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DISTRICT II

June 17, 2020

To:

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Circuit Court Judge
Racine County Courthouse
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Racine, WI 53403

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Jami B. Sierra
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You are hereby notified that the Court has entered the following opinion and order:

2019AP94 Jami B. Sierra v. Brian D. Boston, DMD, S.C.
(L.C. #2017CV1192)

Before Neubauer, C.J., Gundrum and Davis, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Jami B. Sierra, pro se, appeals a judgment granting summary judgment in favor of Dr. Brian D. Boston, DMD, S.C., relative to Sierra's claims that she suffered damages due to Boston's negligent training and supervision of his dental office staff. Upon reviewing the briefs and the record, we conclude at conference that this case is appropriate for summary disposition.

See WIS. STAT. RULE 809.21(2017-18).[1] We affirm the judgment and deny Sierra's recently filed motion to supplement the appellate record.

Boston owns and operates an Aspen Dental clinic. Sierra brought a friend, Frank, there for treatment of several broken teeth, one infected. After Frank was treated, and as Sierra and Frank were leaving, Sierra contends that, out of concern for Frank's discomfort, she asked office staff whether the antibiotic Boston prescribed was sufficient and if Frank could be given pain medication. An argument ensued.

Sierra's and the employees' accounts differ. Sierra claims the staff was "loud," "aggressive," and "unprofessional." The staff said Sierra was "confrontational," demanded narcotics, and made an ominous reference to having a concealed-carry (CCW) permit. They denied her request to speak to Boston, who was not in the front office area, and told her at least twice to leave or police would be called. Sierra and Frank left the office but lingered in the public parking lot—for two minutes, according to Sierra, so Frank could smoke a cigarette.

Boston came out from the back on hearing the commotion. His staff related the incident. Seeing that they appeared "scared" and "uncomfortable" and (through the office window) that Sierra was still outside, he agreed they should call police and report what happened. Sierra was gone by the time police arrived. The police took a statement from two employees but did not interview Boston. The matter was referred to the district attorney's office, and Sierra was charged with misdemeanor disorderly conduct and felony threat to injure. She pled no contest to

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

disorderly conduct. An article about the criminal complaint and plea subsequently was published online. Neither Boston nor his staff were interviewed for the article.

The case before us arises from Sierra's civil suit against Boston.[2] She alleged that Boston's negligent training of his staff in how to "profile" possibly drug-seeking patients and his negligent supervision of staff caused them to improperly call police and make false claims about her conduct, leading to her arrest, confinement, and conviction. She also claimed that the strip search attendant to her arrest and the online article caused her to suffer public humiliation and reputational and psychological harm. Boston sought dismissal of her complaint for failure to state a claim and subsequently moved for summary judgment.

After briefing and a hearing, the court concluded that Boston's sole duty to Sierra, who was not a patient, was to "refrain from willful, wanton or reckless conduct"; that he did not breach that duty; that even if his staff's conduct was wrongful, it was not the cause-in-fact of Sierra's claimed harm, nor was their conduct caused by his; and that public policy augured in Boston's favor because "we want people to call the police" to handle disputes. The court granted Boston's motion and dismissed all of Sierra's claims. She appeals.[3]

"We review summary judgment decisions using the same standards and method as are applied by the circuit court." ***Pawlowski v. American Family Mut. Ins. Co.***, 2009 WI 105, ¶15, 322 Wis. 2d 21, 777 N.W.2d 67. This court has set forth the methodology for reviewing a summary judgment many times, and it need not be repeated at great length. *See* ***Grams v. Boss***,

[2] While the criminal case is not before us, it plays into our decision.

[3] Boston challenges the timeliness of Sierra's appeal. After a thorough jurisdiction check, this court concludes that it was timely filed.

97 Wis. 2d 332, 338, 294 N.W.2d 473 (1980). "[A] moving party is entitled to summary judgment if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." ***Pawlowski***, 322 Wis. 2d 21, ¶15; WIS. STAT. § 802.08(2).

Sierra contends the circuit court first recognized "many" factual disputes but then "completely ignored" them and resolved them against her. She also spends considerable time arguing that staff wrongly asked her to leave the clinic, as she was not a trespasser, because when a person enters the open area of a business held open to the public at a reasonable time and in a reasonable manner, he or she has the implied consent of the owner to enter the premises. *See* ***Levesque v. State***, 63 Wis. 2d 412, 415, 217 N.W.2d 317 (1974); WIS. STAT. § 943.10(3).

Sierra is correct that summary judgment materials are viewed in the light most favorable to the nonmoving party. ***Affeldt v. Green Lake Cty.***, 2011 WI 56, ¶59, 335 Wis. 2d 104, 803 N.W.2d 56. But "the 'mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.'" ***Baxter v. DNR***, 165 Wis. 2d 298, 312, 477 N.W.2d 648 (Ct. App. 1991) (citation omitted).

Applying this methodology, the court resolved in Sierra's favor disputes as to whether drug-seeking motivated her queries; whether she told the staff she had a CCW permit; and whether the pair briefly lingered outside after being asked to leave the clinic. The court found immaterial to Sierra's negligence claim, however, disputes over who initiated the argument, the basis for the confrontation, who was the more unreasonable or rude and why, and whether a truthful report was made to the police.

We agree with the circuit court. Boston did not witness the incident but only directed his employees to accurately give their account to police. He also had no part in removing Sierra—by escort or demand—from the clinic. The consent given to the public to enter business premises is under a limited privilege "impliedly conditioned by time, place and purpose." ***Levesque***, 63 Wis. 2d at 415. The consent is not for all things and all purposes; its extent and scope is determined by the one in possession. ***Id.*** Therefore, Boston would have been within his rights to have Sierra leave his clinic. Further, whether the employee who called the police described Sierra as a trespasser is irrelevant. Law enforcement conducted any follow-up investigation and the DA did not charge Sierra with trespassing. None of the factual disputes are material to the allegations of her negligence claim against Boston.

We observe, as did the circuit court, that Sierra's negligence claim suggests that the police action and her subsequent charging and conviction were the result of malicious prosecution by Boston. Malicious prosecution has six essential elements:

> 1. There must have been a prior institution or continuation of some regular judicial proceedings against the plaintiff in this action for malicious prosecution [Sierra].
>
> 2. Such former proceedings must have been by, or at the instance of the defendant in this action for malicious prosecution [Boston].
>
> 3. The former proceedings must have terminated in favor of the defendant therein, the plaintiff in the action for malicious prosecution [Sierra].
>
> 4. There must have been malice in instituting the former proceedings.
>
> 5. There must have been want of probable cause for the institution of the former proceedings.
>
> 6. There must have been injury or damage resulting to the plaintiff from the former proceedings.

Brownsell v. Klawitter, 102 Wis. 2d 108, 112, 306 N.W.2d 41 (1981) (citations omitted).

If the plaintiff fails to establish any one of these elements, the defendant prevails. ***Tower Special Facilities, Inc. v. Investment Club, Inc.***, 104 Wis. 2d 221, 227, 311 N.W.2d 225 (Ct. App. 1981). Here, Sierra fails to prove several. As she pled no contest, the original proceeding did not resolve in her favor. She did not establish that Boston's actions in supporting his staff in calling the police and advising them to report truthfully were motivated by anything but a legitimate desire to have an unwanted party leave the clinic. Indeed, Boston himself never spoke to police. From there it was for the police to refer Sierra to the DA, if they deemed it warranted, and for the DA to determine if there was probable cause to press charges. Information from the online article came from the complaint drafted by the DA's office, not from Boston or his staff. The "time-honored requirement" of proving malice and want of probable cause in claims of malicious prosecution should not be "discarded in favor of an action of negligence." ***Bromund v. Holt***, 24 Wis. 2d 336, 345, 129 N.W.2d 149 (1964). And Sierra failed to prove the special damages necessary in a malicious prosecution action. *See* ***Johnson v. Calado***, 159 Wis. 2d 446, 460-61, 464 N.W.2d 647 (1991). Humiliation and reputational injury are general damages. *See* ***Lawrence v. Jewell Cos.***, 53 Wis. 2d 656, 660, 193 N.W.2d 695 (1972).

We agree that, even if Sierra believed that the employees gave a false statement to police, there were too many intervening decisions by others between that call and her conviction to say that Boston engaged in conduct that could be deemed a cause-in-fact of any wrongful act by his staff. The circuit court applied the correct summary judgment standard, found no disputes of material facts, and properly concluded that Boston was entitled to judgment as a matter of law.

Lastly, six months after briefing was complete Sierra moved to supplement the record, asking this court to subpoena the original 911 audio recording of the call to police from Aspen Dental. Sierra tells us that defense counsel gave her a copy of the transcript, which she asserts "has a substantial amount of great discrepancies." The transcript is not in the record, however. She did not assert in her brief opposing Boston's summary judgment motion that the transcript would not jibe with the 911 tape or that she attempted to get the tape but could not.

It is the appellant's responsibility to see that the appellate record is complete. ***State v. Dietzen***, 164 Wis. 2d 205, 212, 474 N.W.2d 753 (Ct. App. 1991). Augmenting the appendix with nonrecord material is not allowed. *See* ***Reznichek v. Grall***, 150 Wis. 2d 752, 754 n.1, 442 N.W.2d 545 (Ct. App. 1989).

IT IS ORDERED that the judgment of the circuit court is summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Sierra's motion to supplement the appellate record is denied.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals