

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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SEAN ANTHONY RIKER,

Plaintiff,

v.

TAYLOR ANNE RIKER,

Defendant.

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ORDER

12-cv-641-bbc

In this proposed civil action for monetary and injunctive relief, plaintiff Sean Anthony Riker, an inmate at the Wisconsin Secure Program Facility, contends that his ex-wife, defendant Taylor Anne Riker, falsely told the police that plaintiff had downloaded child pornography on his computer. Plaintiff is proceeding under the in forma pauperis statute, 28 U.S.C. § 1915, and has made an initial partial payment of the filing fee.

As a preliminary matter, it is necessary to determine whether the court has jurisdiction over this case. This is the second case plaintiff has initiated against defendant arising out of the same allegations. In *Riker v. Riker*, 11-cv-602-slc, I screened plaintiff's allegations and concluded that he had stated a claim for slander under Wisconsin law and that jurisdiction was proper. Plaintiff's claim against defendant is a state law claim. Thus, the requirements of 28 U.S.C. § 1332 must be satisfied for the court if the court is to exercise jurisdiction over this case. In plaintiff's first case, plaintiff provided the court an

affidavit, averring that he is a citizen of Wisconsin and that defendant is a citizen of Colorado. Dkt. # 11-1, case number 11-cv-602-slc. In the present case, plaintiff alleges that he is still incarcerated in Wisconsin and that defendant is still living at the same address in Colorado. I conclude from these allegations that the parties are completely diverse. Plaintiff is seeking \$2 million in damages from defendant, so the amount in controversy requirement is met. Back Doctors Ltd. v. Metropolitan Property and Casualty Insurance Co., 637 F.3d 827, 831 (7th Cir. 2011) (amount in controversy requirement of § 1332 is satisfied if it is legally possible for plaintiff to recover that amount, even if recovery of that amount is improbable). With jurisdiction determined, I can screen plaintiff's complaint.

Because plaintiff is proceeding without prepayment of the full filing fee, I must screen his complaint and dismiss any portion that is legally frivolous, malicious, fails to state a claim upon which relief can be granted or asks for money damages from a defendant who by law cannot be sued for money damages. 28 U.S.C. § 1915(e)(2)(B). In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. Haines v. Kerner, 404 U.S. 519, 521 (1972). After reviewing the complaint, I conclude that plaintiff may proceed with his claim against defendant for slander.

In his complaint, plaintiff alleges the following facts.

#### ALLEGATIONS OF FACT

On November 10, 2009, plaintiff Sean Anthony Riker was arrested and incarcerated in Racine County on several criminal charges. On December 19, 2009, defendant Taylor

Anne Riker, plaintiff's wife at the time, told the police that plaintiff had downloaded child pornography on the home computer. Plaintiff hired an investigator to do a forensic computer analysis of their computer and the investigator determined that the pornographic images had been downloaded while plaintiff was incarcerated. Plaintiff was never charged with any crime related to possession of the child pornography, but defendant's accusation is in his criminal record and he worries that the accusation will follow him the rest of his life. Plaintiff fears for his safety among other prisoners and prison staff because he is now associated with the "heinous" charge of possessing child pornography.

## DISCUSSION

### A. Statute of Limitations

On November 22, 2011, plaintiff dismissed his first case against defendant voluntarily under Fed. R. Civ. P. 41(a)(1). Because the case was dismissed without prejudice, plaintiff may bring a new lawsuit asserting the same claim. Plaintiff filed his current suit on August 5, 2012. Under Wisconsin law, plaintiff was required to bring his claim of slander within two years of the date he learned of his injury. Wis. Stat. § 893.57 (2009) ("An action to recover damages for libel, slander, assault, battery, invasion of privacy, false imprisonment or other intentional tort to the person shall be commenced within 2 years after the cause of action accrues or be barred."). (The statute of limitations was amended in 2010 to three years, but the amendment applies only to injuries occurring after the effective date of the amendment, February 26, 2010.) Although the general rule is that

a failure to comply with a statute of limitations is an affirmative defense that must be proven by the defendants, a district court may dismiss a complaint on its own motion if a party pleads enough information showing that the complaint is untimely. *Cancer Foundation, Inc. v. Cerberus Capital Management, LP*, 559 F.3d 671, 674-75 (7th Cir. 2009).

It seems likely that plaintiff's suit is untimely and barred by the statute of limitations. Plaintiff was aware of defendant's statements to the police about his alleged child pornography, at the latest, in mid-November 2010 when plaintiff's attorney gave plaintiff a copy of an investigative report that analyzed plaintiff's laptop for child pornography. Dkt. # 1, Ex. B. However, it is likely that plaintiff knew of defendant's statements earlier, as she first reported his alleged child pornography to police on December 17, 2009. Dkt. # 1, exh. A. If plaintiff knew of defendant's statement before August 5, 2010, his claim would be barred by the statute of limitations. Nonetheless, because it is unclear from plaintiff's complaint and exhibits when exactly he learned of his former wife's statements, I will not dismiss plaintiff's suit at this time on that ground.

#### B. Slander

Plaintiff is suing defendant for slander and defamation. Because the tort occurred in Wisconsin, Wisconsin law applies to this claim. *Schindler v. Seiler*, 474 F.3d 1008, 1010 (7th Cir. 2007). Under Wisconsin law, slander is a type of defamation. *Teff v. Unity Health Plans Ins. Corp.*, 2003 WI App 115, ¶ 40 n. 6, 265 Wis. 2d 703, 731 n. 6, 666 N.W.2d 38, 52 n. 6. To prove a claim of defamation a plaintiff must show that an allegedly

defamatory statement (1) was spoken to someone other than the person defamed; (2) is false; (3) is unprivileged; and (4) tends to harm the defamed person's reputation so as to lower him in the estimation of the community or deter third persons from associating or dealing with him. *Torgerson v. Journal/Sentinel, Inc.*, 210 Wis. 2d 524, 534, 563 N.W.2d 472, 477 (1997); *Hart v. Bennet*, 2003 WI App 231, ¶ 21, 267 Wis. 2d 919, 941, 672 N.W.2d 306, 317.

Additionally, a case alleging slander is not actionable unless (1) the plaintiff both pleads and proves special damages; or (2) the slander is actionable per se. *Freer v. M & I Marshall & Ilsley Corp.*, 2004 WI App 201, ¶ 9, 276 Wis. 2d 721, 730, 688 N.W.2d 756, 760-61. Slander per se is limited to four circumstances: (1) "imputation of certain crimes" to the plaintiff; (2) "imputation . . . of a loathsome disease" to the plaintiff; (3) "imputation . . . of unchastity to a woman;" or (4) defamation "affecting the plaintiff in his business, trade, profession, or office." *Id.* ¶ 11 (quoting *Martin v. Outboard Marine Corp.*, 15 Wis. 2d 452, 459, 113 N.W.2d 135, 139 (1962)). Any defamatory statement accusing a person of a crime punishable by a fine or imprisonment is considered slander per se. *Starobin v. Northridge Lakes Dev. Co.*, 94 Wis. 2d 1, 15-16, 287 N.W.2d 747, 753-54 (1980). When a statement constitutes slander per se, damages are "presumed from the character of the defamatory language." *Freer*, 2004 WI App 201, ¶ 9 (quoting *Martin*, 15 Wis. 2d 452, 459).

Plaintiff's allegations are sufficient to state a claim for slander. He alleges that defendant communicated false statements to a third party. Because the possession of child

pornography is a crime punishable by a fine or imprisonment, defendant's statement that plaintiff downloaded such material is slander per se. As a result, plaintiff does not need to plead and prove special damages. Also, it is reasonable to conclude that defendant's statements to the police alleging that plaintiff had possessed child pornography would lower plaintiff's reputation in the community or deter people from associating with him. Accordingly, plaintiff may proceed in his slander case against defendant.

### C. Motion for Appointment of Counsel

Plaintiff has filed a motion for appointment of counsel. Dkt. # 9. In determining whether to appoint counsel, the court must find that a plaintiff has made a reasonable effort to find a lawyer on his own and has been unsuccessful or that he has been prevented from making such an effort. Jackson v. County of McLean, 953 F.2d 1070, 1073 (7th Cir. 1992). To prove that he has made a reasonable effort to find a lawyer, plaintiff must give the court the names and addresses of at least three lawyers that he has asked to represent him in this case and who turned him down. Armstrong v. Wisconsin, 2012 WL 4467570, \*4 (W.D. Wis. Sept. 26, 2012).

It is unclear whether plaintiff has completed this preliminary step. Plaintiff attached a list of 11 lawyers to his motion for appointment of counsel whom, he alleges, did not respond to his requests for representation in this case. Dkt. # 9, at 2. Plaintiff further states that he wrote to each of the 11 on August 5, 2012. Id., at 1. However, plaintiff does not include any rejection letters from the lawyers, a copy of the letter plaintiff sent to them or

any information about what plaintiff included in his letter.

Even if I were to find that plaintiff has met this preliminary requirement, his motion for appointment of counsel must be denied at this point because it is too early to tell whether the legal and factual difficulty of the case exceeds the plaintiff's demonstrated ability to prosecute it. Pruitt v. Mote, 503 F.3d 647, 654-55 (7th Cir. 2007). Although plaintiff states that his use of the drugs Mirtazapine and Paxil inhibit his ability to think, it is simply too early to tell if plaintiff lacks the ability to litigate this case. With regards to the complexity of the case, many of the relevant facts are within plaintiff's personal knowledge. Plaintiff knows who in the prison is aware of defendant's statement and to what extent his reputation has been damaged. As for the applicable legal standard, the court will apply the appropriate law to the facts, even if plaintiff cannot provide the law on his own or does not understand how the law applies to his facts. As this case progresses, it may become apparent that appointment of counsel is warranted, but for now I will deny plaintiff's motion. Plaintiff is free to renew his motion at a later time.

## ORDER

IT IS ORDERED that

1. Plaintiff Sean Anthony Riker is GRANTED leave to proceed on his claim of slander against defendant Taylor Anne Riker.
2. Plaintiff's motion for appointment of counsel, Dkt. # 9, is DENIED without prejudice.

3. Copies of plaintiff's complaint and this order are being forwarded to the United States Marshal for service on defendant.

4. For the remainder of the lawsuit, plaintiff must send defendant a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer, if any, will be representing defendant, he should serve the lawyer directly rather than defendant. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that he has sent a copy to defendant or to defendant's attorney.

5. Plaintiff should keep a copy of all documents for his own files. If plaintiff does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

6. Plaintiff is obligated to pay the unpaid balance of his filing fee in monthly payments as described in 28 U.S.C. § 1915(b)(2). This court will notify the officials at the Wisconsin Secure Program Facility of that institution's obligation to deduct payments until the filing fee has been paid in full.

Entered this 18<sup>th</sup> day of October, 2012.

BY THE COURT:

/s/

BARBARA B. CRABB  
District Judge