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IN THE
COURT OF APPEALS OF INDIANA

Paul C. Burris III,
Appellant-Defendant,

v.

Bottoms Up Scuba – Indy, LLC,
Michael Ellis, and Renata Ellis,
Appellee-Petitioners.

December 21, 2021

Court of Appeals Case No.
21A-CT-570

Appeal from the Montgomery
Superior Court

The Honorable Daniel G. Petrie,
Judge

Trial Court Cause No. 54D02-
1905-CT-561

Pyle, Judge.

Statement of the Case

- [1] In this interlocutory appeal, Paul C. Burris, III (“Burris”) appeals the trial court’s order denying his motion to dismiss the complaint filed against him by Bottoms Up Scuba Indy, LLC (“Bottoms Up”), Michael Ellis (“Ellis”), and

Renata Ellis (“Renata”) (collectively, “the Bottoms Up Plaintiffs”).¹ Burris argues that the trial court erred by denying his motion to dismiss, which had alleged that the Bottoms Up Plaintiffs’ lawsuit against him violated the anti-SLAPP (strategic lawsuit against public participation) statute. Concluding that the trial court did not err, we affirm the trial court’s interlocutory order.

[2] We affirm.

Issue

Whether the trial court erred by denying Burris’ motion to dismiss.

Facts

[3] Bottoms Up is a scuba diving company with its principal office in Bargersville, Indiana. Ellis and his wife, Renata, are the owners of Bottoms Up, and they, along with Bottoms Up, were certified by the Professional Association of Diving Instructors (“PADI”). Ellis and Renata were certified “to instruct[,] for a fee, students interested in obtaining scuba diving certifications for both open water and [as] instructor[s].” (App. Vol. 2 at 103). Burris was a scuba student at Bottoms Up. In 2016, Burris completed the required scuba coursework at a facility where Ellis was also present, and Burris received his PADI membership and diving instructor’s certification.

¹ The Bottoms Up Plaintiffs also filed their complaint against Jennifer Downey (“Downey”), but she did not file a motion to dismiss and is not participating in this appeal.

[4] In 2018, Burris apparently learned from the husband of a fellow diving instructor that Ellis had been forging paperwork that was submitted to PADI.² Burris phoned PADI to obtain a copy of his own certification paperwork that had been sent to PADI on his behalf. Burris' PADI paperwork contained the name and business information for a physician whom Burris had not seen, and the paperwork showed that this physician had signed the paperwork to indicate that Burris had been cleared for diving. Burris believed that the handwriting looked like Ellis' handwriting. "[C]oncerned that [he] would lose [his] instructor certification when th[e] forgery was discovered, . . . [Burris] called PADI and notified them that [his] paperwork had been forged, that [he] had not had a physical, and that [he] had not been examined" by the physician listed on the form. (App. Vol. 2 at 37). Burris also contacted PADI via email, in which Burris accused Ellis of forging the physician's signature that had indicated that Burris had obtained the appropriate health clearance.

[5] In December 2018 and January 2019, PADI expelled Ellis, Renata, and Bottoms Up from the organization's membership. Thereafter, in May 2019, the Bottoms Up Plaintiffs filed a complaint against Burris. The Bottoms Up Plaintiffs filed amended complaints in December 2019 and July 2020. The Bottoms Up Plaintiffs raised claims of defamation, tortious interference with a business relationship, and tortious interference with a contract.

² The fellow diving instructor was Downey. She also contacted PADI to accuse Ellis of forging the physician's signature on her paperwork.

[6] In February 2020, Burris filed a motion to dismiss pursuant to the anti-SLAPP statute, INDIANA CODE § 34-7-7-5.³ Specifically, Burris argued that because any of his “allegedly defamatory or tortious statements were made in furtherance of [his] right of free speech in connection with a public issue, the statements were protected speech and [the Bottoms Up] Plaintiffs’ claims against [him] [we]re barred by Indiana’s Anti-SLAPP statute.” (App. Vol. 2 at 21). Burris also argued that his statements to PADI were made in good faith and with a reasonable basis in law and fact.

[7] As the anti-SLAPP statute requires that an anti-SLAPP motion to dismiss be treated as a motion for summary judgment,⁴ Burris attached designated evidence to his motion to dismiss. Specifically, Burris attached an affidavit from himself and from PADI employee Johnny Wetzstein (“Wetzstein”). In Burris’ affidavit, he averred that he had contacted PADI to tell them that Ellis had forged the physician’s signature on his form because he had been concerned about losing his instructor certification and because he had believed that “Ellis’s forgeries of [the] doctor’s confirmations of an applicant’s physical fitness for diving was a public safety issue and could be a matter of life and death.” (App. Vol. 2 at 38). As part of Burris’ affidavit, he attached an email from a PADI employee, and that email indicated the physician’s signature on Burris’ form

³ Burris also filed a motion to dismiss pursuant to Indiana Trial Rule 12(B)(6), but the order on that motion is not part of this interlocutory appeal.

⁴ See I.C. § 34-7-7-9(a)(1).

had been forged.⁵ In Wetzstein’s affidavit, he confirmed that the physician listed on Burris’ PADI medical history form could not be located. Wetzstein also averred that PADI had determined that Ellis had made false statements to PADI about his own medical history form and the forms of his wife and sons. Wetzstein’s affidavit also generally asserted that a forgery on PADI paperwork could “raise a public safety concern.” (App. Vol. 2 at 47).

[8] In the Bottoms Up Plaintiffs’ response to Burris’ anti-SLAPP motion to dismiss, they argued that Burris’ action of falsely telling PADI that Ellis had forged documents submitted to PADI was not protected under the anti-SLAPP statute. The Bottoms Up Plaintiffs asserted that Burris could not meet his burden, under the summary judgment standard applicable to an anti-SLAPP motion to dismiss, of showing that his statements to PADI were in furtherance of the constitutional right to free speech, were in connection with a public issue, or were made in good faith with a reasonable basis in law and fact. The Bottoms Up Plaintiffs also attached designated evidence, including an affidavit from Ellis in which he averred that he had not forged the physician’s signature on the PADI paperwork. Their designated evidence also included affidavits from Renata and three other individuals who had received diving instruction at Bottoms Up, all of whom averred that Ellis had not signed the physician’s

⁵ Contrary to Burris’ assertion, the email did not state that Ellis had been the person who had forged the physician’s signature.

signature on their form and that, instead, they had had their own physician sign the form.

[9] In January 2021, shortly before the hearing on Burris' motion, Burris filed a notice of additional support for his anti-SLAPP motion to dismiss. He attached documents that he had obtained after filing his motion to dismiss in February 2020. Specifically, he attached an October 2020 letter from Scuba Diving International and a December 2020 wrongful death complaint filed by an unrelated party against Bottoms Up and other entities. Burris asserted that these documents showed that his act of telling PADI that he believed that Ellis had forged documents submitted to PADI involved a safety issue and constituted a public safety concern.

[10] The trial court held a hearing in January 2021. During the hearing, Burris argued that he had "a free speech right to contact PADI . . . about his own application" and to tell PADI that there had been a forgery on his application. (Tr. Vol. 2 at 6). Burris also argued that his action was "in connection with a public issue" of "diver safety[.]" (Tr. Vol. 2 at 7). The Bottoms Up Plaintiffs argued that this case was not the type of case that the anti-SLAPP statute was intended to stop. Specifically, they argued that "this is not a lawsuit aimed at chilling Mr. Burris's first amendment rights." (Tr. Vol. 2 at 11). The Bottoms Up Plaintiffs also argued that Burris' actions were not in furtherance of his First Amendment right to free speech and that Burris' accusation of forgery was not in connection with a public issue.

[11] Thereafter, the trial court issued an order denying Burris' anti-SLAPP motion to dismiss. The trial court determined that the "[c]ontrolling case on the issue" was *Gresk v. Demetris*, 96 N.E.3d 564 (Ind. 2018) and concluded that Burris had failed to meet the first of the two requirements applicable for showing that the anti-SLAPP statute applied to him. (App. Vol. 2 at 13). Specifically, the trial court concluded that Burris had "not ma[d]e the statement in furtherance of his right to free speech" and that his statement to PADI was "[n]ot [a] matter of public concern because the issue was privately reported to an organization and was not brought to the attention of the general public" and was instead "made to address a private grievance." (App. Vol. 2 at 13).

[12] Burris then filed a motion requesting the trial court to certify its order denying his anti-SLAPP motion to dismiss, and the trial court granted Burris' motion to certify. Burris sought permission to file this interlocutory appeal, and this Court granted his request. Burris now appeals the denial of his anti-SLAPP motion to dismiss.

Decision

[13] Before we address Burris' argument, we note that the Bottoms Up Plaintiffs did not file an Appellees' brief. When an appellee fails to submit an appellate brief, "we need not undertake the burden of developing an argument on the [A]ppellee's behalf." *Front Row Motors, LLC v. Jones*, 5 N.E.3d 753, 758 (Ind. 2014) (quoting *Trinity Homes, LLC v. Fang*, 848 N.E.2d 1065, 1068 (Ind. 2006)). Rather, "we will reverse the trial court's judgment if the appellant's brief

presents a case of prima facie error.’” *Front Row Motors*, 5 N.E.3d at 758 (quoting *Trinity Homes*, 848 N.E.2d at 1068). “Prima facie error in this context is defined as, at first sight, on first appearance, or on the face of it.” *Front Row Motors*, 5 N.E.3d at 758 (internal quotation marks and citation omitted).

[14] Burris argues that the trial court erred by denying his anti-SLAPP motion to dismiss. Specifically, he contends that “the trial court should have granted [his] [m]otion when he showed [that] his report to PADI was a lawful act in furtherance of his free speech right, related to a public issue, made in good faith, and reasonably based in law and fact.” (Burris’ Br. 10). We disagree.

[15] SLAPP lawsuits are “retaliatory” lawsuits in which the “defining goal” is “not to win, but to silence [the] opposition with delay, expense[,] and distraction.” *Gresk*, 96 N.E.3d at 568. “SLAPPs can be difficult to identify.” *Id.* at 569. “If the lawsuit stems from a legitimate legal wrong, it is not a SLAPP[,] . . . [b]ut, if the lawsuit is filed for an ulterior political end, it is a SLAPP.” *Id.* at 568.

[16] “Anti-SLAPP statutes establish key procedural tools to safeguard First Amendment rights[,]” and “[a]n integral component of these statutes is balancing a plaintiff’s right to have his or her day in court and a defendant’s free speech and petition rights, while simultaneously providing a framework to distinguish between frivolous and meritorious cases.” *Id.* Our Indiana Supreme Court has explained that “[p]ublic participation is fundamental to self-government, and thus protected by the Indiana and United States Constitutions[;]” thus, “[w]hen citizens are faced with meritless retaliatory

lawsuits designed to chill their constitutional rights of . . . free speech, . . . Indiana’s anti-SLAPP statute provides a defense.” *Id.* at 566.

[17] Indiana’s anti-SLAPP statute, INDIANA CODE § 34-7-7-5, provides as follows:

It is a defense in a civil action against a person that the act or omission complained of is:

- (1) an act or omission of that person in furtherance of the person’s right of petition or free speech under the Constitution of the United States or the Constitution of the State of Indiana in connection with a public issue; and
- (2) an act or omission taken in good faith and with a reasonable basis in law and fact.

A person who files a motion to dismiss under the anti-SLAPP statute “must state with specificity the public issue or issue of public interest that prompted the act in furtherance of the person’s right of petition or free speech under the Constitution of the United States or the Constitution of the State of Indiana.” I.C. § 34-7-7-9(b). Where a person files a motion to dismiss under the anti-SLAPP statute, courts shall treat the motion as a summary judgment motion. I.C. § 34-7-7-9(a)(1).

[18] Our standard of review for summary judgment cases is well-settled. When we review a trial court’s grant of a motion for summary judgment, our standard of review is the same as it is for the trial court. *Knighten v. E. Chi. Hous. Auth.*, 45 N.E.3d 788, 791 (Ind. 2015). Summary judgment is appropriate only where the moving party has shown that there is no genuine issue of material fact and that

it is entitled to judgment as a matter of law. *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014). “All factual inferences must be construed in favor of the non-moving party, and all doubts as to the existence of a material issue must be resolved against the moving party.” *Ellis v. City of Martinsville*, 940 N.E.2d 1197, 1201 (Ind. Ct. App. 2011). Summary judgment is a “high bar” for the moving party to clear in Indiana. *Hughley*, 15 N.E.3d at 1004.

[19] When a trial court receives an anti-SLAPP motion to dismiss, it must determine whether the requirements in subsections (1) and (2) of the anti-SLAPP statute are met. Specifically, the trial court must determine, under subsection (1), “whether an action was ‘in furtherance of the person’s right of petition or free speech[,]’” and, “if so, whether the action was ‘in connection with a public issue.’” *Gresk*, 96 N.E.3d at 569 (quoting I.C. § 34-7-7-5(1)). If the party filing the anti-SLAPP motion to dismiss has satisfied both requirements of subsection (1), the trial court then determines, under subsection (2), “whether the action was ‘taken in good faith and with a reasonable basis in law and fact.’” *Gresk*, 96 N.E.3d at 569 (quoting I.C. § 34-7-7-5(2)).

[20] In regard to the first part of subsection (1) of whether an action was in furtherance of the person’s right of petition or free speech, our supreme court has explained that “[t]he First Amendment protects a person’s right to ‘petition the Government for a redress of grievances,’ and prohibits the government from ‘abridging the freedom of speech.’” *Gresk*, 96 N.E.3d at 569 (quoting U.S.

Const. amend. I).⁶ “Persons exercising their right of free speech do so to advance the public exchange of ideas essential to a healthy democracy.” *Gresk*, 96 N.E.3d at 569 (internal quotation marks omitted). “[T]he First Amendment protects the ‘unfettered interchange of ideas for the bringing about of political and social changes desired by the people.’” *Gresk*, 96 N.E.3d at 570 (quoting *Lach v. Lake Cty.*, 621 N.E.2d 357, 358 (Ind. Ct. App. 1993), *trans. denied*).

[21] As for the second part of subsection (1) of whether the action was in connection with a public issue, the *Gresk* Court addressed this requirement and explained that “speech is in connection with a matter of public concern if it is addressed to any matter of political, social, or other concern to the community, as determined by its content, form, and context.” *Gresk*, 96 N.E.3d at 571 (internal quotation marks omitted). The *Gresk* Court specifically rejected a broad interpretation of the term “public issue” in subsection (1) of the anti-SLAPP statute. See *Gresk*, 96 N.E.3d at 571, n.10. Instead, our supreme court directed that “courts should *analyze the narrow statements at issue*, avoiding a sweeping view of what is ‘public.’” *Id.* at 571 (emphasis added).

⁶ We note that INDIANA CODE § 34-7-7-2 provides a circular definition of the phrase “act in furtherance of a person’s right of petition or free speech under the Constitution of the United States or the Constitution of the State of Indiana in connection with a public issue” used in the anti-SLAPP statute. Specifically, the statute defines that phrase as “includ[ing] any conduct in furtherance of the exercise of the constitutional right of: (1) petition; or (2) free speech . . . in connection with a public issue or an issue of public interest.” I.C. § 34-7-7-2 (format altered).

[22] In *Gresk*, the Indiana Supreme Court denied a doctor’s anti-SLAPP motion to dismiss filed in a medical malpractice lawsuit against the doctor. *Id.* Our supreme court rejected the doctor’s argument that her report of suspected medical child abuse to the Department of Child Services was in furtherance of the doctor’s right of petition or free speech and was in connection with a public issue. *Id.* Thus, our supreme court determined that the anti-SLAPP statute was inapplicable. *Id.* The *Gresk* Court determined that the doctor’s report had not been made pursuant to her free speech rights because it was confidential and was the product of a statutory duty, which “belie[d] any purported exchange of ideas[,]” and further because the speech was not in relation to the doctor’s participation in government. *Id.* at 570. The *Gresk* Court recognized that child abuse reporting could be, in certain instances, a matter “of general public interest[,]” but it held that “based on the narrow content, form, and context of th[e] [doctor’s] report—medical child abuse of one child—it was not a matter of public concern.” *See Gresk*, 96 N.E.3d at 571. The Court held that the plaintiffs’ medical malpractice lawsuit was “not the type of lawsuit that the anti-SLAPP statute was enacted to prevent because it was not filed to stifle [the doctor’s] speech on a public issue or an issue of public interest, but to recover damages for alleged medical malpractice.” *Id.* (internal quotation marks omitted).

[23] Here, after reviewing Burris’ anti-SLAPP motion and the evidence designated by the parties, the trial court concluded that Burris had failed to meet his burden of proving subsection (1) of the anti-SLAPP statute. Specifically, the trial court

concluded that Burris' acts of telling PADI about his allegations that Ellis had forged a doctor's signature on Burris' paperwork were not made in furtherance of his right to free speech. The trial court also determined that Burris' statement was "not a matter of public concern" because the documentation issue had been "privately reported to an organization and was not brought to the attention of the general public" and that it was instead "made to address a private grievance." (App. Vol. 2 at 13). We agree with the trial court.

[24] Burris' report to PADI about his own paperwork and his allegation that Ellis may have forged the doctor's signature on Burris' paperwork were not in furtherance of Burris' right of free speech and not in connection with a public issue. Burris statements to PADI, made in a phone call and by email, were not made pursuant to his free speech rights as they did not involve the "unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *See Gresk*, 96 N.E.3d at 570 (internal quotation marks and citation omitted). Furthermore, "based on the narrow content, form, and context" of Burris' report to PADI, which involved a personal grievance about Burris' own paperwork made in a private manner to an organization and not to the general public, his statements were "not a matter of public concern." *See id.* at 571. *Cf. Pack v. Truth Publ'g Co., Inc.*, 122 N.E.3d 958, 965-66 (Ind. Ct. App. 2019) (affirming an order granting a newspaper's anti-SLAPP motion to dismiss a teacher's defamation lawsuit against the newspaper and holding that the content, form, and context of the newspaper's online publication of an article regarding the teacher's federal religious-discrimination lawsuit against a local

public school was in connection with a public issue). Because Burris failed to show that his statements met the requirements under subsection (1) of the anti-SLAPP statute, we need not review subsection (2) of the statute. *See Gresk*, 96 N.E.3d at 569. Because the anti-SLAPP statute is inapplicable to this case, we affirm the trial court's interlocutory order denying Burris' motion to dismiss.

[25] Affirmed.

Bailey, J., and Crone, J., concur.