MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Jeffrey Scott James,
Appellant-Plaintiff,

v.

Karen McGuiness,
Appellee-Defendant.

June 14, 2022

Court of Appeals Case No. 21A-CT-2880

Appeal from the Marion Superior Court

The Honorable Cynthia J. Ayers, Judge

Trial Court Cause No. 49D04-2102-CT-6926

Najam, Judge.

Statement of the Case

[1] Jeffrey Scott James appeals the trial court's dismissal of his amended complaint against Karen McGuiness for failure to state a claim upon which relief can be

granted and the trial court's order granting McGuiness' motion to quash a deposition. James raises two issues for our review:

1. Whether the trial court erred when it dismissed his complaint.

2. Whether the court abused its discretion when it granted McGuiness' motion to quash.

[2] We affirm.

Facts and Procedural History

[3] James was married to McGuiness' daughter, Nicole Smith, until 2008. During the marriage, James and Smith had two children, Luca and Adrianna "Shae" James, both of whom are now adults. For the past fourteen years, James has been in a same-sex relationship.

[4] In August 2021, James filed an amended complaint against McGuiness for defamation *per se*, defamation *per quod*, and intentional infliction of emotional distress. In his complaint, Scott asserted that McGuiness had sent Shae a text message with the following statements: "I will accept your father has turned you into a monster like himself"; "He hates us because we are educated, normal, and respectable"; "We may not have his money but what we have we earned"; and "He wanted to use you as a tool to move to Miami which has a large homosexual population." Appellant's App. Vol. 2 at 27. In addition, James claimed that McGuiness had stated to Luca and other individuals that James was "trying to 'turn' Shae gay," that he was "trying to lure Shae to

Florida to entice her into the gay lifestyle," that James "was disgusting," and that "being gay is disgusting." *Id*. James asserted that he had been "damaged" by McGuiness' statements and that they had subjected him to "severe emotional distress, injury, and anxiety[.]" *Id*. at 28-29. On August 10, James served McGuiness with a "Notice of Taking Deposition" in which he "notified" McGuiness that he would take her deposition on September 9. *Id*. at 50.

[5] Thereafter, McGuiness filed a motion to dismiss James' complaint pursuant to Indiana Trial Rule 12(B)(6). McGuiness asserted that James had failed to state a claim upon which relief could be granted because the "communication on its face does not meet the requirements of maintaining an action under Indiana law for either *per se* or *per quod* defamation." *Id*. at 40. She further asserted that James' complaint for intentional infliction of emotional distress failed to state a claim because her conduct "was not extreme and outrageous" and was "not utterly intolerable in a civilized community." *Id*. at 44. Then, on September 7, McGuiness filed a motion to quash James' notice of deposition. The trial court granted McGuiness' motion to quash the same day.

[6] James filed a motion in which he asked the court to reconsider its order granting McGuiness' motion to quash. James alleged that he sought to "gather information necessary and important to his response to [McGuiness'] motion to dismiss." *Id*. at 53. He further stated that he would be "prejudiced" if the court did not allow him to depose McGuiness prior to the hearing on her motion to dismiss because her deposition is "necessary and important" to his response. *Id*. at 55. The court denied James' motion to reconsider.

[7] On December 7, following a hearing at which the parties presented oral argument, the court entered its findings of fact, conclusions of law, and order dismissing James' amended complaint. The court found that this case "presents discourteous and unkind communications between family members," but that the communications did "not rise to the level of defamation in content or form as a matter of law." *Id*. at 16. The court also found that McGuiness' conduct "was not extreme and outrageous" such that James did not state a claim for intentional infliction of emotional distress. *Id*. at 18. This appeal ensued.

Discussion and Decision

Issue One: Motion to Dismiss

[8] James first appeals the trial court's dismissal of his amended complaint for failure to state a claim upon which relief can be granted. As our Supreme Court has stated:

> A motion to dismiss under Rule 12(B)(6) tests the legal sufficiency of a complaint; that is, whether the allegations in the complaint establish any set of circumstances under which a plaintiff would be entitled to relief. Thus, while we do not test the sufficiency of the facts alleged with regards to their adequacy to provide recovery, we do test their sufficiency with regards to whether or not they have stated some factual scenario in which a legally actionable injury has occurred.
>
> A court should accept as true the facts alleged in the complaint and should not only consider the pleadings in the light most favorable to the plaintiff but also draw every reasonable inference in favor of the nonmoving party.

Trail v. Boys and Girls Club of Northwest Ind., 845 N.E.2d 130, 135 (Ind. 2006) (cleaned up). Our review of a trial court's grant or denial of a Rule 12(B)(6) motion is de novo. *Charter One Mortg. Corp. v. Condra*, 865 N.E.2d 602, 604 (Ind. 2007).[1]

Defamation

[9] James first asserts that the court erred when it dismissed his claims for defamation. "Defamation is that which tends to injure reputation or to diminish esteem, respect, good will, or confidence in the plaintiff, or to excite derogatory feelings or opinions about the plaintiff." *McQueen v. Fayette Cnty. Sch. Corp.*, 711 N.E.2d 62, 65 (Ind. Ct. App. 1999). To recover, the plaintiff must establish the basic elements of defamation: (1) a communication with defamatory imputation, (2) malice, (3) publication, and (4) damages. *Id*. "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." *Kelley v. Tanoos*, 865 N.E.2d 593, 596 (Ind. 2007)

[10] Further,

> [a] defamatory statement is said to either be "defamatory *per se*" or "defamatory *per quod*." A communication is defamatory *per se* if it imputes: (1) criminal conduct; (2) a loathsome disease; (3)

[1] Here, the trial court entered findings of fact and conclusions granting McGuiness' motion to dismiss. But because this is an appeal from the court's ruling on a 12(B)(6) motion, we give no deference to the court's decision. *See Abbott v. Ind. Support Home Health Agency, Inc.*, 148 N.E.3d 1091, 1093 (Ind. Ct. App. 2020).

> misconduct in a person's trade, profession, office, or occupation; or (4) sexual misconduct. All other defamatory communications are defamatory *per quod*.

Id. at 596-97 (citations removed). Here, James claims that McGuiness' communications to Shae and Luca were defamatory *per se* and defamatory *per quod*. We address each argument in turn.

Defamation Per Se

[11] For a statement to be actionable as defamatory *per se*, it must not only carry with it one of the four defamatory imputations—criminal conduct, loathsome disease, misconduct in profession, or sexual misconduct—but it also must

> constitute a serious charge of incapacity or misconduct in words so obviously and naturally harmful that proof of their injurious character can be dispensed with. The offensiveness of the statements cannot be determined by how the plaintiff views the statement; the defamatory nature must be present in the nature of the words without any additional facts or circumstances to give context.

In re Indiana Newspapers, Inc., 963 N.E.2d 534, 549-550 (Ind. Ct. App. 2012)

[12] As stated above, James alleged in his complaint that McGuiness had made the following statements to Shae: "I will accept your father has turned you into a monster like himself"; "He hates us because we are educated, normal, and respectable"; "We may not have his money but what we have we earned"; and "He wanted to use you as a tool to move to Miami which has a large homosexual population." Appellant's App. Vol. 2 at 27. In addition, James

claimed that McGuiness had stated to Luca and other individuals that James was "trying to 'turn' Shae gay," that he was "trying to lure Shae to Florida to entice her into the gay lifestyle," that James "was disgusting," and that "being gay is disgusting." *Id.* at 27.

[13] James contends that those statements were defamatory *per se* because they were intended "to induce the hearers to suspect that [James] was guilty of professional misconduct, abuse toward his children, or sexual misconduct." Appellant's Br. at 21. He further contends that, "[a]lthough [McGuiness] did not accuse [him] of a specific crime, reasonable persons could conclude that these statements were calculated to induce the hearers to suspect that [James] was guilty of abuse or some type of criminal or professional misconduct." *Id.* at 22.

[14] However, we hold that the statements at issue are not, as a matter of law, defamatory *per se*. None of the comments impute any loathsome disease. Further, while McGuiness' statements regarding James' money may imply that James did not earn his money in the traditional way, it does not impute any misconduct in his trade or occupation or criminal misconduct. And, contrary to James' assertions, McGuiness' statements regarding James' attempts to turn Shae gay or to entice her into the gay lifestyle do not impute any sexual misconduct. As a result, McGuiness' statements "fall[] short of the type of statement covered by a claim of defamation per se." *Columbus Specialty Surgery Ctr. v. Se. Ind. Health Org., Inc.*, 22 N.E.3d 665, 670 (Ind. Ct. App. 2014). We

therefore hold that James has failed to state a claim upon which relief can be granted on this issue.

Defamation Per Quod

[15] Still, James contends that, even if McGuiness' statements are not defamatory *per se*, they are defamatory *per quod*. With respect to the "defamatory imputation" element of a defamation claim, "some communications are reasonably susceptible to either a defamatory or a nondefamatory interpretation." *McQueen*, 711 N.E.2d at 65. "If the words are ambiguous so that it is possible to construe both a defamatory and non-defamatory meaning, then the case should properly go to the jury." *Jacobs v. City of Columbus By and Through Police Dep't*, 454 N.E.2d 1253, 1264 (Ind. Ct. App. 1983).

[16] Here, while McGuiness' statements may have been rude and disparaging, they are not ambiguous and cannot be imbued with the defamatory meaning suggested by James. *See id*. Stated differently, McGuiness' statements are not susceptible to either a defamatory or nondefamatory interpretation and, thus, need not be submitted to the jury. As a result, the court properly dismissed James' complaint for defamation *per quod*.

Intentional Infliction of Emotional Distress

[17] James next contends that the court erred when it dismissed his claim for intentional infliction of emotional distress. To establish a claim of intentional infliction of emotional distress, a plaintiff must prove by a preponderance of the evidence that the defendant (1) engaged in extreme and outrageous conduct (2)

which intentionally or recklessly (3) caused (4) severe emotional distress to another. *State v. Alvarez ex rel. Alvarez*, 150 N.E.3d 206, 218 (Ind. Ct. App. 2020). It is the intent to harm one emotionally that forms the basis for the tort. *Id*. "The conduct must be particularly deplorable to meet the extreme and outrageous requirement." *Id*.

> Conduct is extreme and outrageous only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"

Id. (quoting *Conwell v. Beatty*, 667 N.E.2d 768, 777 (Ind. Ct. App. 1996)). "If reasonable persons can differ regarding the extremity and outrageousness of certain conduct, then the matter should be left to a jury's determination." *Id*.

[18] On appeal, James alleges that he stated a claim for which relief could be granted because McGuiness' "actions were a clear attempt to undermine [and] destroy [James'] relationship with his children, and reasonable persons, consistent with today's prevailing norms and values, could find such conduct outrageous." Appellant's Br. at 24. But even if James' contentions were true, we conclude that McGuiness' statements do not constitute "outrageous" behavior. Again, McGuiness sent Shae messages saying that James is a "monster," saying that James disliked them for being "normal," saying that he wanted to use Shae as a tool to move to Miami, and implying that James did

not earn his money. Appellant's App. Vol. 2 at 27. And McGuiness told Luca James was trying to "turn" Shae gay, that James was "disgusting" and that being gay is "disgusting." *Id*.

[19] Even considering the facts in the light most favorable to James, reasonable persons would not differ regarding the extremity and outrageousness of McGuiness' conduct. While we certainly do not condone McGuiness' conduct, nothing about her statements is so extreme in degree as to go beyond all possible bounds of decency and should be regarded as utterly intolerable in a civilized society. *See Alvarez ex rel. Alvarez*, 150 N.E.3d at 218. As such, we can conclude, as a matter of law, that McGuiness' actions did not constitute "outrageous" behavior. The trial court therefore did not err when it dismissed James' claim for intentional infliction of emotional distress.

Issue Two: Motion to Quash

[20] Finally, James contends that the court erred when it granted McGuiness' motion to quash his notice of deposition. As our Supreme Court has stated:

> Our standard of review in discovery matters is limited to determining whether the trial court abused its discretion. The trial court abuses its discretion when its decision is against the logic and effect of the facts and circumstances before the court. We do not reweigh the evidence; rather, we determine whether the evidence before the trial court can serve as a rational basis for its decision.

Hale v. State, 54 N.E.3d 355, 357 (Ind. 2016) (quotation marks and citations omitted).

[21] On appeal, James claims that McGuiness' deposition would allow him to "gather information necessary and important to his response to [McGuiness'] motion to dismiss[.]" Appellant's Br. at 26. Similarly, in his motion to reconsider, James asserted that the deposition was required "to gather information necessary and important to his response to [McGuiness'] motion to dismiss." Appellant's App. Vol. 2 at 53. In other words, James sought to use the information from the deposition in an attempt to defeat McGuiness' motion to dismiss.

[22] However, a 12(B)(6) motion to dismiss tests the legal sufficiency of a complaint, not the facts supporting it. *Trail*, 845 N.E.2d at 135. And, in ruling on a motion to dismiss, "[t]he court may only look to the complaint[.]" *McQueen*, 711 N.E.2d at 65. As such, regardless of what information James may have learned from McGuiness' deposition, the court could not have relied on it in deciding whether to grant or deny McGuiness' motion. We therefore hold that the trial court did not abuse its discretion when it granted McGuiness' motion to quash.[2]

[23] Affirmed.

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[2] Indiana Trial Rule 12(B) provides that, if "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provide in Rule 56." Thus, there are instances in which parties may produce documents outside of the pleading to the trial court following a motion to dismiss. However, James does not mention this rule on appeal, nor does he make any argument to explain that he would have attempted to use this rule to convert McGuiness' motion to one for summary judgment. In any event, even if James had presented additional evidence, the trial court could have excluded it.

Bradford, C.J., and Bailey, J., concur.