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2013 IL App (3d) 120442-U
(Consolidated with 120663-U)

Order filed June 5, 2013

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2013

ERIC D. PURYEAR,	) Appeal from the Circuit Court) of the 14th Judicial Circuit,) Rock Island County, Illinois,
Plaintiff-Appellant,	))
v.	) Appeal Nos. 3-12-0442 and 3-12-0663) Circuit No. 11-L-174
JACK A. SCHWARTZ,	)
Defendant-Appellee.	) Honorable) James G. Conway, Jr.,) Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Presiding Justice Wright and Justice Schmidt concurred in the judgment.

ORDER

¶ 1 *Held*: The dismissal of a plaintiff's defamation complaint against an opposing attorney was upheld on appeal because, although the absolute attorney-litigation privilege was not applicable, the plaintiff failed to state a claim for defamation, *per se* or *per quod*. The harm from the statement attributed to the defendant was not obvious or apparent on its face, and the plaintiff failed to sufficiently plead special damages. An order of sanctions, however, was reversed because the attorney-litigation privilege was not applicable to a statement made in the rotunda of the courthouse that did not reference a specific case.

¶ 2 The plaintiff, Eric Puryear, appealed the dismissal of his defamation complaint against the defendant, Jack Schwartz. In the consolidated appeal, Puryear appealed an order of sanctions against him and his counsel under Illinois Supreme Court Rule 137 (eff. Feb. 1, 1994).

¶ 3 FACTS

¶ 4 Puryear alleged in his complaint that, on December 22, 2011, Schwartz, an attorney, entered into the Rock Island County Courthouse. Schwartz was unhappy that his assistants were checked through the security checkpoint. Puryear alleged that, upon information and belief, Schwartz told Deputy Frank Weikert that Puryear, also an attorney, should be checked because Puryear was unlawfully armed, dangerous, and a security risk. Schwartz made the statement in the rotunda of the courthouse, with other people present. Following that incident, Puryear alleged that he was subjected to increased security measures, and other people attributed increased security measures to him. Puryear also alleged that his professional reputation was harmed, and that, on information and belief, members of the public were dissuaded from retaining him as their attorney due to Schwartz's statements.

¶ 5 Puryear's complaint against Schwartz alleged defamation *per se* and defamation *per quod*, and sought punitive damages. Schwartz moved to dismiss the complaint pursuant to section 2-619(a)(9) of the Code of Civil Procedure (735 ILCS 5/2-619(a)(9) (West 2010)). Schwartz alleged that any statements were made in the course of serving as an attorney in an adversary proceeding with Puryear representing the other party and, as such, were subject to an absolute privilege. Puryear's affidavit, submitted in opposition to the motion to dismiss, notes that Weikert heard Schwartz say that Puryear carried a gun. Weikert's intra-departmental report was attached to Puryear's affidavit.

¶ 6 The circuit court heard argument regarding the application of the attorney-litigation privilege. The circuit court granted the motion to dismiss, finding that the statements made by Schwartz were made in the scope of legal proceedings, specifically, the parties were adverse counsel in a hearing on an order of protection set to commence on the date in question. The circuit court noted that *Skopp v. First Federal Savings of Wilmette*, 189 Ill. App. 3d 440 (1989), controlled. Thus, the circuit court found that the statements were absolutely privileged, and the lawsuit filed by Puryear was meritless. The circuit court further found that the Illinois Citizen Participation Act (735 ILCS 110/1 (West 2010)) was not applicable, but that finding is not challenged on appeal.

¶ 7 Schwartz filed a motion for sanctions pursuant to Rule 137, contending that Puryear knew the allegations of his complaint to be false or not well-grounded in fact or law. After another hearing, the circuit court found that Puryear made a reasonable inquiry of fact prior to filing the complaint, but the complaint was not well-grounded in law due to the absolute attorney privilege. The circuit court granted an award of sanctions in the amount of $1500, which was the amount of Schwartz's fees incurred in defending the action, reduced by one-third because of Schwartz's provocative statements.

¶ 8 ANALYSIS

¶ 9 Puryear argues that the circuit court erred in finding that the statements made by Schwartz pertained to an ongoing litigation between the parties. Puryear contends that, under applicable caselaw, the words spoken by the defendant had to be relevant or pertinent to ongoing litigation, and the words did not so relate in this case. Further, Puryear argues that the statement was made three days before they appeared together on the order of protection.

¶ 10 Schwartz argues that the statements he made clearly fell under the purview of the attorney-litigation privilege because they were made in the courthouse, on his way to an adversary hearing with Puryear on an order of protection, and concerned the safety of the court.

¶ 11 A motion to dismiss under section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2010)) admits the legal sufficiency of a plaintiff's complaint, but asserts affirmative matter that defeats the claim. *King v. First Capital Financial Services Corp.*, 215 Ill. 2d 1 (2005). In this case, Schwartz argues that the attorney-litigation privilege was an absolute bar to Puryear's claim. We review *de novo* an order granting a section 2-619 motion to dismiss. *King,* 215 Ill. 2d at 12.

¶ 12 A defamatory statement is not actionable if it is privileged. *Solaia Tech., LLC v. Specialty Publ. Co.*, 221 Ill. 2d 558 (2006). Anything that is said or written in a legal proceeding, as long as it is pertinent and material to the matter in controversy, is protected by an absolute privilege. *Weiler v. Stern*, 67 Ill. App. 3d 179 (1978); Restat 2d of Torts, § 586 ("An attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding"). Although the communication must be pertinent to the litigation, it need not pertain to the specific issues involved in the litigation. *Skopp v. First Federal Savings*, 189 Ill. App. 3d 440 (1989). All doubts will be resolved in favor of a finding that the communication is pertinent or relevant. *Skopp*, 189 Ill. App. 3d at 448. In this case, the statements were made in the courthouse, to an officer, concerning an adversary attorney.

¶ 13 However, Puryear's complaint alleges that the statements were made on December 22,

and Weikert's statement, obtained pursuant to a Freedom of Information Act request, says that the statements were made on December 19. Thus, it is unclear if the parties were actually entering an adversary proceeding on the day of the statement. However, it is clear that the statement was made in the rotunda of the courthouse, not near a specific courtroom, and did not concern the details of any particular case. We find that the absolute privilege is not applicable under these circumstances. Since the circuit court based its order for sanctions on the fact that the complaint was not well-grounded in law because the absolute privilege was applicable, we reverse the order of sanctions.

¶ 14 However, we affirm the dismissal of the complaint because the facts alleged do not support a claim for defamation. As a reviewing court, we can sustain the judgment of the circuit court on any grounds called for in the record. *Leonardi v. Loyola Univ.*, 168 Ill. 2d 83 (1995). A statement is defamatory if it harms a person's reputation to the extent that it lowers the person in the eyes of the community or deters the community from associating with her or him. *Green v. Rogers*, 234 Ill. 2d 478 (2009). To state a claim for defamation, a plaintiff must present facts showing that the defendant made a false statement about the plaintiff, that the defendant made an unprivileged publication of that statement to a third party, and that this publication caused damages. *Green*, 234 Ill. 2d at 491. There are two types of defamatory statements: *per se* and *per quod*. *Jacobson v. Gimbel*, 2013 IL App (2d) 120478 (2013). While damages are presumed in an action for defamation *per se*, a plaintiff must plead and prove actual damages in an action for defamation *per quod*. *Jacobson*, 2013 IL App (2d) 120478, ¶25.

¶ 15 A statement is defamatory *per se* if its harm is obvious and apparent on its face. *Green*, 234 Ill. 2d at 491. In Illinois, there are five categories of statements that are considered

defamatory *per se*: (1) words that impute a person has committed a crime; (2) words that impute a person is infected with a loathsome communicable disease; (3) words that impute a person is unable to perform or lacks integrity in performing her or his employment duties; (4) words that impute a person lacks ability or otherwise prejudices that person in her or his profession; and (5) words that impute a person has engaged in adultery or fornication. *Id.* at 491-92.

¶ 16 Defamation *per se*, like common law fraud, is held to a higher standard of pleading, and the claim cannot be based upon information and belief unless the factual basis is also pled. *Id.* at 495. The preliminary construction of an allegedly defamatory statement is a question of law which we review *de novo*. *Id.* at 492. Also, the innocent construction rule dictates that if the actual words do not, by themselves denote actionable conduct, and there is a more common usage, then the words are not actionable as defamation *per se*. *Moore v. People for the Ethical Treatment of Animals, Inc.*, 402 Ill. App. 3d 62 (2010); *Tuite v. Corbitt*, 224 Ill. 2d 490 (2006).

¶ 17 In this case, although Puryear alleged in his complaint that Schwartz said that Puryear was unlawfully armed, dangerous, and a security risk, the factual basis was Deputy Weikert, who only heard a statement that Puryear carried a gun. Any harm in that statement is not obvious and apparent on its face, so is not defamatory *per se*.

¶ 18 A claim of defamation *per quod* may be brought when: the defamatory character of the statement is not apparent on its face, and plaintiff must plead and prove extrinsic facts to explain the injurious meaning of the statement, or when the statement is defamatory on its face, but does not fall within one of the limited categories of statements that are actionable *per se*. *Tunca v. Painter*, 2012 IL App (1st) 093384 (2012). Under either category, the plaintiff must allege special damages, which are damages to the plaintiff's reputation and pecuniary losses resulting

from the defamatory statement. *Imperial Apparel, Ltd. v. Cosmo's Designer Direct, Inc.*, 227 Ill. 2d 381 (2008). In this case, the allegation that Schwartz's statement injured Puryear's reputation and professional standing lacked the particularity necessary for pleading special damages. See *Becker v. Zellner*, 292 Ill. App. 3d 116 (1997) ("allegations such as damage to one's health or reputation, economic loss, and emotional distress are insufficient to state a cause of action for defamation *per quod*"). Similarly, Puryear's allegation that, on information and belief, people were dissuaded from retaining him as an attorney, lacks the particularity necessary to plead special damages. See *Salamone v. Hollinger Int'l, Inc.*, 347 Ill. App. 3d 837 (2004) (Plaintiff's allegations of special damages were insufficient because he failed to allege with particularity which members of the community ceased associating with him and patronizing his store). We affirm the circuit court's order of dismissal because Puryear has failed to sufficiently plead a claim of defamation.

¶ 19 CONCLUSION

¶ 20 No. 3-12-0442. Affirmed.

¶ 21 No. 3-12-0663. Reversed.