

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

C. DELORES TUCKER and	:	CIVIL ACTION
WILLIAM TUCKER,	:	
	:	NO. 97-6150
Plaintiffs,	:	
	:	
v.	:	
	:	
RICHARD FISCHBEIN,	:	
	:	
Defendant.	:	

MEMORANDUM

BUCKWALTER, S. J.

January 11, 2005

Presently before the Court is Defendant Richard Fischbein’s Renewed Motion for Summary Judgment (Def. Renewed Mot. Summ. J.), Plaintiffs C. Delores Tucker’s and William Tucker’s Response thereto (collectively “Plaintiffs”), and Defendant’s Reply to Plaintiffs’ Response. For the reasons set forth below, Defendant’s motion is granted.¹

I. BACKGROUND

The current cause of action is the third in a series of cases involving these parties. This is the second time the current case is before this Court. Plaintiff C. DeLores Tucker has been an activist against gangsta rap music since approximately 1993. In 1995, Interscope Records, Inc., brought a suit in the Central District of California against Mrs. Tucker alleging she

1. Also currently pending before this Court is Defendant’s Renewed Motion to Disqualify Richard C. Angino as Trial Counsel. Based on this Court’s grant of summary judgment, the motion to disqualify Richard C. Angino is moot and, thus, this Court declines to rule on its merits.

induced a breach of contract between Death Row Records, Inc., and Interscope (“Tucker I”). Tucker I was voluntarily withdrawn by Interscope and Death Row Records.

In 1996, rap artist Tupac Shakur recorded and distributed songs in which he referred to Mrs. Tucker in an allegedly defamatory manner. In response, Plaintiffs filed a cause of action against Death Row Records, Inc., EMI Music, Estate of Tupac Shakur, Ted Field, Richard Fischbein, Interscope Records, Interscope, Inc., James Iovine, David Kenner, MCA, Inc., MTS, Inc., Priority Records, Inc., Seagram, Co., Afeni Shakur, Thorn EMI, and Time Warner (97 CV 4717 (E.D. Pa.)) (“Tucker II”).

On October 1, 1997, Plaintiffs filed the instant cause of action (“Tucker III”) claiming defamation against Time, Inc., Time Magazine reporter Belinda Luscombe, Newsweek Magazine, Newsweek Magazine reporter Johnnie Roberts, and Mr. Fischbein as a result of statements made by Defendant Fischbein regarding Tucker II, which were reported in Time and Newsweek magazines. On October 19, 1998, the defendants filed separate Motions for Summary Judgment. On February 9, 1999, this Court granted summary judgment in favor of all defendants. Relevant to the current matter, this Court granted summary judgment with regard to Defendant Fischbein holding that the statements were not defamatory as a matter of law. (Tucker v. Fischbein, et. al., Civ.A.97-6150, 1999 WL 124355 (E.D. Pa. Feb. 9, 1999)).

Plaintiffs took an appeal of this Court’s grant of summary judgment to the United States Court of Appeals, Third Circuit. The Third Circuit affirmed this Court’s grant of summary judgment as to Time, Inc., Belinda Luscombe, Newsweek Magazine, and Johnnie Roberts, but reversed in part as to Defendant Fischbein. Tucker, et al. v. Fischbein, et. al., 237 F.3d 275, 288-89 (3d Cir. 2001) (“Tucker III Appeal”). The Third Circuit reversed the grant of

summary judgment with regard to the statements made by Defendant Fischbein holding that the statements were, as a matter of law, capable of a defamatory meaning. Id. at 282-83. The Third Circuit further held that an issue of fact existed regarding whether Defendant Fischbein acted with actual malice due to their determination that a reasonable jury could find by clear and convincing evidence that Defendant Fischbein had actual knowledge that the statements made were false. Id. at 284 - 85.

The case currently before this Court, as remanded by the Third Circuit, consists solely of a claim of defamation against Defendant Fischbein. Defendant filed the instant Renewed Motion for Summary Judgment Based on the Absence of Special Damages on October 15, 2004.

II. STANDARD OF REVIEW

A motion for summary judgment will be granted where all of the evidence demonstrates “that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). A dispute about a material fact is genuine “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Since a grant of summary judgment will deny a party its chance in court, all inferences must be drawn in the light most favorable to the party opposing the motion. U.S. v. Diebold, Inc., 369 U.S. 654, 655 (1962).

The ultimate question in determining whether a motion for summary judgment should be granted is “whether reasonable minds may differ as to the verdict.” Schoonejongen v. Curtiss-Wright Corp., 143 F.3d 120, 129 (3d Cir. 1998). “Only disputes over facts that might

affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” Anderson, 477 U.S. at 248.

III. DISCUSSION

Under Pennsylvania law, in a cause of action claiming defamation, the Plaintiff must establish “(1) the defamatory character of the communication; (2) its publication by the defendant; (3) its application to the plaintiff; (4) an understanding by the reader or listener of its defamatory meaning; (5) an understanding by the reader or listener of an intent by the defendant that the statement refers to the plaintiff; (6) special harm resulting to the plaintiff from its publication; and (7) abuse of a conditionally privileged position.” Pennoyer v. Marriott Hotel Services, Inc., 324 F.Supp.2d 614, 618 (E.D. Pa. 2004) (citing Celemente v. Espinosa, 749 F.Supp. 672, 677 (E.D. Pa.1990)(citing 42 Pa.C.S. § 8343(a)(1988))).

Claims based on oral defamation are referred to as slander. Slander actions are divided into two classifications, slander *per quod* and slander *per se*. Agriss v. Roadway Express, Inc., 483 A.2d 456, 469 - 70 (Pa.Super. 1984). There are four categories of slander *per se*: “words that impute (1) criminal offense, (2) loathsome disease, (3) business misconduct, or (4) serious sexual misconduct.” Pennoyer, 324 F.Supp.2d at 618 (citations omitted). All other claims based on defamatory words are classified as slander *per quod*. Id.

As cited above, one of the elements of a defamation claim is a showing of “special harm” resulting from the publication of the alleged defamatory statement. Id. However, the Pennsylvania courts have carved out an exception when the defamatory statement constitutes slander *per se*. In a slander *per se* claim, the plaintiff may succeed in their claim without proof of

special harm. Id. Both parties in the current matter before this Court concede that the oral statement in this matter is not slander *per se*; as such, Plaintiff is required to plead special harm resulting from the publication of the alleged defamatory statement.

The courts have differentiated between “actual harm” and “special harm;” with “actual harm being a threshold hold requirement for all defamation causes of action and “special harm” being an additional requirement in causes of action based on slander *per quod*. “Actual harm” is not limited to a financial loss; rather, “the more customary types of actual harm inflicted by a defamatory falsehood include impairment of reputation and standing in the community, personal humiliation and mental anguish and suffering.” Agriss, 483 A.2d at 467. In the alternative, “[s]pecial harm means harm of an economic or pecuniary nature; mere loss of reputation is not sufficient to prove special harm.” Bethel v. McAllister Bros., Inc., No. Civ.A.91-2032, 1993 U.S. Dist. LEXIS 4243, *25-26 (E.D. Pa. March 30, 1993)(citing Restatement (Second) Torts § 575, Comment b; Agriss v. Roadway Express, Inc., 483 A.2d 456 (Pa.Super. 1984)); see also Sprague v. Am. Bar Ass’n, 276 F.Supp.2d 365, 368-69 (E.D. Pa.. 2003).

In the current matter before this Court, Plaintiffs have adequately pled “actual harm.” However, a review of all of the evidence, with all inferences drawn in the light most favorable to Plaintiffs, reveals that Plaintiffs have failed to allege any “special harm” as a result of the publication of Defendant’s alleged defamatory statement.

In their Complaint, Plaintiffs’ assert that the actions of Defendant caused “mental pain and suffering, humiliation, and damage to their reputations” (Compl. ¶ 28.) In both Plaintiffs’ answers to Defendant’s first set of interrogatories and Plaintiffs’ supplemental

response to Defendant's interrogatories, Plaintiffs detail their suffering and humiliation but fail to claim any economic or pecuniary harm. (Def. Renewed Mot. Summ. J., Ex.4 & 5.) Furthermore, when questioned during a deposition Defendant Mr. Tucker agreed that he was only complaining about emotional distress and not seeking the recovery of any sum of money lost in business. (Def. Renewed Mot. Summ. J., Ex. 7.)

Plaintiffs' memorandum in opposition to the instant motion likewise fails to provide the Court with evidence of any "special harm." Plaintiffs' memorandum provides excerpts from their depositions discussing the emotional distress experienced as a result of the publication of the alleged defamatory statement but fails to set forth an economic or pecuniary harm. Furthermore, the only case law cited in Plaintiffs' memorandum is that defining "actual harm," which, as discussed above, is a distinct and separate necessary element from that of "special harm" in a defamation cause of action based on slander *per quod*.

Accordingly, this Court holds that Defendant is entitled to judgment as a matter of law due to Plaintiffs' failure to set forth any evidence showing "special harm" as a result of the publication of the alleged defamatory statement, a necessary element of a defamation cause of action based on slander *per quod*.

An appropriate order follows.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

C. DELORES TUCKER and	:	CIVIL ACTION
WILLIAM TUCKER,	:	
	:	NO. 97-6150
Plaintiffs,	:	
	:	
v.	:	
	:	
RICHARD FISCHBEIN,	:	
	:	
Defendant.	:	

ORDER

AND NOW, this 11th day of January, 2005, upon consideration of Defendant Richard Fischbein's Renewed Motion for Summary Judgment (Docket No. 100), Plaintiffs' Memorandum of Law in Opposition to Defendant's Renewed Motion for Summary Judgment (Docket No. 102), and Defendant's Reply Memorandum of Law in Further Support of his Renewed Motion for Summary Judgment (Docket No. 104), it is hereby **ORDERED** that Defendant's Renewed Motion for Summary Judgment is **GRANTED**.

Judgment is entered in favor of Defendant Richard Fischbein and against Plaintiffs C. Delores Tucker and William Tucker. This case is **CLOSED**.

BY THE COURT:

RONALD L. BUCKWALTER, S.J.