SIXTH DIVISION
April 17, 2015

No. 1-14-2370

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PETER LUDLOW,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County
	)	
v.	)	No. 14 L 1529
	)	
SUN-TIMES MEDIA, LLC, CUMULUS BROADCASTING, LLC d/b/a WLS AM 890, and FOX TELEVISION STATIONS, INC., d/b/a FOX 32 NEWS,	)	Honorable
	)	Kathy M. Flanagan,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman and Justice Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: We affirmed the dismissal of plaintiff's complaint alleging defamation and false light invasion of privacy, finding that the alleged defamatory statement was capable of an innocent construction.

¶ 2 Plaintiff, Peter Ludlow, appeals the order dismissing, with prejudice, his complaint alleging defamation and false-light invasion of privacy against defendants, Sun-Times Media, LLC, Cumulus Broadcasting, LLC, d/b/a WLS AM 890, and Fox Television Stations, Inc., d/b/a Fox 32 News. We affirm.

¶ 3 On February 10, 2014, a Northwestern University (Northwestern) student, Y.H., filed a lawsuit in federal court alleging Northwestern violated Title IX of the Education Amendment

Act of 1972 (20 U.S.C. § 1681) by discriminating and retaliating against her after she reported that plaintiff, a Northwestern professor, had sexually harassed and sexually assaulted her.

¶ 4 In pertinent part, Y.H. alleged that during her freshman year at Northwestern in 2012, she was a student in a class taught by plaintiff. On February 8, 2012, Y.H. emailed plaintiff and suggested he attend an art event in Chicago related to his field of research and interest. That same day, plaintiff replied to Y.H.'s email and asked her to attend the event with him. Y.H. agreed.

¶ 5 On February 10, 2012, plaintiff drove them to the art exhibit and then to a restaurant, where he ordered wine for Y.H. even though she told him she was underage and did not want to drink. Plaintiff then drove them to a bar and ordered a beer for Y.H., which he insisted she drink. At this point, Y.H. was "under the influence of alcohol" and asked plaintiff to take her back to Evanston. Plaintiff refused and, instead, he took her to two more art exhibits and to his apartment where, at his insistence, she continued to drink.

¶ 6 Plaintiff took Y.H. to another bar around midnight; at this point, Y.H. was "very drunk." Plaintiff commented on Y.H.'s attractiveness and began to rub her back and kiss her at the bar. Y.H. was too intoxicated to "put up any meaningful resistance" to plaintiff's advances. Y.H.'s degree of intoxication by this time was such that she likely went in and out of consciousness and at some point found herself outside the bar, sitting in the snow.

¶ 7 Y.H., subsequently, found herself in an elevator going up to plaintiff's apartment, at which point plaintiff was "furiously making out" with her. Y.H. begged plaintiff to stop, but he groped her breast and buttocks and told her it was "inevitable" that they would have sex. Y.H. next recalls waking up at 4 a.m. in plaintiff's bed with his arms around her. Y.H. panicked and

blacked out. Plaintiff subsequently dropped off Y.H. in Evanston around noon on February 11, 2012.

¶ 8 Y.H. reported the incident to one of her professors on February 12, 2012, and an investigation was begun by Northwestern's director of sexual harassment prevention, Joan Slavin. Director Slavin ultimately concluded that plaintiff had engaged in "unwelcome and inappropriate sexual advances" toward Y.H. Director Slavin further concluded that as a result of the heavy consumption of alcohol purchased for her by plaintiff, Y.H. was "unable to offer meaningful consent."

¶ 9 In her federal court complaint filed on February 10, 2014, Y.H. alleged that Northwestern violated Title IX by committing various discriminatory and retaliatory acts (not pertinent here) against her after she reported plaintiff's sexual harassment and sexual assault.

¶ 10 On February 10, 2014, the same day Y.H. filed her lawsuit in federal court against Northwestern, the Chicago Sun-Times published an article about the lawsuit on its news wire service with the headline: "Student allegedly raped by professor suing Northwestern University." Neither plaintiff nor Y.H. were identified by name in the headline nor in the body of the article; Y.H. was referred to in the article as a junior in Northwestern University's journalism department, and plaintiff was referred to in the article as a "tenured professor" at Northwestern and as a "professor of a philosophy class." The article summarized the allegations Y.H. made against plaintiff in her lawsuit, specifically: (1) plaintiff had strongly insisted that Y.H. drink with him in several bars and at his apartment, even though she was underage; (2) she became intoxicated and blacked out; (3) she regained consciousness in an elevator to plaintiff's apartment where he was "furiously making out with" her, she begged him to stop, but he told her it was "inevitable" that they would have sex; and (4) she lost consciousness again and later woke up in

plaintiff's bed with his arms around her. The article did not provide a caption or case number for Y.H.'s complaint, nor was her complaint attached to or linked in the article.

¶ 11 On February 11, 2014, Cumulus Broadcasting, LLC, d/b/a WLS 890 (Cumulus), and Fox Television Stations, Inc. d/b/a Fox 32 News (Fox News), published on their respective webpages a verbatim copy of the Chicago Sun-Times article and accompanying headline, and posted a link thereto *via* Twitter.

¶ 12 Also on February 11, 2014, plaintiff's counsel demanded that the Chicago Sun-Times delete the headline reference to plaintiff's alleged "rape" of Y.H. The Chicago Sun-Times subsequently revised the headline to read: "Student claiming sexual assault by professor suing Northwestern." Fox News similarly revised the headline on its webpage, but it did not delete nor revise the publically viewable URL or Twitter feed, both of which contain the headline referencing the alleged rape. On February 14, 2014, Cumulus republished the original article under a revised headline referring to allegations of "sexual assault." However, Cumulus did not remove the original article with the headline referencing the alleged rape from its website, or its Twitter feed.

¶ 13 On February 14, 2014, plaintiff filed a two-count complaint in state court against defendants Chicago Sun-Times, Cumulus, and Fox News, alleging causes of action for defamation *per se* and false-light invasion of privacy resulting from defendants' publication of the headline stating that a Northwestern student had been "raped" by a professor. Plaintiff argued that the student had never alleged she had been raped, and that the headline's "false" statement to the contrary had defamed him and cast him in a false light before the public. Plaintiff attached the article, with the offending headline, to his complaint.

¶ 14 Fox News filed a combined section 2-619.1 motion to dismiss plaintiff's complaint under sections 2-615 and 2-619 of the Code of Civil Procedure (Code). 735 ILCS 5/2-615, 2-619, 2-619.1 (West 2012). Pursuant to section 2-619, Fox News argued that plaintiff's complaint against it should be dismissed based on the wire service defense. Fox News argued that the wire service defense shields media outlets from liability arising from republication of allegedly defamatory material obtained from a reputable news organization unless the republisher knew or should have known that the material was false. Fox News argued it obtained the article and headline at issue from the reputable Chicago Sun-Times media wire service, that plaintiff had failed to allege facts suggesting that Fox News knew, or should have known, that the headline was false and, therefore, that the wire-service defense applied to bar plaintiff's complaint against it.

¶ 15 Also, pursuant to section 2-619, Fox News alleged that plaintiff's complaint against it was barred by the fair report privilege. Fox News argued that for the fair report privilege to apply, the report containing the allegedly defamatory statement must be of an official proceeding, and the report must be a complete and accurate, or a fair abridgement, of the official proceeding. Fox News argued that Y.H.'s civil lawsuit filed in federal court against Northwestern qualifies as an official proceeding, and that the headline and accompanying news article at issue was a fair abridgment of that proceeding; accordingly, Fox News contended that the fair report privilege applied to bar plaintiff's complaint against it.

¶ 16 Pursuant to section 2-615, Fox News argued that plaintiff's complaint against it should be dismissed because: (1) the headline and accompanying article did not name plaintiff and therefore was not injurious to him; and (2) the allegedly defamatory headline was capable of an innocent construction.

¶ 17 The Chicago Sun-Times filed a section 2-615 motion to dismiss plaintiff's complaint against it, alleging: (1) the headline did not name plaintiff and therefore was not defamatory *per se*; (2) the headline was subject to an innocent construction; and (3) the headline was a fair report of Y.H.'s allegations against plaintiff and was substantially true.

¶ 18 Cumulus filed a section 2-615 motion to dismiss plaintiff's complaint against it, alleging that the allegedly defamatory headline: (1) was true; (2) was a fair report of Y.H.'s allegations against plaintiff and thus was privileged; and (3) never identified plaintiff. Cumulus also argued that plaintiff's claims against it are barred by the wire service defense.

¶ 19 The circuit court granted defendants' section 2-615 motions to dismiss plaintiff's defamation claim based on the innocent construction rule, finding that the allegedly defamatory statement contained in the headline was susceptible to an innocent construction as it reasonably could be interpreted as referring to someone other than plaintiff. The circuit court also granted defendants' motions (brought pursuant to section 2-615 by the Chicago Sun-Times and Cumulus, and pursuant to section 2-619 by Fox News) to dismiss plaintiff's defamation and false light claims based on the fair report privilege, finding that the allegedly defamatory headline was a fair abridgement of Y.H.'s federal court complaint. With regard to the wire service defense raised in Cumulus's section 2-615 motion and in Fox News's section 2-619 motion, the circuit court found that such a defense is not recognized by Illinois courts. The circuit court further noted that, in light of its ruling dismissing plaintiff's complaint against defendants on other grounds, there was no need to consider the wire service defense in this case. Plaintiff appeals the section 2-615 and 2-619 dismissal.

¶ 20 We begin our analysis by addressing the section 2-615 dismissal of plaintiff's defamation claim pursuant to the innocent construction rule. "A section 2-615 motion to dismiss challenges

the legal sufficiency of a complaint based on defects apparent on its face. In ruling on a section 2-615 motion, only those facts apparent from the face of the pleadings, matters of which the court can take judicial notice, and judicial admissions in the record may be considered. All well-pleaded facts must be taken as true. However, a court cannot accept as true mere conclusions unsupported by specific facts. Exhibits attached to the complaint are considered part of the pleadings. We review an order granting a section 2-615 dismissal *de novo*." [Internal quotations and citations omitted.] *Phillips v. DePaul University*, 2014 IL App (1st) 122817, ¶ 24.

¶ 21 "To state a defamation claim, a plaintiff must present facts showing that the defendant made a false statement about the plaintiff, the defendant made an unprivileged publication of that statement to a third party, and that this publication caused damages. A defamatory statement is a statement that harms a person's reputation to the extent it lowers the person in the eyes of the community or deters the community from associating with her or him. A statement is defamatory *per se* if its harm is obvious and apparent on its face. 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." [Internal citations omitted.] *Solaia Technology, LLC, v. Specialty Publishing Co*., 221 Ill. 2d 558, 579-80 (2006).

¶ 22 Plaintiff alleged that the headline published by the Chicago Sun-Times, and republished by Cumulus and Fox News, falsely stated that a Northwestern student had been "raped" by a Northwestern professor when in fact she had accused him of groping her over her clothing and

had not accused him of sexually penetrating her. Plaintiff alleged the headline was defamatory *per se* in that it imputed to him the commission of a criminal offense as well as a want of integrity in the discharge of his duties and also imputed a lack of ability in his trade.

¶ 23 However, the circuit court found that the headline was capable of an innocent construction as it reasonably could be interpreted as referring to someone other than plaintiff. A statement that is defamatory, *per se*, is not actionable when it is reasonably capable of an innocent construction. *Id*. at 580. The innocent-construction rule requires the court to consider the statement in context and to give the words of that statement, and the implications arising from them, their natural and obvious meaning. *Id*. " '[I]f, as so construed, the statement may reasonably be innocently interpreted or reasonably be interpreted as referring to someone other than the plaintiff it cannot be actionable *per se*.' "[1] *Id*. (quoting *Chapski v. Copley Press*, 92 Ill. 2d 344, 352 (1982)). "As a general rule in applying the innocent construction rule, a newspaper headline and the text of the article to which it refers are to be considered as one document and read together as a whole." *Harrison v. Chicago Sun-Times, Inc*., 341 Ill. App. 3d 555, 570 (2003).

¶ 24 Our supreme court has held that where plaintiff is not named in the allegedly defamatory statement, it is not actionable under the innocent construction rule unless the complaint indicates that "persons other than the plaintiff and the defendant must have reasonably understood that the [statement] was about the plaintiff and that the allegedly libelous expression related to [him]."

[1] Some Illinois courts have also held that an essential element of a defamation *per se* claim is that the challenged statement be "of and concerning the plaintiff", *i.e*., that the alleged defamatory statement be identifiably about the plaintiff (*Schivarelli v. CBS, Inc.*, 333 Ill. App. 3d 755, 765 (2002)). The "of and concerning" requirement is basically the same as the innocent construction rule; if the allegedly defamatory statement reasonably can be construed as referring to someone other than plaintiff, then it is not "of and concerning" him and is not actionable. See *Muzikowski v. Paramount Pictures Corp*., 322 F. 3d 918, 927 (7th Cir. 2003).

Bryson v. News America Publications, Inc., 174 Ill. 2d 77, 96-97 (1996). Accordingly, we proceed to examine whether plaintiff's complaint indicates that one must have reasonably understood the offending headline to be referring to plaintiff.

¶ 25 As discussed, plaintiff alleged in his complaint that he was defamed by the offending headline to an article published by the Chicago Sun-Times on February 10, 2014, and republished by Cumulus and Fox News. The article (with accompanying headline) was attached to plaintiff's complaint and became a part thereof. *Phillips*, 2014 IL App (1st) 122817, ¶ 24. The headline stated: "Student allegedly raped by professor suing Northwestern University." The headline did not identify either the student or professor by name. The accompanying article (which, as discussed, must be read together with the headline and considered as one document) summarized Y.H.'s federal court complaint against Northwestern, including her allegations against plaintiff, but the article did not identify either Y.H. or plaintiff by name; the article merely referenced Y.H. as a junior in Northwestern's Medill School of Journalism, and it referenced plaintiff as a tenured Northwestern professor who taught a philosophy class. Thus, nothing in the article or headline would have informed a person as to the specific identity of the Northwestern professor referenced therein.

¶ 26 To deduce the identity of the Northwestern professor referenced in the article and headline, a reader would have had to examine the federal court complaint filed by Y.H., which identified plaintiff by name. However, Y.H.'s federal court complaint was not attached to or made part of the article and headline; thus, to deduce plaintiff's identity, a reader would have had to discover the federal court complaint on his own and read it.

¶ 27 When, as here, one must look to extrinsic facts outside the allegedly defamatory statement in order to tie it to plaintiff, the statement is capable of an innocent construction as

referring to someone other than plaintiff and is not actionable as defamation *per se*. *Schaffer v. Zekman*, 196 Ill. App. 3d 727 (1990), is informative. In *Schaffer*, Dr. Michael Schaffer was the chief toxicologist employed by the Cook County Medical Examiner. *Id*. at 728. Defendant Pam Zekman was an investigative reporter for WBBM-TV. *Id*. Defendant Gary Cummings was the vice president and general manager of WBBM-TV. *Id*. at 729. In a WBBM-TV broadcast aired on February 28, 1985, defendant Cummings referenced a series of reports previously broadcast by Ms. Zekman that described "how evidence was mishandled by the Medical Examiner's Office." *Id*. Nine months earlier, in May 1984, Ms. Zekman had disclosed that toxicologists in the medical examiner's office had made mistakes while handling evidence in the "infamous" Tylenol-cyanide murder cases. *Id*. Ms. Zekman had also stated that Dr. Schaffer was the medical examiner's chief toxicologist, that he would not agree to an interview, but that he defended his lab's actions during the Tylenol "crisis." *Id*.

¶ 28 In the February 1985 broadcast, defendant Cummings expressed concern that the Cook County Board of Commissioners was not taking steps to correct the "scandal" in the medical examiner's office; in the course of the broadcast, defendant Cummings never mentioned Dr. Schaffer by name. *Id*. at 729-30.

¶ 29 Schaffer brought an action for defamation against defendants, alleging:

¶ 30 "Because the February 1985 broadcast referred specifically to the May 1984 broadcasts and because the only person identified in the May 1984 broadcasts as 'mishandling evidence' was Dr. Schaffer, and because Dr. Schaffer was the only one identified in the May 1984 broadcast as handling the evidence or performing the tests in the Tylenol case, a substantial portion of the television audience to whom the February 1985 broadcast was published reasonably understood

the statement 'evidence was mishandled by the Medical Examiner's Office' to refer to Dr. Schaffer and to no one else." *Id*. at 730.

¶ 31 Dr. Schaffer alleged that at the time of defendant Cummings' 1985 broadcast, defendants knew the statements concerning the "mishandling" of evidence were false. *Id*. at 730-31. The circuit court dismissed Dr. Schaffer's defamation complaint pursuant to section 2-615 of the Code. *Id*. at 731.

¶ 32 On appeal, the appellate court held that the statement "evidence was mishandled by the Medical Examiner's Office" was not defamatory *per se* as to Dr. Schaffer. *Id*. at 732. The appellate court noted:

> "Not only is he not named therein, but the statement does not refer to him or mention toxicologists or the 'chief toxicologist,' not does it allude to specific investigations conducted solely by Schaffer. At most, it refers to a group of which Schaffer is a member, the Cook County Medical Examiner's Office." *Id*.

The appellate court further noted that "Schaffer, himself, found it impossible to rest his claim on Cummings' [broadcast] alone, and was forced to look outside the complete text of the [broadcast] and refer to a series of reports aired nine months earlier." *Id*. The appellate court held that defendant Cummings' broadcast was capable of an innocent construction as not being of and concerning Dr. Schaffer, where Dr. Schaffer was not identified by name in defendant Cummings' broadcast, and where Dr. Schaffer had to look at extrinsic facts outside the broadcast in order to tie it to him; as extrinsic facts were necessary to identify Dr. Schaffer as being the subject of the broadcast, the broadcast was not so obviously and naturally harmful to Dr. Schaffer on its face as to constitute defamation *per se*. *Id*.

¶ 33 Similarly, in the present case, the allegedly defamatory headline was capable of an innocent construction as not being of and concerning plaintiff, where plaintiff was not identified by name in the headline or in the accompanying article, and where plaintiff had to look at extrinsic facts outside the headline and article (*i.e.*, to Y.H.'s federal court complaint) in order to tie the statement to him; as extrinsic facts were necessary to identify plaintiff as the subject of the statement, it was not so obviously and naturally harmful to plaintiff on its face as to constitute defamation *per se*.

¶ 34 Plaintiff argues that *Bryson* compels a different result. In *Bryson*, plaintiff, Kimberly Bryson, brought an action against defendants, News America Publications, Inc., and Lucy Logsdon, alleging she was defamed by the publication of an article entitled *Bryson*, which was written by Ms. Logsdon and published by News America. *Bryson*, 174 Ill. 2d at 83. On plaintiff's appeal from the section 2-619 dismissal of her complaint[2], the pertinent issue was whether the article must be innocently construed as referring to someone other than plaintiff. *Id.* at 96. The supreme court held that since the article used plaintiff's last name, defendants' claim that the article must be innocently construed as referring to someone other than plaintiff fails. *Id.* at 97. Defendants argued that the article may be construed as not referring to plaintiff because it was labeled "fiction" and, therefore, does not purport to describe a real person. *Id.* The supreme court disagreed, stating, "The fact that the author used the plaintiff's actual name makes it reasonable that third persons would interpret the story as referring to the plaintiff, despite the fictional label. In addition, the setting of the story, the events described therein, and the

[2] Defendants' motion to dismiss was ostensibly brought under section 2-615; however, defendants and the trial and appellate courts considered matters outside the complaint in addressing the portion of the motion which sought dismissal of the defamation *per se* counts under the innocent construction rule. Accordingly, the supreme court considered that part of the motion as having been filed and decided under section 2-619. *Id.* at 91-92.

identification of the writer as a native of southern Illinois all lead to a reasonable conclusion that third persons familiar with both the plaintiff and the defendant would understand the story as referring to the plaintiff." *Id*. at 97-98.

¶ 35 The supreme court further held that since the appeal came to it from an order granting a section 2-619 motion to dismiss, the court properly could consider plaintiff's answers to interrogatories when considering the motion. *Id*. at 98 (citing 735 ILCS 5/2-619(c) (West 1992) (stating that if the party opposing a section 2-619 motion to dismiss presents "affidavits or other proof *** establishing facts obviating the grounds of defect," the court may consider the same in granting or denying the motion)). The supreme court held that plaintiff's interrogatory answers, which identified more than 25 alleged similarities between herself and the physical attributes, locations and events attributed to the character "Bryson" in the article, necessitated the rejection of defendants' claim that the article must be innocently construed as referring to someone other than plaintiff. *Bryson*, 174 Ill. 2d at 98.

¶ 36 In the present case, plaintiff argues that since the *Bryson* court looked outside the offending article at issue there and considered answers to interrogatories in determining whether the innocent construction rule applied, we may look outside the offending headline and accompanying article here and consider Y.H.'s federal court complaint identifying plaintiff as her assailant. We disagree. The present case is factually distinguishable from *Bryson*, as the allegedly defamatory statement contained in the headline did *not* identify plaintiff by name, nor was plaintiff named in the accompanying article. As this is a case in which plaintiff was not named in the allegedly defamatory statement, *Schaffer* (not *Bryson*) applies. Further, unlike in *Bryson*, on appeal here we are considering a section 2-615 dismissal, pursuant to which we may only consider whether the complaint and any attachments state a cause of action for defamation

per se; we may not look to any materials outside the complaint. *McCleary v. Wells Fargo Securities, L.L.C.*, 2015 IL App (1st) 141287, ¶ 23.

¶ 37 When considering only plaintiff's complaint and the attached newspaper article and headline, we find that the allegedly defamatory headline with accompanying article that never identified plaintiff by name is subject to an innocent construction; as such, plaintiff has failed to state a cause of action for defamation *per se*. Accordingly, we affirm the section 2-615 dismissal of plaintiff's defamation *per se* count.

¶ 38 Plaintiff also argues that the allegedly defamatory statement supports a cause of action for false-light invasion of privacy. To sustain this cause of action, plaintiff must plead: (1) defendants placed him in a false light before the public; (2) the false light would be offensive to a reasonable person; and (3) defendants acted with actual malice. *Seith v. Chicago Sun-Times, Inc*., 371 Ill. App. 3d 124, 139 (2007). Because plaintiff's unsuccessful defamation *per se* claim is the basis of his false-light claim, plaintiff's false-light invasion of privacy claim fails as well. *Id*.

¶ 39 Next, plaintiff contends we should reverse the circuit court's dismissal of his complaint with prejudice and allow him the opportunity to replead. Where, as here, plaintiff never moved to amend his complaint and the record on appeal contains no proposed amended pleading, "the court presumes that another attempt at pleading would be fruitless," (*Kostur v. Indiana Insurance Co*., 192 Ill. App. 3d 859, 866 (1989)), and his request to replead is properly denied.

¶ 40 Even if plaintiff had moved to amend his complaint, we would deny his request to replead, where no amendment would have cured the deficiencies of the complaint, specifically, that the alleged defamatory statement did not identify plaintiff and thus was subject to an innocent construction. See *Moore v. People for the Ethical Treatment of Animals, Inc*., 402 Ill.

App. 3d 62, 75 (2010) (affirming dismissal with prejudice when the proposed amendment would not have cured the deficiencies of the complaint).

¶ 41 For the foregoing reasons, we affirm the circuit court. As a result of our disposition of this case, we need not address the arguments concerning the fair report privilege and the wire service defense.

Affirmed.