2015 IL App (3d) 130898-U

Order filed August 27, 2015

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2015

ROBYN O. CULLEN and KARI A. GARDNER,	)	Appeal from the Circuit Court
	)	of the 10th Judicial Circuit,
	)	Tazewell County, Illinois.
Plaintiffs-Appellees/ Cross-Appellants,	)	
	)	Appeal No. 3-13-0898
v.	)	Circuit Nos. 06-L-136 & 06-L-137
CC SERVICES, INC., an Illinois corporation,	)	
	)	The Honorable
Defendant-Appellant/ Cross-Appellee.	)	Paul Gilfillan,
	)	Judge, presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Justices Carter and Wright concurred in the judgment.

ORDER

¶ 1 *Held*: A trial court did not abuse its discretion in allowing leave to amend, and an amended complaint related back to the timely-filed original complaints, where the newly alleged claim of defamation by a superior had a sufficiently close relationship to the events alleged in the original complaints. By not seeking interlocutory appeal of those claims dismissed from the original complaints, and by filing an amended complaint that made no reference to the original complaints, the plaintiffs waived any challenge to the summary judgment order dismissing those claims. The judgment of the trial court in favor of the plaintiffs was affirmed, including punitive damages, subject to the *remittitur*.

¶ 2 The defendant employer, CC Services, Inc., appealed from judgments in favor of plaintiff employees, Robyn O. Cullen and Kari A. Gardner, in a defamation action. The employees cross-appealed the trial court's reduction of the punitive damage award, the grant of summary judgment to the defendant on the original complaint, and an *in limine* order barring some evidence on the issue of damages.

¶ 3 FACTS

¶ 4 The plaintiffs, Robyn Cullen and Kari Gardner, were hired by the defendant, CC Services, Inc., as agents for the group of companies comprising Country Financial. Both were responsible for selling and servicing Country Financial products. Clancy Jansen, manager for the Tazewell and Woodford Counties agency, recruited and supervised both plaintiffs. The plaintiffs were assigned to share an office in Washington, Illinois, and they paid their office expenses from a joint bank account. The expenses were reimbursed by the defendant.

¶ 5 Acting upon information from Dianne Ellenson, the plaintiffs' assistant, that the plaintiffs were planning on becoming agents for a competitor, Jansen met with the plaintiffs in their office on October 31, 2005. The plaintiffs denied that they had signed a contract to work for the competitor.

¶ 6 Thereafter, on November 2, 2005, Jansen met with the plaintiffs in his office. Jansen's assistant, Jeri Wiseman, took notes of the meeting. Jansen informed the plaintiffs that he had learned of two additional allegations against them: (1) the plaintiffs had submitted expense reimbursement forms indicating a pay raise for Ellenson a month before she received it, and (2) the plaintiffs had submitted a reimbursement form showing that they paid a temporary employee for a week when she was actually only paid for a day. Wiseman's notes of the meeting indicate that Jansen called it "theft." The plaintiffs denied knowing anything regarding the alleged theft.

Later on that day, the plaintiffs were discharged by the defendant. Jansen sent an email to other agents informing them that he had to terminate the contracts of the plaintiffs "for cause." As required by statute, on November 8, 2005, the defendant sent Uniform Suspected Insurance Fraud Reporting forms to the Illinois Department of Insurance for both of the plaintiffs. On each form, a box was checked under the suspected fraud type for "agent fraud." The defendant also sent Uniform Termination Notices (Form U-5) to the National Association of Securities Dealers Regulation, Inc. (NASD), stating that that plaintiffs had each submitted incorrect reimbursement forms and allegedly retained company funds that were for an assistant.

¶ 7 On November 1, 2006, the plaintiffs filed separate complaints against the defendant, alleging that the defendant defamed them with Jansen's email and with the filings to the Department of Insurance and NASD. Cullen added a claim for intentional infliction of emotional distress. The trial court granted the defendant's motion for summary judgment, finding that the email was subject to the innocent construction rule, the Department of Insurance filing was absolutely privileged or at least subject to a qualified privilege, and the NASD forms were as a matter of law not defamatory and were also subject to a qualified privilege. The trial court also granted the defendant summary judgment on Cullen's intentional infliction of emotional distress claim. However, the trial court allowed the plaintiffs to file an amended complaint to set forth a claim of defamation arising from the statement that Jansen made in the presence of Wiseman on November 2, 2005. The defendant did not ask for, nor did the order granting summary judgment contain, any language making it immediately appealable under Illinois Supreme Court Rule 304(a).

¶ 8 The first amended complaint, then, only contained two counts, one by each plaintiff, alleging that the defendant committed defamation when Jansen accused the plaintiffs of theft in

the presence of Wiseman. The amended complaint did not contain any references to the counts in the original complaints. While the original complaints alleged that Jansen accused the plaintiffs of stealing in the November 2, 2005, meeting, the first amended complaint added the detail that this was said in the presence of Wiseman. The defendant moved to dismiss the amended complaint as barred by the statute of limitations, but that motion was denied. The defendant's motion for summary judgment on the basis of qualified privilege was also denied.

¶ 9 The case proceeded to a jury trial. During jury selection, the plaintiffs exercised their peremptory challenges and struck all three women in the first eight potential jurors. The defendant also used its peremptory challenges to strike two women from the first eight and struck another woman for cause. Of the first eight jurors, only one was a woman. The defendant objected, contending that the plaintiffs were improperly excluding women. Jury selection continued and, in the last panel of four, three jurors were women. At the completion of *voir dire*, the plaintiffs had two unused peremptory challenges. After the full jury was empaneled, the trial court considered the defendant's challenge and summarily denied it. The jury returned a verdict in favor of the plaintiffs in the amounts of $115,000 economic damages and $500,000 punitive damages, each. The trial court found that the punitive damages were excessive and reduced them to $230,000 each (twice the compensatory damages). The plaintiffs consented to the *remittitur* but filed a notice of appeal.

¶ 10 ANALYSIS

¶ 11 I. The amended complaint

¶ 12 The defendant contends that the trial court abused its discretion in granting the plaintiffs leave to file an amended complaint following summary judgment. Further, the defendant argues that the defamation claims based on Wiseman's presence at the November 2, 2005, meeting did

not grow out of the same allegations pleaded in the original complaints and did not relate back. The plaintiffs contend that the trial court properly exercised its discretion to allow them to file the amended complaint. With respect to whether the amended complaint related back, the plaintiffs argue that it related back to the original complaints because the original complaints contained the factual allegation that Jansen accused the plaintiffs of theft in the November 2 meeting.

¶ 13 The defendant argues that the trial court abused its discretion by granting the plaintiffs leave to amend following the grant of summary judgment. Section 2-1005(g) grants court discretion to permit amendment of a complaint after summary judgment. 735 ILCS 5/2-1005(g) (West 2010). To determine whether the trial court abused its discretion, we look to four factors: (1) whether the proposed amendment would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment was timely; and (4) whether previous opportunities to amend the pleading could be identified. *Loyola Academy v. S & S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 273 (1992). Review of an order granting leave to amend after the grant of summary judgment is abuse of discretion. *Loyola Academy*, 146 Ill. 2d at 273.

¶ 14 As to the first element, the defendant argues that the amended complaint made no effort to cure the defects that led to summary judgment, but moved on to a separate statement. The plaintiffs argue that the allegation of theft was made in the original complaints, and they were not aware until the hearing on the motion for summary judgment that the defendant was not aware of the allegation of defamation based on Jansen's allegation of theft. Thus, the amendment cured this pleading defect. As to the second element, arguably to the most important, see *Hartzog v. Martinez*, 372 Ill. App. 3d 515, 525 (2007), the defendant argues that it

was prejudiced by the untimely amended complaint, claiming that the passage of time affected the witnesses' memories of the events. The plaintiffs point out that the defendant was aware of Jansen's theft accusation from the outset of the case. Since the factual allegation that Jansen accused the plaintiffs of theft at the November 2 meeting was contained in the original complaints, and the meeting notes were written down, prejudice is minimal. As to the final element, the defendant argues that the plaintiffs had several years to amend, but failed to do so. However, as stated earlier, the plaintiffs contend that they did not become aware until the summary judgment hearing that defamation based upon Jansen's statement was not properly pled. Based on the *Loyola Academy* factors, it cannot be said that the trial court abused its discretion in granting the motion to amend.

¶ 15 Section 2–616(b) of the Code of Civil Procedure governs the relation-back doctrine and provides in relevant part as follows:

> "The cause of action, cross claim or defense set up in any amended pleading shall not be barred by lapse of time under any statute or contract prescribing or limiting the time within which an action may be brought or right asserted, if the time prescribed or limited had not expired when the original pleading was filed, and if it shall appear from the original and amended pleadings that the cause of action asserted, or the defense or cross claim interposed in the amended pleading grew out of the same transaction or occurrence set up in the original pleading, even though the original pleading was defective in that it failed to allege the performance of some act or the existence of some fact or some other matter which is a necessary condition precedent to the right of recovery or defense asserted, if the condition precedent has in fact been performed, and for the purpose of preserving the cause of action, cross claim or defense set up in the

amended pleading, and for that purpose only, an amendment to any pleading shall be held to relate back to the date of the filing of the original pleading so amended." 735 ILCS 5/2–616(b) (West 2012).

¶ 16 Relation back is appropriate where a party seeks to add a new legal theory to a set of previously alleged facts. *Porter v. Decatur Memorial Hosp.*, 227 Ill. 2d 343, 358, (2008). In *Porter*, our Supreme Court adopted the "sufficiently close relationship" test, whereby a new claim will be considered to have arisen out of the same transaction or occurrence if the new allegation, as compared with the timely-filed allegations, show that the events alleged were close in time and subject matter and led to the same injury. *Porter*, 227 Ill. 2d at 360. An amendment that states an entirely new and distinct claim for relief based upon completely different facts will not relate back. *Porter*, 227 Ill. 2d at 360. Review of a trial court's decision that an amended complaint relates back to the original complaint, in the context of a section 2-619 (735 ILCS 5/2–619 (West 2012)) motion to dismiss, is *de novo*. *Porter*, 227 Ill. 2d at 352.

¶ 17 In *Porter*, the timely-filed first amended complaint alleged that the hospital provided the people to care for the plaintiff and the hospital, through its agents and employees, failed to report the plaintiff's diminishing neurological status. *Porter*, 227 Ill. 2d at 361. The plaintiff's second amended complaint, filed after the statute of limitations had expired, added a claim against the hospital based on the alleged negligence of the radiologist for his failure to properly interpret the CT scan regarding the plaintiff's neurological status. *Id.* Even though the plaintiff's earlier complaint did not mention a CT scan, the court found that there was a sufficiently close relationship between the allegations to allow relation back. *Id.* The later allegation grew out of the same transaction or occurrence, the two allegations were part of the same events leading up

to the same ultimate injury, they were closely connected in both time and location, and they were similar in character and general subject matter. *Id.*

¶ 18 In this case, the alleged defamatory statement by Jansen that the plaintiffs were guilty of theft was a part of the series of events alleged in the original complaints – after his meeting with the plaintiffs where he allegedly accused them of theft, Jansen sent out the email and the fraud reporting forms. The defendant cites to the case of *Kakuris v. Klein* for the proposition that each alleged defamatory statement constitutes a separate cause of action arising from distinct circumstances. *Kakuris v. Klein,* 88 Ill. App. 3d 597 (1980). However, in that case, the new allegations were based on defamatory statements made more than a year after the original complaint was filed. Applying the sufficiently close relationship test of *Porter*, we find no error in the trial court's conclusion that the amended complaint related back to the original complaints.

¶ 19 II. *Batson* challenge

¶ 20 The defendant argues that the plaintiffs unconstitutionally excluded women from the jury panel. During *voir dire,* the plaintiffs peremptorily struck three women. The defendant argues that it made a *prima facie* showing that the plaintiffs exercised peremptory challenges on the basis of gender, and the trial court erred in not requiring the plaintiffs to provide a gender-neutral reason for excluding women jurors.

¶ 21 *Batson v. Kentucky* dictates a three-step process for determining whether a peremptory challenge has been exercised in an unconstitutional manner. *Batson v. Kentucky*, 476 U.S. 79 (1986). First, the party objecting to the challenge must make a *prima facie* showing of an inference of a discriminatory purpose. *Batson*, 476 U.S. at 93-94. Second, if a *prima facie* case has been demonstrated, the burden shifts to the other party to adequately explain the challenge by offering permissible justifications for the strike. *Id.* Finally, the trial court must then consider

those explanations and determine if the defendant has established purposeful discrimination. *Id.* In this case, the trial court denied the motion, finding that the defendant did not make a *prima facie* showing that the plaintiffs exercised their peremptory challenges on the basis of gender.

¶ 22 A *prima facie* showing of discrimination under *Batson* requires that the challenging party raise the inference that the opposing party exercised peremptory challenges to remove venire members based upon discriminatory reasons. *People v. Andrews*, 146 Ill. 2d 413, 424 (1992). We will reverse a trial court's finding that the defendant failed to make a *prima facie* showing only if it was against the manifest weight of the evidence. *Id.*

¶ 23 The plaintiffs acknowledge that they struck three women during *voir dire*. The defendant, however, also used its peremptory challenges to strike two women, and challenged a third woman for cause. The jury that was selected was made up of eight men and four women. At the end of *voir dire*, the plaintiffs still had two unused peremptory strikes. Based on these facts, we cannot conclude that the trial court's conclusion that the defendant failed to raise the inference of discrimination was against the manifest weight of the evidence.

¶ 24 III. Punitive Damage Award

¶ 25 The jury awarded the plaintiffs each $500,000 in punitive damages and $115,000 in compensatory damages. The trial court reduced the punitive damage awards to twice the compensatory damages, or $230,000 each. The defendant argues that the evidence provided no basis for the imposition of any punitive damages and the issue should not have been submitted to the jury. The defendant also argues that the punitive damages awards violated due process and were grossly excessive.

¶ 26 Punitive damages are intended to punish the wrongdoer and to deter that party and others from committing similar acts in the future. *Deal v. Byford*, 127 Ill. 2d 192 (1989). They may be

awarded when the defendant's tortious conduct is "committed with fraud, actual malice, deliberate violence or oppression, or when the defendant acts willfully, or with such gross negligence as to indicate a wanton disregard of the rights of others." *Slovinski v. Elliot*, 237 Ill. 2d 51, 58 (2010) (quoting *Kelsay v. Motorola, Inc.*, 74 Ill.2d 172, 186 (1978)). The due process clause, however, prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor. *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 416 (2003). We will reverse a jury's determination of punitive damages only if it is against the manifest weight of the evidence. *Leyshon v. Diehl Controls*, 407 Ill. App. 3d 1 (2011). In this case, the trial court found that the punitive damages were appropriate, but excessive, on the basis that the defamatory statement was likely the result of inadequate investigation rather than a premeditated scheme. The trial court rejected the argument that the reduced punitive damages award violated due process. Since the evidence supported a finding of gross negligence by Jansen in his accusations of theft, the award of punitive damages was not against the manifest weight of the evidence. Thus, there was no due process violation.

¶ 27 In a related argument, the plaintiffs argue that the trial court abused its discretion when it granted the defendant's post-trial *remittitur* order and reduced the jury's punitive damages award from $500,000 to $230,000 for each plaintiff. "An award of punitive damages must be remitted to the extent that there is no material evidence to support it." *Slovinski v. Elliot*, 237 Ill. 2d 51, 64 (2010). The plaintiffs argue that the jury's award was proportional at five times the compensatory damages, it was not excessive given its purpose of deterring other employers from committing similar offenses, and it was in line with similar cases. In support of their argument, the plaintiffs cite to *Gibson v. Philip Morris*, where the trial court awarded $215,000 in compensatory damages and $1,000,000 in punitive damages. *Gibson v. Philip Morris*, 292 Ill.

App. 3d 267 (1997). In that case, the trial court found that punitive damages were appropriate because the defendant acted with actual malice. *Gibson*, 292 Ill. App. 3d at 280.

¶ 28 In this case, the trial court found that the punitive damage awards were excessive because the defendant's actions fell at the lower end of the punitive damages scale. The defamatory statement was isolated, limited in scope, and likely the result of inadequate investigation rather than a premeditated scheme. Such findings do not show an abuse of discretion**.** See *Slovinski*, 237 Ill. 2d at 64 (remittitur of punitive damages award from $2 million to $1 million was an abuse of discretion; the appellate court's further reduction to punitive damages equal to compensatory damages of $81,600 was appropriate where there was no evidence of a premeditated scheme, limited publication, and limited compensatory damages).

¶ 29 IV. Judgment as a matter of law

¶ 30 The defendant argues that it was entitled to judgment as a matter of law because the plaintiffs failed to establish the necessary elements of defamation. The defendant argues that Jansen's statement was substantially true, that the plaintiffs did not establish publication, and the evidence did not show that the defendant abused the qualified privilege. The plaintiffs argue that Jansen's statement was defamation *per se*.

¶ 31 A judgment notwithstanding the verdict (JNOV) or a directed verdict should only be granted in cases in which all of the evidence, when viewed in the light most favorable to the nonmoving party, so overwhelmingly favors the movant that no contrary verdict could ever stand. *Hardy v. Cordero*, 399 Ill. App. 3d 1126, 1130 (2010); *Cherny v. Fuentes*, 271 Ill. App. 3d 1071, 1075 (1995). We review *de novo* a trial court's denial of a motion for a directed verdict or a motion for a JNOV. *Hardy*, 399 Ill. App. 3d at 1130; *Lawlor v. North American Corp. of Illinois*, 2012 IL 112530, ¶ 37.

¶ 32 To state a claim for defamation, 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. *Solaia Tech., LLC v. Specialty Pub. Co.*, 221 Ill. 2d 558, 579 (2006). 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. *Solaia Tech.*, 221 Ill. 2d at 579. Certain limited categories of defamatory statements are defamatory *per se*, where the plaintiff need not plead nor prove actual damage to her reputation to recover. *Bryson v. News Am. Publications*, Inc., 174 Ill. 2d 77, 87 (1996). Also, the substantial truth of an alleged defamatory statement is a defense to a defamation action although substantial truth is generally a question for the jury. *Coghlan v. Beck*, 2013 IL App. (1st) 120891, ¶ 42.

¶ 33 The defendant argues that Jansen's statement regarding theft was substantially true because the plaintiffs admitted to signing the inaccurate reimbursement forms. The defendant cites to *Cianci v. Pettibone Corp.*, 298 Ill. App. 3d 419, 424 (1998). In that case, the employee admitted to the personal use of a courier service, but claimed that it was allowed. *Id.* The court found that the allegations that the employee wrongfully made personal shipments without authority, and made illegal use of the courier, were substantially true, and not defamatory. *Id.* The facts are very similar in this case; the plaintiffs admitted that they signed the inaccurate reimbursement forms. Like the employee in *Cianci*, the plaintiffs argued that it was not theft because they lacked the intent. However, this was a question for the jury, especially since there was evidence that the plaintiffs were unaware of the discrepancies in the reimbursements and the funds were properly deposited in their business account.

¶ 34 The defendant also argues that the evidence was insufficient to establish that Jansen's statement was published when it was made in the presence of Jansen's assistant. Although the states are split on whether interoffice communication constitutes publication, Illinois courts have found it is publication for defamation purposes. *Popko v. Continental Casualty Co.*, 355 Ill. App. 3d 257, 261 (2005).

¶ 35 A defamatory statement is not actionable, however, if it is privileged. *Solaia Tech., LLC*, 221 Ill. 2d at 585. There are two classes of privileged statements: those subject to an absolute privilege and those subject to a conditional or qualified privilege. *Id.* A qualified privilege has been found in three circumstances: (1) situations in which some interest of the person who publishes the defamatory matter is involved; (2) situations in which some interest of the person to whom the matter is published or of some other third person is involved; (3) situations in which a recognized interest of the public is concerned. *Gibson v. Philip Morris, Inc.*, 292 Ill. App. 3d 267, 275 (1997). Even if a qualified privilege exists, the communication can still be defamatory and actionable if the privilege is abused. *Gibson v. Philip Morris, Inc.*, 292 Ill. App. 3d 267, 275-76 (1997). A plaintiff must show that there was a direct intention to injure him or that there was a reckless disregard of the plaintiff's rights and of the consequences which may result to him. *Id.* at 276. In this case, there was sufficient evidence of an abuse of the qualified privilege, of a reckless disregard and a failure to fully investigate the truth, so the jury's verdict cannot be said to be against the manifest weight of the evidence.

¶ 36 V. Jury instructions

¶ 37 The defendant argues that the trial court erred in denying the defendant's instruction no. 8, which defined a defamatory statement. The defendant argues that the error was compounded by the giving of plaintiffs' instruction no. 10, which defined theft. The defendant argues that this

combination of instructions suggested to the jury that unless the defendant proved each of the elements of theft, including intent, it was guilty of defamation. The plaintiffs argue that the defamation instruction would have led to confusion and that the jury was properly instructed regarding defamation and damages. Jury instructions are generally reviewed under an abuse of discretion standard, but when the issue is whether the applicable law was accurately conveyed to the jury, the standard of review is *de novo*. *Barth v. State Farm Fire & Casualty Co.*, 228 Ill. 2d 163, 170 (2008).

¶ 38 The defendant also contends the trial court erred in refusing defendant's no. 14, which discussed proximate cause:

> "A plaintiff is not entitled to any damages, however, that are not proximately caused by the statement alleged to be defamatory. When I use the expression "proximate cause," I mean a cause that, in the natural or ordinary course of events, produced the plaintiff's injury."

¶ 39 The trial court refused this instruction because damages are presumed in cases of defamation *per se*. The jury was instructed that it could award the damages that naturally flow from a defamatory statement. The defendant acknowledged that damages were presumed when the defamation was *per se*, but argued that they were minimal, and the jury improperly gave damages for loss of employment, which the defendant argues was casually disconnected from the defamation. The trial court found that the jury instructions accurately stated the law. While the evidence of plaintiffs' lost income was not strong, there was some evidence. After reviewing the instructions as given, we agree that the jury instructions accurately stated the law and there was no abuse of discretion in refusing to give the challenged instructions.

¶ 40 VI. Conduct of plaintiffs' counsel

¶ 41 The defendant argues that it was deprived of a fair trial because the plaintiffs' counsel made false allegations that were unsupported by the record. Specifically, the defendant argues that the plaintiffs' counsel implied that the defendant had a copy of a proposed lease because Gardner supplied the lease to Jansen in October 2005 and loudly made remarks about Jansen during a sidebar at the bench. Also, the defendant argues that the plaintiffs' counsel asked several questions that violated an *in limine* order. Although the trial court instructed the jury to disregard any of counsel's statements at the bench, and sustained objections to testimony barred by the *in limine* order, the defendant argues that it is entitled to a new trial.

¶ 42 Conduct of counsel warrants a new trial when it is so improper that it deprives the opponent of a fair trial. *Taluzek v. Illinois Central Gulf Railway Co.*, 255 Ill. App. 3d 72, 82-83 (1993). The trial court found that the issue of where the proposed lease came from and how it ended up in the defendant's possession was ambiguous, so the plaintiffs' counsel could have made a legitimate argument regarding the defendant's knowledge of the lease. That, along with the trial court's response to objections, convince us that the defendant was not deprived of a fair trial.

¶ 43 VII. The plaintiffs' cross-appeal

¶ 44 The plaintiffs argue that the trial court erred in granting summary judgment on their original complaints. The defendant argues that the plaintiffs abandoned those claims when they filed an amended complaint and failed to reference or incorporate the claims from the original complaints. Whether a dismissed claim has been preserved for review is a question of law that we review *de novo*. *Bonhomme v. St. James,* 2012 IL 112393, ¶ 17.

¶ 45 "[A] party who files an amended pleading waives any objection to the trial court's ruling on the former complaints," and " '[w]here an amendment is complete in itself and does not refer

to or adopt the prior pleading, the earlier pleading ceases to be a part of the record for most purposes, being in effect abandoned and withdrawn.' " *Bonhomme v. St. James*, 2012 IL 112393, ¶ 17 (quoting *Foxcroft Townhome Owners Ass'n v. Hoffman Rosner Corp.*, 96 Ill.2d 150, 153–54 (1983) and *Bowman v. County of Lake*, 29 Ill.2d 268, 272 (1963)). The plaintiffs filed their first amended complaint after the trial court granted summary judgment in favor of the defendant on Cullen's claim of intentional infliction of emotional distress and both plaintiffs' claims of defamation arising from the email, the filings with the department of insurance, and the forms submitted to the NASD. None of those claims were referred to or incorporated in the first amended complaint, which states two counts of defamation for the comments made by Jansen on November 2. The plaintiff argues that the waiver rule of *Bonhomme* does not apply because the claims were not dismissed but rather were resolved on summary judgment. However, while we recognize the procedural differences between dismissal and summary judgment, we find that the rationale behind *Bonhomme* is equally applicable in this case. After summary judgment was granted, and leave to amend was granted, the plaintiffs had three options to preserve those claims for review: stand on the complaint and appeal, seek to make the order final and appealable under Supreme Court Rule 304(a), or reference the claims in the first amended complaint. See *Childs v. Pinnacle Health Care, LLC*, 399 Ill. App. 3d 167, 176-177 (2010). By doing none of those things, and filing a first amended complaint, the plaintiffs waived any challenge to the trial court's summary judgment ruling. See *Bilut v. Northwestern University*, 296 Ill. App. 3d 42, 46 (1998) (relying on *Foxcroft*, the appellate court found that a plaintiff waived her right to appeal from the entry of summary judgment on three counts that were not realleged in her second amended complaint).

¶ 46 As a final matter, the plaintiffs ask that, if we reversed and remand, we find that the trial court erred in granting a motion *in limine* relevant to damages. Since we are affirming the judgment in favor of the plaintiffs, we will not address this issue.

¶ 47 CONCLUSION

¶ 48 The judgment of the circuit court of Tazewell County is affirmed

¶ 49 Affirmed.