tortious statements" contained in the official statement because he made them "in his capacity as mayor of the city." Appellants' App. Vol. II p. 13.

[4] The City moved to dismiss the complaint under Trial Rule 12(B)(6), and the trial court granted the motion.

[5] The Lakes now appeal.

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[1] Meer was charged with eight crimes: six felonies (intimidation and official misconduct) and two misdemeanors (false informing). These charges are pending, with a jury trial currently scheduled for August 30, 2022. *See* Cause No. 46D04-1910-F6-1475.

[2] Although the Lakes moved to dismiss Meer because he filed for bankruptcy, we note that the Tort Claims Act provides, "A lawsuit alleging that an employee acted within the scope of the employee's employment bars an action by the claimant against the employee personally." Ind. Code § 34-13-3-5(b). It thus appears Meer cannot be sued personally since the allegations against the City are that Meer acted within the scope of his employment.

Discussion and Decision

[6] The Lakes argue the trial court erred by granting the City's motion to dismiss. A civil action may be dismissed under Trial Rule 12(B)(6) for "failure to state a claim upon which relief can be granted." A 12(B)(6) motion "tests the legal sufficiency of the plaintiff's claim, not the facts supporting it." *Residences at Ivy Quad Unit Owners Ass'n, Inc. v. Ivy Quad Dev., LLC*, 179 N.E.3d 977, 981 (Ind. 2022) (quotation omitted). To overcome a 12(B)(6) motion, the complaint must allege facts that demonstrate the "possibility of relief." *Id.* at 980. We review a 12(B)(6) dismissal de novo. *Id.* at 981. We take the facts alleged in the complaint as true, consider all complaint allegations in the light most favorable to the nonmoving party, and draw every reasonable inference in that party's favor. *Id.*

[7] To begin with, the parties dispute whether the Indiana Tort Claims Act (ITCA) applies to this case. The Lakes argue the ITCA applies and that Meer is an employee of the City under the ITCA. The City argues the ITCA doesn't apply and that Meer isn't an employee of the City under common law. We agree with the Lakes.

[8] The ITCA governs tort claims against political subdivisions and their employees. *Burton v. Benner*, 140 N.E.3d 848, 852 (Ind. 2020); *Chariton v. City of Hammond*, 146 N.E.3d 927, 931 (Ind. Ct. App. 2020), *trans. denied*; Ind. Code § 34-13-3-1. "[The ITCA] allows suits against governmental entities for torts committed by their employees but grants immunity under the specific

circumstances enumerated in Indiana Code section 34-13-3-3." *Mangold ex rel. Mangold v. Ind. Dep't of Nat. Res.*, 756 N.E.2d 970, 975 (Ind. 2001); *see also* I.C. § 34-13-3-3 (providing that "a governmental entity or an employee acting within the scope of the employee's employment is not liable if a loss results" from certain enumerated conditions and acts). Under the ITCA, an "employee" is "a person presently or formerly acting on behalf of a governmental entity, whether temporarily or permanently or with or without compensation, including . . . **elected public officials**." I.C. § 34-6-2-38(a) (emphasis added).

[9] Here, the Lakes sued the City—a political subdivision, *see* I.C. § 34-6-2-110—for a tort (defamation) allegedly committed by Meer when he was mayor of the City. The ITCA governs this tort claim. And under the ITCA, Meer, an elected public official, is an employee. *See Davidson v. Perron*, 716 N.E.2d 29 (Ind. Ct. App. 1999) (finding that a defamation claim against the mayor and City of Elkhart was governed by the ITCA), *trans. denied*.[3]

[10] The City next argues that even if Meer is an employee under the ITCA, the trial court properly granted its motion to dismiss because "Meer was acting outside the scope of employment at the time the alleged defamatory statements were made." Appellee's Br. p. 18. Under the doctrine of respondeat superior, an employee's act or omission falls within the scope of employment if the injurious behavior is incidental to authorized conduct or furthers the employer's business

[3] The City claims Meer was not an employee of the City under *Lake County v. State ex rel. Manich*, 631 N.E.2d 529 (Ind. Ct. App. 1994), *reh'g denied*. But that case doesn't apply because it doesn't deal with the ITCA.

to an appreciable extent. *Burton*, 140 N.E.3d at 852. "Conversely, an employee's act is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer." *Id.* (quotation omitted). "But an employee's wrongful act may still fall within the scope of his employment if his purpose was, to an appreciable extent, to further his employer's business, even if the act was predominantly motivated by an intention to benefit the employee himself." *Id.* (quotation omitted).

[11] Generally, "whether an employee's actions were within the scope of employment is a question of fact to be determined by the factfinder." *Id.* (quotation omitted). "When the facts are undisputed and would not allow a jury to find that the tortious acts were within the scope of employment, however, a court may conclude as a matter of law that the acts were not in the scope of employment." *Id.* (quotation omitted).

[12] Given the procedural posture of this case, we take the facts alleged in the complaint as true, consider all complaint allegations in the light most favorable to the Lakes, and draw every reasonable inference in their favor. And according to these facts, Meer, the mayor of the City, released a statement to news outlets. Meer called the statement "[his] official statement" and signed it "Mayor Meer." Contrary to the City's claim, these facts are sufficient to allege that Meer acted within the scope of his employment such that the Lakes could be entitled to relief. Thus, dismissal under 12(B)(6) is not appropriate on this basis.

[13] The City next argues that even if the Lakes "sufficiently alleged that Meer . . . was acting within the scope of his employment such that the Lakes could be entitled to relief," the trial court properly granted its motion to dismiss because "the Lakes fail to state a claim of defamation." Appellee's Br. p. 22. "A defamatory communication is one that tends 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) (quotation omitted). A defamatory communication is either defamatory per se or defamatory per quod. 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. *Id.*

[14] To establish a claim of either per se or per quod defamation, the plaintiff must prove these elements: (1) a communication with defamatory imputation, (2) malice, (3) publication, and (4) damages. *Id.* at 596-97. Generally, the determination of whether a statement is defamatory is a question of law for the court. *Id.* at 596. "However, the question of whether a communication is defamatory becomes a question of fact for the jury if the communication is reasonably susceptible of either defamatory or non-defamatory interpretation." *Davidson*, 716 N.E.2d at 37; *see also Kelley*, 865 N.E.2d at 596.

[15] The City argues the allegations in Meer's official statement are non-defamatory as a matter of law, thereby warranting dismissal of the case. We disagree. In addressing this issue, we find *Davidson* helpful. There, James Perron, the mayor

of the City of Elkhart, wrote a letter about Elkhart Police Department Officer Bruce Davidson that appeared in an Elkhart newspaper (the letter was purportedly written by another officer, but the mayor later admitted writing it). The letter provided, in relevant part:

> Davidson's assertion that "Mayor Perron has been too soft on crime and a little too hard on cops" is laughable. **In reality, some cops like Davidson have been a little too soft on crime and too hard on Mayor Perron.**
>
> **Police certainly have privileges but I do not believe that they should be abused in the way that some officers like Davidson have done.** The so-called vote of no confidence amounted to only a cheap shot against the chief.

Davidson, 716 N.E.2d at 32 (emphases added). Officer Davidson sued the mayor and the city for defamation. The mayor and the city moved to dismiss under Trial Rule 12(B)(6), alleging the statements emphasized above were non-defamatory as a matter of law. The trial court granted the motion to dismiss as to the first statement that Officer Davidson was "soft on crime" but denied it as to the second statement that Officer Davidson had abused the privileges given to police officers. The mayor and the city appealed the denial as to the second statement. We affirmed:

> The communication at issue is the statement that "[p]olice certainly have privileges, but I do not believe that they should be abused in the way that some officers like Davidson have done." Considering the statement in context, and according to the idea

> the statement was calculated to convey to the public, we cannot say, as a matter of law, that the statement is not defamatory. A reasonable trier of fact could conclude the statement amounted to a charge of official misconduct against Davidson purportedly written by a fellow officer imputing to the reader that Davidson has abused his privileges as a police officer. This is no minor charge against a police officer. Under the circumstances, a question of fact exists on the issue of whether the communication here was defamatory.
>
> We disagree with the Mayor and the City that the trial court should have concluded that the statement constituted opinion as a matter of law. Indeed, whether the statement expresses an "opinion" is not dispositive. Instead, the question is whether a reasonable fact finder could conclude that the statement implies facts which may be proven true or false. Notwithstanding the statement's publication in the editorial section or what may be considered the "opinion" section of the newspaper, the statement at issue implies verifiable facts regarding Davidson's conduct and performance as a police officer. A reasonable fact finder could infer that there was a factual predicate to the statement as to Davidson's abuse of his privileges and that those who read the article understood the statement to be grounded in fact.

Id. at 37 (cleaned up).

[16] Here, Meer's official statement contains the following allegations: (1) Meer learned from a confidential informant that John Lake colluded with the LaPorte County Drug Task Force to have his son arrested; (2) the arrest was made because allies of John and Mary Lake lied to the prosecutor's office and drug task force; (3) the election was coming up and the prosecutor's office should not be used for personal agendas and political gain; and (4) the

retaliation against Meer and his family must stop. *See* Appellants' Reply Br. p. 8. As in *Davidson*, we cannot say, as a matter of law, that these statements are non-defamatory. A reasonable trier of fact could conclude they amount to charges of misconduct against John Lake, the prosecutor, and Mary Lake, an attorney. A reasonable trier of fact could also infer they imply facts that may be proven true or false and that there is a factual predicate to them. Under these circumstances, a question of fact exists as to whether the statements are defamatory.

[17] As we said in *Davidson*, we express no opinion on the merits and acknowledge that after the facts have been more fully developed, the Lakes' claim may not survive a motion for summary judgment. *Davidson*, 716 N.E.2d at 38. But at this point, we cannot say the complaint is insufficient as a matter of law.

[18] Reversed and remanded.

Crone, J., and Altice, J., concur.