

FOURTH DIVISION
March 13, 2014

Nos. 1-13-1250 and 1-13-2088, Consolidated

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

LEO STOLLER,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	No. 11 L 12519
)	
LANCE G. JOHNSON, et al.,)	Honorable
)	Kathy M. Flanagan,
Defendants-Appellees.)	Judge Presiding.

PRESIDING JUSTICE HOWSE delivered the judgment of the court.
Justices Fitzgerald Smith and Epstein concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court’s order granting summary judgment in favor of defendants because defendants’ defamatory publication is protected by the fair report privilege is affirmed.

¶ 2 Plaintiff, Leo Stoller, filed a second amended complaint for (1) defamation, (2) intentional infliction of emotional distress, (3) conspiracy to defame, (4) conspiracy to inflict

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emotional distress, and (5) aiding and abetting against defendants Lance G. Johnson, David Abrams, Alfred Goodman, and the law firm Roylance, Abrams, Berdo & Goodman, LLP. Prior to this suit and the allegedly defamatory publication at issue in this case, defendant Johnson, a partner in the defendant law firm, had defended a client in a trademark infringement lawsuit brought by plaintiff. The circuit court of Cook County granted defendants' motion for summary judgment. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 Sometime between November 8, 2007, and November 10, 2007, the Intellectual Property Law Section of the State Bar of California presented a paper authored by defendant Johnson at the 32nd Annual Intellectual Property Institute, held at the Marriott Hotel in Monterey, California. The paper is titled "A House of Cards: Leo Stoller and the Central Mfg. Co. Licensing Scam." The paper's opening paragraph both summarizes the content and tone of the paper and encapsulates plaintiff's allegations of defamation. The paper states as follows:

"Leo Stoller is a trademark terrorist who should be in jail.

His scheme relied on serial false oaths, falsified evidence, and false testimony by two co-conspirators in support of extortion by false allegations of trademark infringement. He extorted settlement fees and obtained new trademark registrations from innocent business owners by assignment on the promise of an uncontrolled license back to allow the victims to continue operating their businesses.

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Exploiting weaknesses in multiple aspects of the TM registration system, Stoller acquired new trademark registrations by fraud, perjury and false specimens of use. It's amazing he wasn't wearing federal orange years ago."

¶ 5 Johnson's paper goes on to describe plaintiff's path to becoming an alleged professional vexatious litigator of trademark infringements. Defendant Johnson describes plaintiff's past business, how it resulted in the accumulation of trademarks, the personal issues that arose from its failure, and Johnson's own conjecture as to how plaintiff came to see value in the trademark itself, rather than any particular product it represents. The author speculates that when plaintiff did not achieve commercial gain from his trademarks he turned to litigation to realize their value. Johnson wrote that "[t]he 1996-1999 period saw the rise of Stoller's litigation career" and described the various ways in which Stoller allegedly generated income from that career. The paper describes what the author perceives to be the methodology of one of Stoller's lawsuits. Describing a prototypical lawsuit as "Stoller's operation," the author makes repeated references to Stoller's "victims," accuses Stoller of making "false allegations," fabricating discovery, and dilatory litigation tactics.

¶ 6 The allegedly defamatory paper states that plaintiff "filed 33 lawsuits from 1996 to 1998," all of which plaintiff lost, and lists several cases with "colorful decisions from this period." Two in particular resulted in sanctions in 1998, followed by a recording of assignments of trademarks held by the company involved in those cases (S. Industries, Inc.) to other corporate entities which

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Stoller also controlled (Central Manufacturing Co., Central Manufacturing, Inc., and Sentra Industries, Inc.). The original company, involved in the litigation that resulted in sanctions, filed for bankruptcy. Later, an entity involved in litigation with Stoller assigned the sanction judgment to another company (Pure Fishing, Inc.) which had become involved in litigation with Stoller.

¶ 7 The paper states that Stoller began litigating trademarks again in 2004 by filing oppositions to trademark registrations by other entities and sending letters demanding they cease use of his trademarks with licensing offers. In 2005, Stoller filed suit against Pure Fishing, Inc. Johnson writes why this later round of litigation failed, including that, in one case, Stoller “failed to keep (or manufacture convincing versions of) adequate records to substantiate his allegation of use of the *** mark” before the defendant who allegedly infringed on Stoller’s trademark began using it, and, in another case, the defendant (Pure Fishing, Inc.) could “file counterclaims to assert an unsatisfied sanction award from 1998.” The paper states that the latter case resulted in the cancellation of 34 of Stoller’s trademark registrations. Subsequently, in a separate bankruptcy proceeding involving Stoller personally (and due to Stoller allegedly lying on disclosure forms, omitting key information, and filing false bankruptcy schedules), “Pure Fishing Inc. became Stoller’s largest creditor.” Johnson described Stoller’s bankruptcy proceeding as including “a trademark trafficking business that included more than 200 federal registration certificates, third party licenses and almost three dozen pending oppositions and lawsuits that lacked factual or documentary foundation.” In that bankruptcy proceeding, an organization the

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paper only identifies as the “Society for the Prevention of Trademark Abuse, LLC”¹ purchased Stoller’s portfolio of trademarks and as a result, according to Johnson, “Leo Stoller is now out of the trademark business for the foreseeable future.”

¶ 8 Johnson identifies “Nine Factors That Allowed Stoller To Stay In Business.” Included among them was a statement that “Stoller obtained new registrations and maintained old registrations by filing fabricated evidence and false declarations of use.” Johnson alleged he could (but in his paper he did not) “document 23 registrations in which Stoller submitted nothing more than a specimen consisting of a label printed on his computer with [a trademark] and a conclusionary, [*sic*] false declaration in which he attested to use of the attached specimen on the goods specified in the registration.” Many of the factors Johnson identified and commentary in the paper are directed at alleged “weaknesses in multiple aspects of the TM registration system” and at the Trademark Trial and Appeal Board (TTAB), which Johnson opines permitted Stoller to exploit the system with his “open and notorious conduct.”

¶ 9 In September 2008 plaintiff filed a *pro se* complaint against defendants in the circuit court of Cook County for defamation, intentional infliction of emotional distress (IIED), conspiracy to defame, conspiracy to inflict emotional distress, and aiding and abetting. Each count in the September 2008 complaint was based on the paper defendant Johnson prepared for the Intellectual Property Law Section of the State Bar of California conference. Plaintiff

¹ “The Society for the Prevention of Trademark Abuse, LLC was formed for the purpose of acquiring the IP portfolio and corporate stock of the Leo Stoller estate (*In re Leo Stoller*, case no. 05 B 64075 (Bankr. N.D. Ill.)).” <http://preventtmabuse.blogspot.com/> (visited February 16, 2014).

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attempted to serve defendants by certified mail. In June 2009, the trial court quashed plaintiff's service and plaintiff appealed. The appellate court affirmed, our supreme court declined review, and the matter returned to the circuit court in December 2011.

¶ 10 In May 2012 plaintiff filed a second amended complaint. Plaintiff's second amended complaint is based solely on the paper presented to the Intellectual Property Law Section of the California bar at its conference in 2007². The second amended complaint makes claims based on the same five causes of action raised in the September 2008 complaint against the original defendants and against additional defendants named for the first time in the second amended complaint. Those additional defendants are not parties to this appeal. (Hereinafter all references to defendants are to the original defendants named in the September 2008 complaint and again in the second amended complaint.)

¶ 11 In December 2012, defendants moved for summary judgment on the grounds (1) their description of plaintiff as a trademark terrorist who should be in jail was rhetorical hyperbole protected by the First Amendment, (2) their publication was protected by the fair report privilege as an accurate report of several judicial proceedings involving plaintiff, and (3) plaintiff failed to allege extreme and outrageous conduct in support of his claim for IIED. In March 2013, the trial court granted defendants' motion for summary judgment. The trial court found defendants' paper was not protected as "exaggerated, figurative and hyperbolic" speech because the paper as a whole suggested factual content. The trial court found that "when the entire paper is read as a

² Not at issue in this appeal is Count VI of the second amended complaint, which alleges defendants aided and abetted each other in avoiding service of process and false swearing.

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whole, it is replete with statements that are clearly verifiable, and the surrounding of the hyperbolic [‘trademark terrorist,’ ‘he should be in jail,’ and ‘wasn’t wearing federal orange years ago,’] by the verifiable infer that the hyperbolic is also a statement of fact.”

¶ 12 However, the trial court granted summary judgment based on its application of the fair report privilege. The court also found the record devoid of evidence to support plaintiff’s allegations of extreme and outrageous conduct. Finally, the court found that in light of its holdings, plaintiff’s derivative claims of conspiracy and aiding and abetting must also fail. The court denied plaintiff’s motion to reconsider the judgment granting summary judgment in favor of defendants.

¶ 13 This appeal followed.

¶ 14 ANALYSIS

¶ 15 On appeal, plaintiff argues the paper is *per se* defamatory in that the paper falsely implies plaintiff committed a criminal offense, imputes plaintiff’s inability or want of integrity in performing the duties of his profession as a trademark expert, and uses false words that prejudice plaintiff in his trade or profession. Plaintiff admits his defamation claim “forms the basis for each other cause of action plead by Stoller, [IIED], conspiracy *** and aiding and abetting.” Plaintiff argues the trial court correctly held that defendants’ statements plaintiff is a “trademark terrorist” who “should in jail” and expressing disbelief plaintiff “wasn’t wearing federal orange years ago” are not constitutionally protected hyperbole. Plaintiff argues the trial court erred, however, in holding that the fair report privilege applies.

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¶ 16

A. Standard of Review

¶ 17 Plaintiff appeals the trial court’s order granting defendants’ motion for summary judgment and denying his motion to reconsider the order granting summary judgment in favor of defendants.

“Summary judgment is appropriate where the pleadings, depositions, and admissions, together with the affidavits, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. [Citation.] The court must construe the evidence strictly against the movant and liberally in favor of the nonmoving party. [Citation.] We review *de novo* a trial court’s ruling on a motion for summary judgment.” *Eubanks v. Northwest Herald Newspapers*, 397 Ill. App. 3d 746, 749 (2010).

¶ 18

B. Sufficiency of Plaintiff’s Brief

¶ 19 Defendants initially respond plaintiff’s appeal should be dismissed because plaintiff failed to comply with several Illinois Supreme Court Rules pertaining to briefs on appeal. Defendants admit that individually, the shortcomings in plaintiff’s opening brief “may seem picayune” but they argue that in the aggregate, plaintiff’s errors demonstrate plaintiff’s “cavalier attitude towards the judicial system and merit the dismissal of his appeal.” We agree that our supreme court’s rules of procedure concerning appellate briefs are not mere suggestions, and that

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failure to comply with those rules is not an inconsequential matter. *Hall v. Naper Gold Hospitality LLC*, 2012 IL App (2d) 111151, ¶ 7. “The purpose of the rules is to require parties before a reviewing court to present clear and orderly arguments so that the court can properly ascertain and dispose of the issues involved.” *Id.* However, “the striking of an appellate brief, in whole or in part, is a harsh sanction and is appropriate only when the alleged violations of procedural rules interfere with or preclude review. [Citation.]” (Internal quotation marks omitted.) *In re Detention of Powell*, 217 Ill. 2d 123, 132 (2005). Here, the deficiencies in plaintiff’s brief neither hinder nor preclude our review. Plaintiff’s brief is insufficient in several respects, but not such that we cannot ascertain the issues and reach a proper disposition. Accordingly, we will review plaintiff’s appeal on the merits. *Id.*

¶ 20 C. Pertinent Trademark Principles

¶ 21 Although plaintiff’s complaint sounds in defamation, a brief discussion of trademark law is required to understand plaintiff’s allegations against defendants, which of course is necessary for us to fairly resolve plaintiff’s appeal. “A trademark is a word, name, symbol, device, or other designation, or a combination of such designations, that is distinctive of a person’s goods or services and that is used in a manner that identifies those goods or services and distinguishes them from the goods or services of others. A service mark is a trademark that is used in connection with services.” Restatement (Third) of Unfair Competition, § 9 (2013). “Trademark law is designed to reduce the costs customers incur in learning who makes the product, and this also helps sellers obtain rewards from producing goods of consistent quality, for consumers will

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find it easier to find and buy goods with which they have been satisfied in the past.” *Bretford Mfg., Inc. v. Smith System Mfg. Corp.*, 419 F.3d 576, 579 (7th Cir. 2005).

¶ 22 “It is an axiom of service and trademark law that the first user of a mark owns it if conflicts arise with rival claimants. [Citation.] Once the basic rights in a mark are acquired upon its initial use, one may supplement or extend those rights by registration.” *Freedom Savings and Loan Ass’n v. Way*, 583 F. Supp. 544, 553 (D.C. Fla. 1984). The Lanham Act provides for the registration of trademark rights. *Time Mechanisms, Inc. v. Qonaar Corp.*, 422 F. Supp. 905, 911 (D.C. N.J. 1976). The United States Patent and Trademark Office (PTO) protects owners of trademarks by allowing them to register their trademarks. *In re Four Seasons Hotels, Ltd.*, 987 F.2d 1565, 1566 (C.A. Fed. 1993). Registration of the trademark protects the owner of the trademark from its use by another to palm off his goods as those of the trademark owner. *Consolidated Cosmetics v. Neilson Chemical Co.*, 109 F. Supp. 300, 307 (D.C. Mich. 1952).

¶ 23 “[F]ederal registration of a mark does not guarantee ownership rights in the mark; rights in a registered mark are acquired through actual use, just as for unregistered marks.” *Brothers of Wheel M.C. Executive Council, Inc. v. Mollohan*, 909 F. Supp. 2d 506, 542 (S.D. W.Va. 2012).

“Registration of a mark on the federal Principal Register confers a number of procedural and substantive legal advantages over reliance on common law rights. Among these rights acquired by Principal Register registration are:

(1) Federal jurisdiction for infringement without the

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necessity of any required amount in controversy. A related claim of common law unfair competition may be asserted along with the claim for infringement of a registered mark.

(2) In federal court, profits, damages and costs are recoverable and treble damages and attorney's fees are available.

(3) A registration on the Principal Register is *prima facie* evidence of the validity of the registered mark, of the registration of the mark, of the registrant's ownership of the mark, and of the registrant's exclusive right to use the registered mark.”

McCarthy on Trademarks and Unfair Competition,
Fourth Edition § 19:9 (2013).

¶ 24 “A cause of action for infringement exists where a person uses (1) any reproduction, counterfeit, copy[,] or colorable imitation of a mark; (2) without the registrant's consent; (3) in commerce; (4) in connection with the sale, offering for sale, distribution[,] or advertising of any goods; (5) where such use is likely to cause confusion, or to cause mistake or to deceive.

[Citation.]” (Internal quotation marks omitted.) *Choice Hotels Intern., Inc. v. Patel*, 940 F. Supp. 2d 532, 539 (S.D. Tex. 2013). Moreover, “[a]ny person who believes that he would be

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damaged by the registration of a mark upon the principal register, including the registration of any mark which would be likely to cause dilution by blurring or dilution by tarnishment under section 1125(c) of [the Lanham Act], may, upon payment of the prescribed fee, file an opposition in the Patent and Trademark Office.” 15 U.S.C. § 1063(a) (2014).

¶ 25 An entity must complete two, distinct steps to register its mark with the PTO. “First, the entity must submit an application that meets relevant requirements in order to receive a filing date. Second, the entity must meet more detailed requirements to secure final approval of the application to obtain registration.” *Humanoids Group v. Rogan*, 375 F.3d 301, 304 (4th Cir. 2004). The application requirements are:

“(2) The application shall include specification of the applicant’s domicile and citizenship, the date of the applicant’s first use of the mark, the date of the applicant’s first use of the mark in commerce, the goods in connection with which the mark is used, and a drawing of the mark.

(3) The statement shall be verified by the applicant and specify that--

(A) the person making the verification believes that he or she, or the juristic person in whose behalf he or she makes the verification, to be the owner of the mark sought to be registered;

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(B) to the best of the verifier's knowledge and belief, the facts recited in the application are accurate;

(C) the mark is in use in commerce; and

(D) to the best of the verifier's knowledge and belief, no other person has the right to use such mark in commerce either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods of such other person, to cause confusion, or to cause mistake, or to deceive, except that, in the case of every application claiming concurrent use, the applicant shall--

(i) state exceptions to the claim of exclusive use; and

(ii) shall specify, to the extent of the verifier's knowledge--

(I) any concurrent use by others;

(II) the goods on or in connection with which and the areas in which each concurrent use exists;

(III) the periods of each use; and

(IV) the goods and area for which the applicant desires registration.

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(4) The applicant shall comply with such rules or regulations as may be prescribed by the Director. The Director shall promulgate rules prescribing the requirements for the application and for obtaining a filing date herein.” 15 U.S.C. § 1051(a)(2), (a)(3), (a)(4) (2014).

¶ 26 D. Defamation and Privilege

¶ 27 “There are two types of defamatory statements: defamation *per se* and defamation *per quod*.” *Naleway v. Agnich*, 386 Ill. App. 3d 635, 638 (2008).

“To prove defamation *per se*, a plaintiff is required to show: (1) that the defendant made a false statement concerning the plaintiff; (2) that there was an unprivileged publication of the defamatory statement to a third party by the defendant; and (3) that the plaintiff was damaged. [Citation.] *** Further, a claim for defamation *per se* must fit into one of the following categories: (1) words that impute the commission of a criminal offense; (2) words that impute infection with a loathsome communicable disease; (3) words that impute an inability to perform or want of integrity in the discharge of duties of office of employment; and (4) words that prejudice a party, or impute a lack of ability, in his or her trade, profession, or business. [Citation.]” (Internal quotation marks omitted.) *Seitz-Partridge v. Loyola University of Chicago*, 2013 IL

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App (1st) 113409, ¶ 21.

¶ 28 However, “the first amendment prohibits defamation actions based on loose, figurative language that no reasonable person would believe presented facts.” *Imperial Apparel, Ltd. v. Cosmo’s Designer Direct, Inc.*, 227 Ill. 2d 381, 397 (2008). Thus, the First Amendment protects exaggerated, figurative and hyperbolic speech. *Id.* (citing *Troy Group, Inc. v. Tilson*, 364 F. Supp. 2d 1149, 1157 (C.D. Cal. 2005)).

“A defamatory statement is not actionable if it is privileged.

[Citation.] The presence or absence of a privilege is a question of law. [Citation.] There are two classes of privileged statements: those subject to an absolute privilege, and those subject to a conditional or qualified privilege. [Citation.] *** A qualified privilege protects communications that would normally be defamatory and actionable, in order to effect the policy of protecting honest communications of misinformation in certain favored circumstances and thus facilitate the availability of correct information. [Citation.]” *Naleway*, 386 Ill. App. 3d at 639-40.

¶ 29 The trial court held the fair report privilege applies to the paper at issue in this case.

“[T]he fair report privilege has two requirements: (1) the report must be of an official proceeding; and (2) the report must be complete and accurate or a fair abridgement of the official

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proceeding. [Citation.] *** For a publication to be considered a fair abridgment, the report must convey to readers a substantially correct account of the official proceedings. [Citation.] A reporter is not privileged to make additions of his own that would convey a defamatory impression or to indict expressly or by innuendo the veracity or integrity of any of the parties. [Citation.] Finally, it is the accuracy of the summary, not the truth or falsity of the information being summarized, that is the benchmark of the privilege. [Citation.]” (Internal quotation marks omitted.)
Eubanks, 397 Ill. App. 3d at 749 (citing *Solaia Technology, LLC v. Specialty Publishing Co.*, 221 Ill. 2d 558, 588-90 (2006)).

¶ 30 Plaintiff argues the fair report privilege does not apply because the paper (1) was not reporting on an official proceeding and (2) is not a fair abridgement of the judicial opinions which defendants’ purport form the basis of the alleged report. Specifically, plaintiff argues the paper is not a report on an official proceeding because the paper never claims to be a report of an official proceeding, nor was it ever defendants’ “intention to fairly report on anything.” Plaintiff argues defendants’ selective citation to official opinions merely to support their biased view should not cloak them in the protection of the fair report privilege, and their invocation of the fair report privilege is but a pretense. Moreover, plaintiff argues, defendants’ summarization of plaintiff’s career was not a “fair and accurate abridgement” of that career, but an intentional

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misrepresentation that failed to include litigation that ended in plaintiff's favor and contained independent claims accusing plaintiff of actual crimes.

¶ 31 Defendants do not dispute the paper at issue is defamatory of plaintiff. Regardless, we agree with the trial court that the literary context--a publication describing plaintiff's litigation history and his actual conduct therein, supported by reference to numerous judicial writings related to those proceedings--implies the paper contains statements of objective fact that may be actionable. *Solaia*, 221 Ill. 2d at 581. Moreover, we find that, despite the fact the paper employs hyperbole to make defendants' point, the statements independently allege "a kernel of fact" on their face: that plaintiff is a criminal who uses his trademarks for no other reason than to extract settlements. Therefore, the paper may be actionable as defamation *per se*. *Solaia*, 221 Ill. 2d at 584-85. See also *Id.*, at 581 (" 'it is well established that statements made in the form of insinuation, allusion, irony, or question, may be considered as defamatory as positive and direct assertions of fact.' ") (quoting *Berkos v. National Broadcasting Co.*, 161 Ill. App. 3d 476, 487 (1987)). Accordingly, we now turn to whether the paper is *not* actionable because the fair report privilege applies. This is a question of law. *Solaia*, 221 Ill. 2d at 585 (whether or not a defamatory statement is actionable because it is privileged is a question of law).

¶ 32 1. Official Proceeding

¶ 33 In *Solaia*, our supreme court expressly held that "there is no judicial-action limitation on the fair report privilege in Illinois." *Solaia*, 221 Ill. 2d at 589. Thus, the fair report privilege applies to defamatory reports of judicial proceedings from the time a complaint is filed, provided

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the second prong of the fair report privilege test is satisfied. *Id.* That is, the report must be either a “complete and accurate” rendering of the judicial proceeding or a “fair abridgement.” *Id.*, at 589-90. It is irrelevant that defendants were not reporting as members of the media. *Missner v. Clifford*, 393 Ill. App. 3d 751, 761 (2009) (“Both media and nonmedia reports may claim protection under the privilege.”). “[T]he availability of the privilege does not depend on the status of the reporter; rather, it is conditioned upon the fairness and accuracy of the report.” *Id.* Nor does the medium in which defendants published the defamatory report impact our analysis. The privilege “extends to any person who makes an oral, written or printed report to pass on the information that is available to the general public.” Restatement (Second) of Torts § 611 Comment c (2013).

¶ 34 But plaintiff’s argument does not assert that the judicial proceedings allegedly reported on by defendants were not official proceedings, and plaintiff concedes that the privilege does not apply only to members of the media. Plaintiff does not argue that the judicial opinions were not official, plaintiff argues defendants were not “reporting.” On the contrary, the paper is defendants’ malicious summarization of plaintiff’s entire career. Plaintiff also argues that defendants’ purpose was not to report an official proceeding, but to write an “opinion piece” defaming him. Defendants’ only response to this argument is that, to the extent plaintiff complains that the defamatory statements summarize his career, “that ‘career’ *** is detailed, to one degree or another, in literally every single one of the decisions cited in the article at issue.”

¶ 35 Defendants assert that because what they published was in the source material, they must

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have been reporting on the source material--an official proceeding--within the meaning of the fair report privilege. Defendants' argument misses the point of plaintiff's argument. The question is whether defendants' intent is relevant. Stated differently, is the fair report privilege destroyed when the publisher intends harm by publishing a report of an official proceeding. In the realm of defamation law, the intent required to destroy a privilege is "malice." The law recognizes two types of malice for purposes of determining whether a privilege is "defeasible if the statement was made with malice." See *Solaia*, 221 Ill. 2d at 586. Actual malice is subjective awareness of the falsity or probable falsity of a statement, while common law malice means an ill will or intent to harm. *Id.*, at 585 fn. 3.

¶ 36 In *Solaia*, the issue before our supreme court was whether the fair report privilege defeated the plaintiff's claim that the defendants in that case made false statements with actual malice. *Solaia*, 221 Ill. 2d at 562. The defendants argued that the lower court erred in holding that the fair report privilege could be trumped by an allegation of actual malice. *Id.*, at 579. Our supreme court agreed with the defendants. *Id.*, at 587. Our supreme court held that "the fair report privilege overcomes allegations of either common law or actual malice." *Id.* Accordingly, plaintiff's argument that defendants are not entitled to the protection of the fair report privilege because their "intention *** was not to report but to defame" him must fail. Defendants' intent is irrelevant. The fair report privilege applies to a report of an official proceeding if the report is a complete and accurate report of the official proceeding or a fair abridgment of the proceeding. *Id.*, at 588. Defendants do not contend their paper is a complete and accurate report of all of

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plaintiff's litigation. Accordingly, we must now determine whether the paper is a fair abridgment of those proceedings cited therein.

¶ 37 2. Fair Abridgement

¶ 38 A fair abridgement means that the report must convey to readers a substantially correct account. *Solaia*, 221 Ill. 2d at 590.

“[I]t is necessary that nothing be omitted or misplaced in such a manner as to convey an erroneous impression to those who hear or read it ***. The reporter is not privileged under this Section to make additions of his own that would convey a defamatory impression, nor to impute corrupt motives to any one, nor to indict expressly or by innuendo the veracity or integrity of any of the parties.” (Internal quotation marks omitted.) *Id.* (quoting Restatement (Second) of Torts § 611, Comment f, at 300-01 (1977)).

¶ 39 The court determines whether the report is a fair abridgment under this standard by determining if “the sting of the defamatory statement in the proceeding is the same as the sting of the defamatory statement in the report.” *Id.* Plaintiff argues that defendants’ “defamatory statements did not fairly and accurately summarize the statements made by any combination of the various courts before which [he] appeared, and especially not the totality of them.” Plaintiff notes the paper accuses him of committing very specific crimes that would be easily recognizable by the audience of trademark attorneys to whom defendants published the statements. The paper states plaintiff committed perjury, serial false oaths, and used false specimens of use--the last

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being a “term of art *** for trademark experts and lawyers.” Plaintiff also asserts that defendants destroyed the privilege by going beyond the factual accounts in the judicial proceedings on which they were allegedly reporting and added additional matters from “other unrelated judicial proceedings” (in reference to the paper’s allegations of criminal conduct), but plaintiff does not identify those other proceedings or their subject matter. Plaintiff argues the paper and the judicial opinions do not carry the same “sting” of defamation because the judicial opinions merely insinuate misconduct or frivolous actions brought with insufficient evidence, not that a specific crime has been committed.

¶ 40 The bulk of the paper at issue does in fact attack the manner in which plaintiff has conducted various patent infringement lawsuits. The paper makes repeated references to plaintiff’s “scheme” or “operation,” both used to describe plaintiff’s past patent infringement lawsuits. Despite plaintiff’s argument that defendants omitted discussion of litigation in which he has been involved that was resolved in his favor, defendants’ paper clearly identifies the cases it discusses, even though the paper does not provide a specific citation for all of them.³ Defendants’ choice of subject matter is not, itself, defamatory.

¶ 41 The paper lists the “financial impact” of plaintiff’s “meritless proceedings.” As previously noted, Johnson listed in detail the course of the prototypical Stoller patent infringement lawsuit, and did so in such a manner as to highlight its lack of legal merit or

³ “Stoller filed 33 lawsuits from 1996 to 1998. Only six went to a reported decision. Stoller lost all of these and was sanctioned for fees in four. The Northern District of Illinois published a number of colorful decisions from this period.” “In 2004, Stoller believed that the judicial waters were clear once again for a new round of suits.”

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evidentiary support. The paper specifically lists nine “colorful decisions” that resulted from plaintiff’s litigation “enterprise” in which he would “confuse, deceive, and misdirect,” frustrate discovery, and manipulate procedure. The paper describes how plaintiff was able to file “meritless oppositions” to trademark filings, containing assertions described as “absurd” and generated other “frivolous” filings. Johnson ultimately concludes that plaintiff’s demise lie in his over-reaching, mishandling of cases, and over-abuse of the allegedly loose procedures which initially allowed plaintiff to flourish.

¶ 42 The primary “sting” of defendants’ paper is that plaintiff engaged in meritless litigation without factual support, abused the trademark litigation process at every level, and in the process engaged in, at minimum, misconduct in litigating his trademarks. We have no difficulty finding this “sting” is the same as that reflected in the judicial decisions cited in defendants’ paper. At the outset, the author identified his personal involvement with plaintiff’s litigation in *Central Mfg. Co. v. Pure Fishing, Inc.*, No. 05 C 725 (N.D. Ill. 2005). Johnson represented the defendant against plaintiff in that trademark infringement action. *Id.*, at _____. The district judge’s written order dismissing the case with prejudice opens by stating “[t]his case is a striking example of gross misconduct by counter-defendant and plaintiff’s principle, Leo Stoller, and his counsel ***.” *Id.*, at _____. The *Pure Fishing, Inc.* order states that plaintiff “has earned a reputation for initiating spurious and vexations federal litigation” (*Id.*) and cited eight decisions from the federal district court for the Northern District of Illinois in support, which described plaintiff variously as “running an industry that produces often spurious, vexations, and harassing federal

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litigation,” and initiating litigation “lacking in merit and approaching harassment.” See *Id.* (and cases cited therein). The judge in *Pure Fishing, Inc.* described the arc of plaintiff’s litigation “career” and the usual course of litigation plaintiff initiates much the same as defendants’ paper, though in less detail. See *Id.* See also *Central Mfg. Co. v. Brett*, No. 04 C 3049 (N.D. Ill. 2005) (beginning, “Stoller’s trademark infringement lawsuits typically arise in the following way” and describing the process in a similar fashion as defendants’ paper)⁴. The judge found that in the *Pure Fishing, Inc.*, case, plaintiff “likely engaged in the unauthorized practice of law by indiscriminately placing his signature and that of [his attorney] on meritless and untrue pleadings. *Id.*, at ____.

¶ 43 In *S Industries, Inc. v. Stone Age Equipment, Inc.*, 12 F. Supp. 2d 796 (1998), one of the “colorful decisions” cited in the paper as epitomizing plaintiff’s various lawsuits in the 1990s, the trial judge’s memorandum opinion and order granting summary judgment in favor of the defendants begins with the following passage:

“This lawsuit presents serious issues about the ethics of the plaintiff’s principal and his counsel. ‘S Industries, Inc. *** appears to have entered into a new industry--that of instituting federal litigation.’ *S Industries, Inc. v. Hobbico, Inc.*, 940 F. Supp. 210, 211 (N.D. Ill. 1996) (Shadur, J.).⁵ To this we might add

⁴ *Central Mfg. Co. v. Brett*, No. 04 C 3049 (N.D. Ill. 2005), is discussed in defendants’ paper.

⁵ This case is also cited in defendants’ paper.

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litigation lacking in merit and approaching harassment. Of the five merits-related decisions spawned by S Industries' ('SI') 1996 trademark litigation siege, three have entered summary judgment against SI and two have seriously questioned the validity of SI's complaints. Our decision continues in this vein, and thus signifies a continuing pattern of bad faith litigation by SI, who has been represented by the same counsel in each case." *Stone Age Equipment, Inc.*, 12 F. Supp. 2d at 798-99.

¶ 44 The *Stone Age Equipment, Inc.*, court found "a striking absence of proof supporting [the plaintiff's] claims." *Stone Age Equipment, Inc.*, 12 F. Supp. 2d at 799. The defendants in that case argued "quite forcefully--that SI and Stoller fabricated evidence in attempt to show first use" of the trademark [(STEALTH)] at issue in that case. *Stone Age Equipment, Inc.*, 12 F. Supp. 2d at 805. The court found that plaintiff's "convoluted explanation" that his company created new catalogs--which plaintiff submitted to show use of the mark--by cutting and pasting over old catalogs, along with a forensic document examiner's inability to date the allegedly fabricated catalog "just barely saves Stoller from a finding that he submitted fabricated evidence in a federal court proceeding." *Id.*, at 808. Later in its opinion, the court recognized one of plaintiff's arguments in that case as "nothing short of dishonest" (*Id.*, at 817) and that, in that case and in an earlier case, plaintiff used a misleading tactic to argue the strength of his trademark (*Id.* (citing *S*

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Industries v. Hobbico, Inc., 940 F. Supp. 210, 212 (N.D. Ill. 1996))).⁶ Finally, to award the defendants attorney fees and costs, the court found that it must find the case “oppressive.” The court wrote as follows:

“This suit clearly rises to that level, if not above it. In support of its claims, SI offered highly questionable (and perhaps fabricated) documents; testimony from its principal that was inconsistent, uncorroborated, and in some cases, demonstrably false; affidavits from career SI witnesses; and otherwise utterly inadequate evidence. The shocking fact remains that SI has no proof that the Stoller companies ever made or sold a STEALTH shoe--the very subject of the alleged infringement.

SI also tried repeatedly to misdirect the court by focusing on federal registrations for goods or marks not at issue in this case, irrelevant PTO proceedings, and license agreements to use STEALTH on goods totally unrelated to the defendants’ products. It is as if SI thought that the

⁶ *Hobbico* is also cited in the paper at issue in this case.

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sheer paper weight of its submissions would magically mutate into probative proof. To respond to this paper storm of dubious evidence, defendants had to conduct a broad and, no doubt, expensive investigation. In addition, SI tried to inject bogus fact issues (despite having moved for summary judgment), misstated the evidence, and made frivolous legal arguments.” *Id.*, at 819-20.

¶ 45 The court noted its hope the “opinion curbs Stoller and his attorney’s desire to continue their vexatious litigation trek. SI’s pattern of receiving four adverse judgments that point out the questionable nature of its evidence and triggering two orders to pay attorneys’ fees, [citation], in the last six months leads us reluctantly to conclude that sanctions beyond awarding the defendants their attorneys’ fees might be in order here.” *Id.*, at 820 (citing *S Industries, Inc. v. Diamond Multimedia Systems, Inc.*, 991 F. Supp. 1012, 1023-24 (N.D. Ill. 1998)).⁷ We need not belabor the point. The defamatory “sting” of defendants’ paper, to the extent it accuses plaintiff of filing unsupported and vexatious litigation with respect to various trademarks he holds, is the same sting as the numerous judicial proceedings on which the paper reports.

¶ 46 Plaintiff argues that separately, the paper also accuses him of obtaining new trademark registrations by fraud, perjury, and false specimens of use, which is a felony that is committed on

⁷ *Diamond Multimedia Systems, Inc.* is also cited in defendants’ paper.

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a trademark application.⁸ Thus, plaintiff argues, the true “sting” of defendants’ paper is that plaintiff had no valid trademarks, no standing to file any trademark infringement suits, and is a serial felony offender. Plaintiff argues that “[n]one of the opinions cited by [defendants] in their trial court briefs made a finding of perjury, fraud, false oaths, or any other crimes, nor did they contain any statement that such crimes had been committed by [p]laintiff.” Plaintiff argues those portions of the paper are not a fair abridgment of any court proceedings, because no court has ever found him to have committed any crime or to have obtained any trademark in violation of the law. We agree with plaintiff that the paper does imply that plaintiff committed a criminal offense. As to the remainder of his argument we disagree with plaintiff and find that the paper *is* a fair abridgment of the judicial proceedings on which it reports to the extent the paper implies plaintiff committed a crime by filing fraudulent trademark applications.

¶ 47 In holding that the sting of the defamation in the paper at issue accusing plaintiff of crimes in the acquisition of trademarks is the same as the sting of the judicial proceedings, we find *Solaia* instructive. In *Solaia*, the plaintiffs alleged that a statement was defamatory because it implied they had committed a crime. *Solaia*, 221 Ill. 2d at 593. The defendants argued that the

⁸ The statement in the trademark application must be verified by the applicant. 15 U.S.C. § 1051(a)(3). The Code of Federal Regulations states that: “Instead of an oath, affidavit, verification, or sworn statement *** the following language, may be used: The undersigned being warned that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. 1001 [(criminalizing the making of any ‘materially false, fictitious, or fraudulent statement’ in an ‘administrative matter, including *** a document required by law, rule, or regulation to be submitted to *** any office or officer within the legislative branch’ (18 U.S.C. § 1001)] ***, declares that all statements made of his/her own knowledge are true; and all statements made on information and belief are believed to be true.” 37 C.F.R. § 2.20. Thus, plaintiff argues, submitting false statements in a trademark application subjects him to punishment under 18 U.S.C. 1001.

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statement they published was a fair abridgment of an antitrust lawsuit that had been filed against the plaintiffs and, therefore, the fair report privilege applied. *Id.*, at 591. Our supreme court found that the statements at issue, a trade magazine report about ongoing litigation within the industry it covered, did imply that the plaintiffs committed a crime, particularly when read in context with its other publications on the subject. *Id.*, at 594. The complaint alleged the plaintiffs violated the Sherman Antitrust Act and in doing so injured a party in the antitrust case. *Id.*

¶ 48 The defamatory publication stated that: “The Sherman Act also makes it a crime to monopolize or conspire with any person or persons to monopolize any part of trade or commerce.” (Emphasis omitted.) *Id.*, at 593. However, the antitrust complaint did not charge the plaintiffs with a crime and did not mention any criminal proceedings. *Id.*, at 593-94. Nonetheless, our supreme court held that the publication was a fair abridgement of the complaint and, consequently, that the fair report privilege applied. *Id.*, at 596. The court found the publication to be a fair abridgement of the complaint, which did not allege the commission of a crime, because the section of the Sherman Antitrust Act cited in the complaint “clearly states that a person found to have violated the act is guilty of a crime.” *Id.*, at 595. The court warned, however, that had the publication “strayed a bit farther from the statutory language, the implication left by the statement would have been actionable.” *Id.*, at 596.

¶ 49 In *Solaia*, the defamatory statement was an implication that the plaintiffs had committed a crime. The judicial proceeding alleged violations which “[c]ursory research would have

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revealed” to actually be a crime if committed, even though the complaint did not allege a crime. See *Solaia*, 221 Ill. 2d at 595. Our supreme court held that the sting of the judicial proceeding and the sting of the publication were the same for purposes of the fair report privilege, even though additional, though readily available, information, was required to equate the two. Thus, we find that we may determine the defamatory sting of an official proceeding as compared with a report of that proceeding from more than what is stated *expressly* in the judicial proceeding. See also *Wilson v. United Press Associations*, 343 Ill. App. 238, 244 (1951) (holding inaccurate report that the plaintiff was serving a criminal sentence during pendency of appeal when in fact the plaintiff was out on bail pending appeal was not libelous, where the plaintiff’s status “could not be ascertained from a reading of the opinion which was reported by [the] defendant.” Rather, “a reading of the Supreme Court opinion would suggest that [the] plaintiff had actually begun to serve his sentence, since the court states that the case had come before it on writ of error and does not say that supersedeas had been granted.”).

¶ 50 Turning to this case, although the court did not address the question directly, the validity of one of plaintiff’s trademark applications was raised in *Stone Age Equipment, Inc.* There, the plaintiff, one of Stoller’s companies, filed a trademark infringement suit against a company using the trademark STEALTH on rubber soles for rock-climbing shoes and water-terrain navigation boots. *Stone Age Equipment, Inc.*, 12 F. Supp. 2d at 799. The plaintiff claimed to own the trademark STEALTH for use on various sporting goods and athletic shoes and boots. *Id.* The court found that the plaintiff held several federal registrations of the STEALTH trademark but

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none of them mentioned athletic shoes or boots, rubber, or rubber shoe soles. *Id.*, at 800.⁹

“Stoller nevertheless claims that his companies have been using the STEALTH mark on athletic shoes since at least 1985.” *Id.*, at 800. The evidence in that case was that the plaintiff company filed an application to register the STEALTH trademark for use on sport and athletic shoes in 1989, pursuant to a licensing agreement with a shoe company. *Id.*, at 801. The court described the documents the plaintiff submitted with the application to demonstrate the mark’s use on shoes (*Id.*)¹⁰ and later, the court discussed that document in its analysis of whether the plaintiff had proved use of the mark prior to the defendant’s use of the mark on its climbing and water-terrain shoe soles (*Id.*, at 811). The court found that the evidence the plaintiff submitted with its application, which was the same evidence the plaintiff provided to a shoe manufacturer to show that it was selling shoes under the STEALTH mark, was inadequate to establish use of the mark. *Id.*, at 811, 811 fn 25. The court found that “the photocopy of the shoe with STEALTH on the

⁹ “A firm’s right to use a mark only extends as far as the goods noted in the registration. [Citation.]” (Internal quotation marks omitted.) *Central Mfg. Co. v. Brett*, No. 04 C 3049 (N.D. Ill. 2005). All of the plaintiff’s trademark infringement claims required a likelihood of confusion. *Stone Age Equipment, Inc.*, 12 F. Supp. 2d at 819. The description of the goods in the registration controls for purposes of determining likelihood of confusion. *Id.*, at 813 (citing *Broderick & Bascom Rope Co. v. Goodyear Tire & Rubber Co.*, 531 F.2d 1068, 1070 (1976)).

¹⁰ Puma USA contacted the plaintiff to ask if it had used the mark on shoes. The plaintiff replied that it did, and as proof provided, among other documents, a “an undated photocopy of what looks like a shoe with the word STEALTH on one side of the heel.” *Stone Age Equipment, Inc.*, 12 F. Supp. 2d at 800. After the plaintiff and Puma USA entered an agreement making Puma USA the exclusive licensee for the STEALTH mark on footwear, the plaintiff filed an application to register the mark for use on sport and athletic shoes. *Id.*, at 801. “To demonstrate the mark’s use on shoes, [the plaintiff] supplied the PTO with a photocopy that resembled the one *** provided to Puma.” *Id.*

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heel is undated and bears no evidence of the shoe's sale or shipment to the public." *Id.*, at 811.

Elsewhere in its opinion, the court found no evidence that the Stoller companies sold STEALTH shoes to the public (*Id.*) and that the plaintiff company "cannot produce even a single STEALTH shoe, much less any evidence that one was sold on the market" (*Id.*, at 812). The court found "[a]bsolutely nothing in the record" to support Stoller's claim that his companies sold athletic shoes as early as 1985. *Id.*, at 808-09.

¶ 51 An application to register a trademark must include "the date of the applicant's first use of the mark, the date of the applicant's first use of the mark in commerce, the goods in connection with which the mark is used, and a drawing of the mark." 15 U.S.C. § 1051(a)(2). The *Stone Age Industries, Inc.* court found no evidence the plaintiff in that case ever used the mark in commerce on the goods specified in the application. The clear implication from the court's opinion is that Stoller's trademark registration application for use of the STEALTH mark on sport and athletic shoes was fraudulent.

¶ 52 In *Brett*, the plaintiffs, including another company of which Stoller is the president and sole shareholder, sued the defendants alleging they infringed on the plaintiffs' trademark by using the STEALTH mark on baseball bats. *Id.* Several years earlier, Stoller, doing business under another corporate name, registered the mark for use on various sporting goods that did not include baseball bats. Stoller registered the mark for use on baseball bats in 2001, and alleged he learned of the defendants' infringing use in 2004. The defendants argued that the plaintiffs did not own the mark for baseball goods because they could not "show actual use of the mark in

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connection with an established, presently existing, and ongoing business.” *Id.* The court found that the plaintiffs “failed entirely to provide admissible evidence that they offered ‘Stealth’ baseball items in the market *at any time.*” (Emphasis added.) *Id.* The plaintiffs produced what they claimed to be a list of various Stealth products, but the court found “absolutely no evidence that these products ever existed except as lines on a piece of promotional paper.” *Brett*, No. 04 C 3049, at _____. The court found that the plaintiffs did not own the mark for baseballs or baseball bats.

¶ 53 The *Brett* court’s analysis was not limited to Stoller’s subsequent registration of the mark for use on baseball bats. The court addressed the plaintiffs’ argument that “baseball bats are so ‘closely related’ to baseballs that Defendants’ use of the word ‘Stealth’ on bats infringes Plaintiffs’ [1984] mark for baseballs.” *Id.*, at _____. The court rejected that argument because it found that the plaintiffs were not the senior user of the mark for baseballs. The court found, with regard to both trademarks (for baseballs and for baseball bats), as follows:

“None of Plaintiffs’ ‘evidence’ establishes that any goods were actually sold or transported in commerce. In fact, it is unclear whether Plaintiffs make any products. It is not clear whether the baseball featured in Plaintiffs’ flyer¹¹ is even for sale by Plaintiffs or whether any baseballs were ever sold.” *Id.*, at _____.

¹¹ In response to a discovery request for all documents showing the volume of sales for goods bearing the mark “Stealth” Stoller “produced a softball and a piece of paper he alleged was an advertising flyer for a ‘Stealth baseball.’ ” *Brett*, No. 04 C 3049, at _____.

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¶ 54 The verified statement (on which plaintiff relies for his argument that defendants accused him of being a felon) in support of a trademark registration application must specify that “the mark is in use in commerce” and that “to the best of the verifier’s knowledge and belief, no other person has the right to use such mark in commerce.” 15 U.S.C. § 1051(a)(3). We note that the plaintiffs in *Brett* filed a trademark registration application for baseball bats in 2001, but the court found that the plaintiffs “failed completely to support their claim that they actually used the ‘Stealth’ mark *** prior to [the defendants’] use of the word ‘Stealth’ on baseball bats in 1999.” *Id.*, at _____. “In fact, Plaintiffs did not produce any invoices, purchase orders, cancelled checks, bank statements, or any other indicia of a commercial transaction involving the sale of even one ‘Stealth’ baseball-related product.” *Id.*, at _____.

¶ 55 A trademark registration application must specify the applicant's “first use of the mark in commerce.” 15 U.S.C. § 1051(a)(2). “The statutory language clarifies that ‘use’ of a mark means the bona fide use of such mark made in the ordinary course of trade, and not made merely to reserve a right in a mark. [Citation.]” (Internal quotation marks omitted.) *Brett*, No. 04 C 3049, at _____. The *Brett* court found that “given the near total dearth of documentary evidence supporting Plaintiffs’ contentions of mark usage, it is far more reasonable to find that Plaintiffs’ actions amount to, at best, an attempt ‘merely to reserve a right in the mark’ for baseless, harassing litigation such as this.” *Id.*, at _____. Although the *Brett* court did not expressly so find, the clear implication is that the plaintiffs, and, necessarily, Stoller, attempted to register the trademark for use on baseball bats fraudulently and that any specimens of use in connection with

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that application were, therefore, false. This conclusion is supported by the court's specifically noting that, although the plaintiffs claimed they began selling baseball related products as early as 1981, the plaintiffs provided no documentary evidence of their use of the mark in commerce at any time. *Brett*, No. 04 C 3049, at _____. See also *Central Mfg., Inc. v. Brett*, 492 F.3d 876, 883 (7th Cir. 2007) ("By exposing Central's failure to make bona fide use of the 'Stealth' mark for baseballs, Brett Brothers met its burden to overcome the presumption afforded by the 1985 registration, and summary judgment in its favor was the appropriate course.").

¶ 56 The suggestions in *Stone Age Equipment, Inc.* and *Brett* that plaintiff obtained new trademarks fraudulently is stronger than in the paper presented at the conference. In the paper at issue in this case, defendants asserted in conclusory fashion that plaintiff "acquired new trademark registrations by fraud, perjury and false specimens of use." The paper does not claim which registrations plaintiff obtained fraudulently and does not describe the allegedly false specimens, the nature of the fraud, or the subject of the perjury. These conclusory statements are only actionable because they are presented within the context of a paper which purports to present factual information regarding plaintiff to a sophisticated audience. See *Solaia*, 221 Ill. 2d at 581 ("expressions of opinion may often imply an assertion of objective fact and, in such cases, would be considered actionable") (quoting *Dubinsky v. United Airlines Master Executive Council*, 303 Ill. App. 3d 317, 324 (1999)). In the cases cited above, however, the courts cite specific examples of the documents plaintiff used to support his claims of use of the trademark on specified goods, and describes why those supporting documents appear to have been

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fabricated¹². A reader of both publications--defendants' paper and the judicial proceedings-- would come away with a stronger sense that plaintiff had obtained new registrations with false specimens of use from the judicial proceedings than from defendants' paper. Under those circumstances, we cannot say the paper has a "greater sting" in terms of defamatory impact than did the judicial proceedings themselves. See *Tunney v. American Broadcasting Co.*, 109 Ill. App. 3d 769, 775 (1982) ("If the broadcast statement carried a 'greater sting' in terms of libelous impact than did their statements, it cannot be considered a fair and accurate summary.").

¶ 57 The paper in this case implies plaintiff obtained at least some of the patents that formed the bases of his infringement actions fraudulently. A careful reading of the judicial proceedings on which the paper reports implies the same. The report does not convey an erroneous impression of the judicial proceedings and the defamatory sting of the judicial proceedings is the same or greater than the sting of the report. The defamatory statements in defendants' paper are not actionable because they are privileged under the fair report privilege. The paper in which defendants published the defamatory statements is a fair abridgment of official proceedings: to

¹² Stoller "produced a *softball* and a piece of paper he alleged was an advertising flyer for a 'Stealth *baseball*.'" (Emphases added.) *Brett*, No. 04 C 3049, at _____. Stoller's "alleged records do not reflect any actual sales of any products ***." (Emphasis added.) *Id.* "There is no way for this Court to know that this alleged sales sheet bears any relation to reality and is not simply something Plaintiffs generated on a home computer for the purposes of this litigation." *Id.* "Plaintiffs have provided absolutely no credible evidence of baseball product sales to establish their exclusive right in the Stealth mark for baseballs, much less for baseball bats." *Id.* See also *Stone Age Equipment, Inc.*, 12 F. Supp. 2d at 807 fn 20 (detailing findings of expert document examiner with regard to Stoller's "cut and paste" catalog of products using the trademark at issue). Stoller's "photocopy of the shoe with STEALTH on the heel is undated and bears no evidence of the shoe's sale or shipment to the public." *Id.*, at 811.

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wit, the numerous judicial proceedings cited therein. Defendants' paper is an accurate report of the accumulated judicial proceedings. Accordingly, "the privilege defeats the defamation claim because the accuracy of the summary is the 'benchmark of the privilege'; the report is the public's window to the proceeding." *Solaia*, 221 Ill. 2d at 590.

¶ 58 E. IIED and Remaining Claims

¶ 59 Plaintiff made no argument to this court that the trial court erred in granting summary judgment in favor of defendants on his claim of intentional infliction of emotional distress for want of evidence of extreme and outrageous conduct. "Where an appeal is from dismissal of multiple counts of the complaint but the appellant only argues certain counts in the brief on appeal, the other counts are not considered as they are deemed forfeited pursuant to Illinois Supreme Court Rule 341(h)(7) (eff. July 1, 2008). [Citation.]" *Reynolds v. Jimmy John's Enterprises, LLC*, 2013 IL App (4th) 120139, ¶ 55. As plaintiff did not argue error in the trial court's dismissal of his claim for IIED, he has abandoned that count on appeal. Plaintiff also conceded his claims for IIED, conspiracy, and aiding and abetting are derivative of his defamation claim. As plaintiff's defamation claim fails, so too his remaining claims necessarily fall.

¶ 60 CONCLUSION

¶ 61 For all of the foregoing reasons, the trial court's judgment is affirmed.

¶ 62 Affirmed.