UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

CONSOLIDATED CASES

Nos. 1553, 2099

September Term, 2014

No. 0365

September Term, 2015

BRETT KIMBERLIN

v.

AARON WALKER, ET AL.

Meredith,
Nazarian,
Eyler, James R.
(Retired, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: February 2, 2016

Brett Kimberlin filed suit against numerous individuals in the Circuit Court for Montgomery County, and sought damages based on allegedly defamatory statements they made about him. Some, but not all, of his claims went to trial, but the circuit court granted judgment in favor of all defendants after Mr. Kimberlin presented his case-in-chief. He appeals that ruling and various pre-trial rulings that whittled down the claims that ultimately went forward. Because we agree with the circuit court that only two of Mr. Kimberlin's claims could go to trial, and that he failed to prove a fundamental element of those claims once he got there, we affirm.

I. BACKGROUND

No one would dispute that Mr. Kimberlin and the defendants bear a great deal of animosity toward one another, and their use of social media has effectively thrown gasoline on an already well-fueled fire. The parties have been involved in other litigation, in Maryland and in other jurisdictions, but we focus on what brought them together in this case.

On August 30, 2013, Mr. Kimberlin filed suit against a number of defendants, and by the time of trial a year later, four remained: Aaron Walker, William Hoge, Sr., Robert Stacy McCain, and Ali Akbar (whom we refer to collectively as the "Appellees"). In the Complaint, Mr. Kimberlin alleged, in short, that the Appellees had set out to ruin him by attacking his reputation on internet blogs and Twitter, and by embroiling him in litigation:

> This matter arises out of a multi-year campaign by [the Appellees] to smear, destroy and imprison [Mr. Kimberlin] by knowingly, maliciously, and intentionally filing numerous frivolous, defamatory, and malicious court filings—including civil suits, peace orders, and criminal charges—and then

> publishing false, defamatory, and tasteless stories about those filings as if the allegations were true, all the time raising funds from unsuspecting people who read the stories.

Mr. Kimberlin claimed that the Appellees falsely portrayed him as "engaging in criminal activity, being a pedophile, rapist and domestic terrorist, and engaging in domestic violence," and he countered that their portrayals were not "based on reality." In the Complaint, Mr. Kimberlin purported to detail litigation involving the parties, claiming that Mr. Walker had assaulted him outside a courtroom in 2012, that Mr. Walker had wrongly accused him of raping his wife, and that all Appellees had posted "hundreds of false and defamatory blog posts and Twitter tweets over the past year attacking [Mr. Kimberlin] as a criminal rapist and pedophile who commits domestic violence." The Complaint also listed a number of blog posts and tweets in which, he alleged, the Appellees continued to spread these messages.

The Complaint listed counts for malicious prosecution, conspiracy to abuse process, defamation, false light invasion of privacy, harassment, infliction of emotional distress, and stalking, and Mr. Kimberlin sought to recover compensatory and punitive damages. After discovery was served, the Appellees filed motions for summary judgment on all counts of the Complaint (which we will refer to collectively as the "Summary Judgment Motions").

The court held a hearing on July 1, 2014. The Appellees claimed in their motions that Mr. Kimberlin had failed to produce in discovery all the documents that he alleged were defamatory. He responded that because the Appellees had *created* the documents, he was not obliged to produce them in discovery. The court disagreed and ordered him to

comply with outstanding discovery. The court then granted the Summary Judgment Motions in part in favor of all Appellees, leaving for trial Mr. Kimberlin's claims for defamation and false light invasion of privacy.

Before trial, however, the defendants moved again for summary judgment on these claims. This time, they argued that Mr. Kimberlin could not testify at trial because he was a convicted perjurer. (The basis for this argument, which we discuss in detail below, appears in a Maryland statute that prohibits a convicted perjurer from testifying. Md. Code (1974, 2013 Repl. Vol.), § 9-104 of the Courts & Judicial Proceedings Article ("CJP")). As a result, the Appellees argued, Mr. Kimberlin would be unable to establish falsity or damages, both essential elements of the two remaining claims. The court denied the motion, finding the existence of a material dispute of fact. The court declined, however, to rule on the constitutionality of the statute.

A jury trial was to begin on August 11, 2014. The Friday before the Monday trial date, however, Mr. Kimberlin filed a "motion to find [CJP § 9-104] unconstitutional." This longstanding statutory provision prohibits convicted perjurers from testifying, and Mr. Kimberlin fit that description—by his own (reluctant) admission. But the trial court ultimately concluded that the language of the statute—which declares that "[a] person convicted of perjury may not testify," CJP § 9-104, was not absolute, because it used the word "may" rather than "shall," and that left the trial court with discretion to permit it. The court reiterated this ruling the following morning, explaining that it was a "matter of fundamental fairness" to prohibit Mr. Kimberlin from testifying based on a forty-year-old perjury conviction.

But then in a plot twist, Mr. Kimberlin decided not to testify after all—although, and notably, he never suggested that he was *unprepared* to testify as a result of the timing of the judge's ruling. Instead, Mr. Kimberlin presented the following case: *first*, he gave a lengthy opening statement, in the course of which the Appellees interposed numerous objections, many of which the trial court sustained; *second*, he called and questioned all the named defendants, which again led to numerous and often successful objections; and *finally*, Mr. Kimberlin called his daughter (whom we will simply call "Daughter"), and sought to elicit testimony that comments by the Appellees caused harm to *her*, even though she was not a party. His theory, as he explained it, was that Daughter suffered bullying that flowed somehow from the Appellees' defamatory comments about him.

After Daughter's testimony, Mr. Kimberlin rested, and the Appellees moved for judgment. They argued that Mr. Kimberlin had introduced no evidence of falsity or harm or malice that could support a claim for defamation. Mr. Kimberlin countered that his was a clear case of defamation *per se*, and that because the Appellees accused him of a crime (pedophilia), he was not required to show specific damages. Although the court continued to press Mr. Kimberlin to establish evidence of falsity, Mr. Kimberlin continued to argue that a case of defamation *per se* led to an automatic presumption of harm.

The trial court ultimately granted the Appellees' motion from the bench on August 12, 2014:

> With respect to the count alleging that the defendants showed him in a bad light or false light, that is really the easier of the two and the Court will grant judgment in favor of the defendants with respect to that count. There's not one scintilla

> of evidence in this case that the statements that were made by these individuals were false.
>
> Now, the Court is not finding that the statements were true. We don't have to get there. *It's just that there was no testimony that they were false.*

(Emphasis added.) The trial court then analyzed in some detail the question of whether pedophilia was a crime that could give rise to an action for defamation *per se*. The court stressed that Mr. Kimberlin had devoted his case to establishing that the Appellees called him a pedophile, but had not proven that it was a crime or, more to the point, that the allegations were false:

> Assume arguendo that pedophilia was a crime and it is not, even though I said the plaintiff kept referring to it as a crime, it's not a crime. Assume arguendo that it was, *there was absolutely no evidence in this case of exactly to what the defendant is alleged to have done*. And so I think the case falls short of rising to the level that it should go to the jury. And for those reason the Court issues a judgment in favor of the defendants.

(Emphasis added.)

The path of this case following the trial court's oral ruling became tortuous, and the appellate record in this case is, to put it delicately, a mess. A small measure of confusion arose from the fact that the circuit court did not enter a formal judgment immediately after trial, although that was cleared up soon enough. The far larger source was Mr. Kimberlin's decision to file three separate notices of appeal as the post-trial paper flew.

Most of the pleadings in this case came to this Court in Case No. 1445, September Term 2014. That appellate record contains the Complaint (bearing circuit court civil case number 380966, as do all the pleadings in all three records) and four pleading volumes that

include the varied pre-trial pleadings and certain pleadings and administrative documents relating to the trial. That record does not include any final entry of judgment. It appears that on August 27, 2014, Mr. Kimberlin filed a "Motion for Issuance of Judgment," in which he sought some final order of disposition because, even though the trial court directed a verdict in favor of the Appellees from the bench on August 12, 2014, nothing dispositive appeared in the case file and the court did not direct entry of judgment. But although Mr. Kimberlin had sought a formal judgment by way of this motion, he *also* filed a Notice of Appeal not long after, on September 11, 2014, which in turn initiated Case No. 1445 and caused the circuit court to transmit the record as it existed at that point.

In the meantime, though, the parties continued filing other pleadings in the circuit court, and on October 31, 2014, the circuit court *granted* the Motion for Issuance of Judgment, and the court entered judgment on November 5, 2014. Then, on November 17, 2014, Mr. Kimberlin filed a Motion for New Trial in response to that entry of judgment. He filed a *second* Notice of Appeal on December 1, 2014 that purported to appeal from the November 5, 2015 judgment. That notice of appeal initiated a second appeal, Case No. 2099, September Term 2014.

We also had stayed the *first* appeal because of Mr. Kimberlin's filing of the Motion for New Trial, and the case sat (quite possibly because the trial judge who presided over the trial had retired) with no ruling. The court then addressed Mr. Kimberlin's Motion for New Trial, and denied that motion on April 9, 2015. The court also directed that same day that judgment be entered in favor of the Appellees.

Then, apparently in an an over-abundance of caution, Mr. Kimberlin filed a *third* notice of appeal on April 29, 2015, in which he noted an appeal from the April 9, 2015 final judgment order. That initiated a third case in this Court, Case No. 365, September Term 2015. All three notices of appeal attack the same decisions, and we address them next.

II. DISCUSSION

Mr. Kimberlin challenges numerous aspects of the trial court's decision, and we will take them in slightly different order.[1] Overall, our analysis flows from the fact that Mr. Kimberlin failed to offer evidence that could prove the elements of his case, most visibly by his decision not to testify. It's hard to know whether his testimony alone could have

[1] Mr. Kimberlin presents the following issues on appeal:

I. Whether [CJP § 9-104], which prohibits anyone convicted of perjury from testifying in any Maryland court, is unconstitutional as a violation of the First Amendment's guarantee to meaningful access to the courts, the Fifth Amendment's due process clause, and the Fourteenth Amendment's Equal Protection, under both the United States and Maryland Constitutions, and other articles of the United States and Maryland Constitutions.

II. Whether the circuit judge erred in his ruling for a directed verdict on the defamation and false light counts.

III. Whether the circuit court judge erred in not following the law with regard to his ordering a directed verdict, rather than allowing the jury to issue a verdict.

IV. Whether the trial judge exhibited prejudicial conduct in the case that deprived appellant of a fair trial.

V. Whether the circuit court erred in denying pretrial appellant's claims for abuse of process, conspiracy and intentional infliction of emotional distress.

saved his case, but either way, the trial judge correctly ruled that the case could not go to the jury based on what Mr. Kimberlin had presented.

A. The Trial Court Properly Granted The Summary Judgment Motions.

Mr. Kimberlin claims *first* that the trial court should not have dismissed his claims for abuse of process, conspiracy to abuse process, and intentional infliction of emotional distress. Mr. Kimberlin claims that he dismissed the stalking and harassment claims voluntarily, but the record of the ruling isn't altogether clear; the trial judge first started to name the counts with respect to which he was granting the Summary Judgment Motions, then stated simply that "Counts 3 and 4 will remain." In either event, the court did not dismiss these claims—it granted the Summary Judgment Motions as to the claims of abuse of process, conspiracy to abuse process, and intentional infliction of emotional distress, and we review the ruling on that posture.

We review the grant of a summary judgment motion *de novo*. *Am. Civil Liberties Union Found. of Md. v. Leopold*, 223 Md. App. 97, 110 (2015). The trial court may not resolve any disputed issues of fact at summary judgment, *see* Md. Rule 2–501(a), and so "the standard for appellate review of a trial court's grant of a motion for summary judgment is simply whether the trial court was legally correct." *Beatty v. Trailmaster Prods., Inc.*, 330 Md. 726, 737 (1993). A party opposing summary judgment may not defeat the motion solely with allegations. Instead, "a party opposing summary judgment must identify disputed material facts with particularity and offer evidence or testimony demonstrating

the dispute." *Piney Orchard Cmty. Ass'n, Inc. v. Piney Pad A, LLC*, 221 Md. App. 196, 219 (2015).

This last step in the summary judgment analysis was Mr. Kimberlin's undoing. Although he claims here that there was ample evidence to support his claims, he offered nothing other than *allegations* at the time of the hearing. For example, when he first addressed the court about his own motion for summary judgment, he stated, "Every single case [against Mr. Kimberlin] has been dismissed, *nolle prossed*, thrown out in some way, shape, or form. There's been probably a dozen judges right here in this court, in federal court, state court, district court, who have all had to suffer through the things that these guys have done." This sort of generalized rhetoric will not suffice. The pleading he filed in opposition to the Summary Judgment Motions contained a list of "lawsuits, peace orders, and criminal charges" filed against him by the defendants. He purported to summarize each case broadly, as in the following:

> In the Prince William County case, Defendant Walker filed numerous motions to have Plaintiff found in contempt and fined tens of thousands of dollars, all of which were rejected by Judge Potter. In the Federal suit, Defendant Walker sued Plaintiff's non-profit employer and then attempted to extort plaintiff by demanding that the employer fire Plaintiff. Both of these actions by Defendant Walker were intended to and were attempts to deprive Plaintiff of property.

But other than his own summaries—not by way of an affidavit, but in an opposition styled as a legal pleading—Mr. Kimberlin did not file any evidence bearing on the Appellees' motives or demonstrating his injuries in response to the Summary Judgment

Motions. And he identified no discovery responses that would have contradicted or placed in doubt any material fact that the Appellees had raised with respect to each claim.

In the absence of countervailing evidence, the trial court properly granted the Summary Judgment Motions. *See Campbell v. Lake Hallowell Homeowners Ass'n*, 157 Md. App. 504, 530 (2004) (laying out the elements of an abuse of process claim, including "first, that the defendant willfully used process after it has issued in a manner not contemplated by law; second, that the defendant acted to satisfy an ulterior motive; and third, that damages resulted from the defendants[']' use of perverted process." (internal citations and quotations omitted)). Mr. Kimberlin introduced no pleadings from cases he listed, nor any affidavit, answers to interrogatories, or other statements purporting to explain what emotional distress he suffered. And he never took the stand: instead, Mr. Kimberlin sought, improperly, to *argue* about the cases that he claimed the Appellees had filed, and that formed the basis of the abuse of process and conspiracy claims, during opening arguments and in his questioning of other witnesses. The same was true with his intentional infliction of emotional distress claim, where he introduced no evidence of harm other than to speak broadly about it to the court. *See Exxon Mobil Corp. v. Albright*, 433 Md. 303, 350-51 (2013) (explaining that, in an intentional infliction of emotion distress claim, "as long as the emotional distress due to the tortious conduct is *manifested objectively*, the emotional distress is deemed genuine and compensable even though the tortious conduct did not cause bodily harm" (emphasis added)). Given what it had (and didn't have) before it at the time, the circuit court correctly granted the Summary Judgment

Motions as to the abuse of process, conspiracy to abuse process, and intentional infliction of emotional distress claims.

B. The Trial Court's Ruling Regarding CJP § 9-104 Is Unreviewable.

Mr. Kimberlin argues *second* that CJP § 9-104 is unconstitutional. We decline to address this argument because the trial court never ruled that the statute *is* constitutional—in fact, the court decided that Mr. Kimberlin could testify at trial, and thus never applied the statute to bar his testimony in the first place. This leaves us with no decision unfavorable to Mr. Kimberlin to review. *See Suter v. Stuckey*, 402 Md. 211, 232 (2007) ("Maryland common law is clear that, as a general rule, the only persons who may appeal a judgment are those aggrieved by that judgment."). Why, after winning that motion, he opted not to testify after all is unclear, but we know that he was not thwarted from doing so by § 9-104.

Mr. Kimberlin also contends that the timing of the court's ruling, which was made "literally minutes before testimony was to begin," left him "wholly unprepared to take the stand." But he never raised that complaint at *any* stage of the circuit court proceedings, nor did he imply to the trial court that he suffered any prejudice—he did not ask for a postponement (and we don't mean to suggest that he should have been granted one if he had), nor did he offer any practical reason why he couldn't prepare his own testimony for a trial when he had been seeking to assert his right to testify all along.

C. The Trial Court Exhibited No "Prejudicial Conduct" In The Course Of The Trial.

Mr. Kimberlin complains *third* that the trial judge "depriv[ed] him of the right to put on evidence to prosecute his case." He claims that the judge limited Daughter's testimony in a way that prevented him from generating an issue of fact as to whether he was a pedophile and whether he suffered damage to his reputation. He also claims the trial judge should have permitted him to go further in his examination of Mr. Walker, and that he should have been allowed to introduce certain emails sent to Mr. Walker and Mr. Hoge from Mr. Kimberlin's wife.

Evidentiary decisions lie within the discretion of the trial judge, *Abrishamian v. Washington Med. Group, P.C.*, 216 Md. App. 386, 409 (2014), and we will not disturb those decisions here. As a general matter, the court gave Mr. Kimberlin a great deal of leeway throughout the trial to explore different avenues. But the court expressed concern about why Mr. Kimberlin found it necessary to call Daughter, given her age and the seriousness of the allegations involved. Even then, the court curbed the questioning only when Mr. Kimberlin sought to stray into issues that were not proper for her, such as damage to Mr. Kimberlin's reputation, of which she had no direct knowledge, or the truth (or falsity) of whether he was a pedophile. So, for example, although Mr. Kimberlin argued that Daughter was bullied because of the Appellees' conduct, he never connected her suffering to harm to him based on the alleged actions of the Appellees. And the trial judge correctly pointed out that Mr. Kimberlin could not use Daughter's testimony to disprove the truth of any allegation that he was a pedophile: "No one is objecting to what the jury

has a right to know in terms of harm. The objection is the manner in which you are setting out to do that. *If these individuals said that you're a pedophile, the best person to testify about that is you.*" (Emphasis added.) And as to the testimony regarding an unspecified "courtroom assault" by Mr. Walker and Mr. Kimberlin's wife's emails, the trial judge correctly prohibited Mr. Kimberlin from introducing hearsay evidence, and he has offered no basis on which we could find those rulings incorrect.

D. The Trial Court Properly Granted The Appellees' Motion For Judgment At The Close Of Mr. Kimberlin's Case.

Fourth, Mr. Kimberlin argues that the trial judge erred in granting judgment to the defendants after his case-in-chief.

> In reviewing the grant of a motion for judgment, we "assume the truth of all credible evidence on the issue, and all fairly deducible inferences therefrom, in the light most favorable to the party against whom the motion is made." *Orwick v. Moldawer*, 150 Md. App. 528, 531 (2003). Consequently, we "may affirm the grant of the motion for judgment only if . . . we conclude that there was insufficient evidence to create a jury question." *Wilbur v. Suter*, 126 Md. App. 518, 528 (1999).

Spengler v. Sears, Roebuck & Co., 163 Md. App. 220, 235 (2005) (internal citations omitted).

Mr. Kimberlin raises several arguments in this regard, but his problem on these remaining claims is a pure failure of proof, and specifically to prove that any of the allegedly defamatory or false statements was false. This failure dooms both his defamation claim, *see id.* at 240 ("[I]f a plaintiff cannot prove the falsity of a particular statement, the statement will not support an action for defamation."), and his claim for a false light invasion of privacy. *Piscatelli v. Smith*, 424 Md. 294, 306 (2012).

The absence of proof revealed itself most visibly in the following exchange with the court, when the trial judge pressed Mr. Kimberlin to point to *evidence* that the Appellees' statements were false:

> THE COURT: My question is who testified in this case that the statement was false?
>
> MR. KIMBERLIN: Who testified?
>
> THE COURT: *Yes, what evidence is there that the statement was false?* The question does not suggest, the Court's question does not suggest that the statement was true, no. But I'm just focusing on . . . [t]he instructions that the Court would have to give to the jury that they must follow. And these are just annotations, *Offen v. Brenner*, [402 Md. 191 (2007)]. So what testimony was there that the statements made by these gentlemen were false?
>
> MR. KIMBERLIN: It's considered false. It's I mean I don't know what to tell you. You're asking me to prove a negative. I mean—
>
> THE COURT: I'm not asking you to prove anything. *I'm asking you who in this courtroom yesterday or today said that those statements were false.*
>
> MR. KIMBERLIN: Your Honor, in a defamation case—
>
> * * *
>
> THE COURT: Who said it was false?
>
> MR. KIMBERLIN: Who said it was false?
>
> THE COURT: Do you want to read this?
>
> MR. KIMBERLIN: I know what they said.
>
> THE COURT: I mean I didn't make this up. This is Maryland law.

> MR. KIMBERLIN: *I think that the jury has to make that finding whether it's false and whether it's true.*
>
> THE COURT: *But there has to be some evidence. They just can't pull things out of the air, a jury.* They can't just go back there and decide what they want to decide. I have to give them instructions on the law.

(Emphasis added.)

Mr. Kimberlin appears to have conflated two concepts, and argues here, as he did at trial, that accusing someone of pedophilia constitutes defamation *per se*. But that notion (one that we decline to address) does not relieve a plaintiff of the initial burden to prove *falsity*. That is, in order to plead a defamation claim under Maryland law, a plaintiff must allege specific facts establishing four elements to the satisfaction of the fact-finder: "(1) that the defendant made a defamatory statement to a third person, (2) that the statement was false, (3) that the defendant was legally at fault in making the statement, and (4) that the plaintiff thereby suffered harm." *Piscatelli*, 424 Md. at 306 (citations and quotations omitted). This first element requires proof of a *defamatory* statement "that tends to expose a person to public scorn, hatred, contempt, or ridicule, which, as a consequence, discourages others in the community from having a good opinion of, or associating with, that person." *Id.* (citations and quotations omitted). The second element requires proving *falsity*—that a statement "'is not substantially correct.'" *Id.* (quoting *Batson v. Shiflett*, 325 Md. 684, 726 (1992)).

We explained in *Shapiro v. Massengill*, 105 Md. App. 743 (1995), the difference between defamation *per se* and defamation *per quod*:

> "In the case of words or conduct actionable *per se* their injurious character is a self-evident fact of common knowledge of which the court takes judicial notice and need not be pleaded or proved. In the case of words or conduct actionable only *per quod*, the injurious effect must be established by allegations and proof of special damage and in such cases it is not only necessary to plead and show that the words or actions were defamatory, but it must also appear that such words or conduct caused actual damage."

Id. at 773 (quoting *Metromedia, Inc. v. Hillman*, 285 Md. 161, 163-64 (1979)). This distinction goes not to the truth or falsity of a statement—it goes to damages. That is, a plaintiff is relieved of proving *the injurious character* of a statement if it is deemed defamation *per se*. But if the statements here were deemed defamation *per se* (and again, we aren't holding that they should or shouldn't be), Mr. Kimberlin still has to prove that they were false as well—a statement that is defamatory but true isn't actionable. And although he keeps *saying* he has shown falsity, he declined to take the stand to deny the allegations. Whether or not his testimony would have cured the problem, we agree with the circuit court that he failed to satisfy the burden of production he bore even to get to the jury on these two claims.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.