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DISTRICT III

August 13, 2013

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You are hereby notified that the Court has entered the following opinion and order:

2013AP802

Earnest L. Johnson v. Thomas L. Kimmons (L. C. #2013SC191)

Before Stark, J.¹

Earnest Johnson appeals a small claims judgment in favor of Thomas Kimmons and an order denying Johnson's motion for reconsideration. Johnson argues the circuit court erroneously exercised its discretion by entering judgment in favor of Kimmons. Based upon our

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

review of the briefs and record, we conclude this case is appropriate for summary disposition and we summarily affirm. *See* WIS. STAT. RULE 809.21.

Johnson and Kimmons were prison cellmates. Johnson filed a small claims action against Kimmons, alleging Kimmons defamed him by falsely reporting to prison guards that Johnson “rape[d]” and exposed himself to Kimmons. Johnson alleged Kimmons’ statement harmed his prison reputation and could have exposed him to additional charges.

Kimmons responded and asserted he never accused Johnson of raping him. As for the allegation that Johnson exposed himself, Kimmons argued that part of the statement was true. Kimmons explained that, while he was brushing his teeth in the sink, Johnson got up and urinated in the toilet, which was approximately eight inches from the sink. Kimmons became very upset and he reported to officers that Johnson exposed himself. Kimmons asserted that when he made his report, he specifically told prison officials that he believed Johnson’s actions were not sexually motivated.

A prison conduct report stated that on December 22, 2012, Kimmons reported to officers that Johnson “exposed his penis to [Kimmons] ... while he was brushing his teeth.” Prison officials commenced an investigation and conducted a number of interviews with Kimmons. The report’s author stated Kimmons did not provide “substantial evidence” of the allegation and the author concluded that Kimmons “lied ... that Johnson ... exposed his penis in a sexual gratification manner towards him.”

The circuit court held a small claims hearing and both parties appeared from prison via video teleconferencing. The court minutes reflect that the circuit court found Johnson did not

meet his burden of proving Kimmons made a false statement. The court also determined there was no damage to Johnson's reputation.

Johnson moved for reconsideration, and the circuit court denied his motion. In its written decision, the court noted that, although Johnson had failed to properly subpoena the author of the prison conduct report, the report was nevertheless discussed at length at the small claims hearing and the court considered the conduct report when making its determination.

On appeal, Johnson argues the circuit court erroneously exercised its discretion by concluding he failed to meet his burden of proving Kimmons defamed him. Johnson faults the circuit court for not requiring the prison official who authored the conduct report to appear at the small claims hearing. He contends that, because the prison official's conduct report states that Kimmons "lied," the circuit court should have concluded Kimmons made a false allegation against him. He also asserts that he proved the statement caused him harm.

Johnson, however, failed to provide us with a transcript from the small claims hearing. Because we cannot review what occurred at the small claims hearing, we must assume that every fact essential to support the circuit court's determination is supported by the record. *See Austin v. Ford Motor Co.*, 86 Wis. 2d 628, 641, 273 N.W.2d 233 (1979). Accordingly, we affirm the circuit court's small claims judgment and order.

However, even if we addressed Johnson's arguments on the merits, we would conclude the circuit court did not erroneously exercise its discretion by entering judgment in favor of Kimmons. "A circuit court erroneously exercises its discretion if it applies an improper legal standard or makes a decision not reasonably supported by the facts of record." *Johnson v. Cintas Corp. No. 2*, 2012 WI 31, ¶22, 339 Wis. 2d 493, 811 N.W.2d 756. As relevant in this

case, “[t]he elements of a common law action for defamation are: (1) a false statement; (2) communicated by speech, conduct or in writing to a person other than the one defamed; and (3) the communication is unprivileged and tends to harm one’s reputation[.]” *Ladd v. Uecker*, 2010 WI App 28, ¶8, 323 Wis. 2d 798, 780 N.W.2d 216.

Johnson first objects to the court’s determination that he failed to properly subpoena the prison official who had authored the conduct report, which resulted in a finding by the court that the official was not required to attend the small claims hearing. Johnson fails to explain how this determination is erroneous. The court stated Johnson wanted the prison official to testify about the conduct report. However, although the prison official was absent from trial, the court nonetheless considered the conduct report when making its determination.

Next, Johnson objects to the court’s determination that he failed to prove Kimmons made a false statement, and he emphasizes the conduct report stated Kimmons “lied.” However, in its order denying the motion for reconsideration, the court noted it considered the conduct report when it found Johnson had failed to prove Kimmons made a false statement. We interpret the court’s conclusion to mean that, despite the conduct report, it found Kimmons’ version of events more credible—specifically, that Kimmons saw Johnson’s penis while Johnson urinated, that Kimmons reported this to officers, and that Kimmons never reported, but specifically denied, that Johnson exposed himself in a sexually gratifying manner. It is the function of the circuit court, as fact finder, to make credibility determinations and weigh conflicting evidence. *Cogswell v. Robertshaw Controls Co.*, 87 Wis. 2d 243, 250, 274 N.W.2d 647 (1979).

Finally, Johnson argues he proved he was harmed by Kimmons’ statement. However, because the circuit court found there was no false statement, any harm Johnson allegedly

suffered is irrelevant. *See Ladd*, 323 Wis. 2d 798, ¶8. In any event, Johnson makes only conclusory and speculative allegations about how Kimmons' statement harmed him.² We therefore assume that, at the small claims hearing, Johnson failed to present sufficient evidence establishing harm. *See Austin*, 86 Wis. 2d at 641.

IT IS ORDERED that the court's judgment and order are summarily affirmed. *See* WIS. STAT. RULE 809.21

² Specifically, Johnson alleges Kimmons' statement harmed his reputation because he has been labeled a "sexual predator," the statement caused him to be placed in temporary lockup while officers conducted an investigation that could have resulted in more charges, and the statement could affect his hearings before the prison board.

Diane M. Fremgen
Clerk of Court of Appeals