

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).

2016 IL App (3d) 150149-U

Order filed December 14, 2016

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2016

| | | |
|-------------------------------------|---|-------------------------------|
| ROBERT LEE SCROGGINS, |) | Appeal from the Circuit Court |
| |) | of the 21st Judicial Circuit, |
| Plaintiff-Appellee and |) | Kankakee County, Illinois. |
| Cross-Appellant, |) | |
| |) | |
| v. |) | Appeal No. 3-15-0149 |
| |) | Circuit No. 12-CH-553 |
| ROUTE 50 AUTO SALES, an Illinois |) | |
| Corporation; ROBERT LYLE SCROGGINS; |) | |
| and DENVER F. TAYLOR, JR., |) | |
| |) | Honorable |
| Defendants-Appellants and |) | Adrienne W. Albrecht, |
| Cross-Appellees. |) | Judge, Presiding. |

JUSTICE LYTTON delivered the judgment of the court.

Justice Wright concurred in the judgment.

Justice Schmidt dissented, with opinion.

ORDER

¶ 1 *Held:* (1) Trial court erred in awarding punitive damages where plaintiff did not request such an award and erred in refusing to award compensatory damages where plaintiff proved defamation *per se*. Cause is remanded for the trial court to reconsider its award.

(2) Trial court properly dismissed plaintiff's motion for leave to file an amended complaint to conform to the evidence before the judgment was entered where plaintiff filed motion two months after the conclusion of trial.

¶ 2 Defendants, Route 50 Auto Sales, Robert Lyle Scroggins (Lyle), and Denver F. Taylor, Jr., appeal from an order of the circuit court awarding plaintiff, Robert Lee Scroggins, \$1,000 in compensatory damages and \$15,000 in punitive damages for a defamatory statement Lyle posted at his business. We affirm in part, reverse in part, and remand for further proceedings.

¶ 3 **BACKGROUND**

¶ 4 Lyle Scroggins owns and operates a used auto sales business on Route 50 in Kankakee. He is also Robert Lee's father. For several years, Robert Lee and other members of Lyle's family have worked at the used car lot, including Lyle's ex-wife, June Scroggins, and her son, Denver Taylor.

¶ 5 In June of 2012, Lyle posted a large sign near the entrance to his business that stated:

"BOBBY S SHAME ON YOU
U ROBBED YOUR OWN FATHER
HE IS A THIEF AVOID HIM
HE IS A SEX OFFENDER"

Robert Lee first saw the sign on August 5, 2012. He contacted his attorney, and Lyle took the sign down. Within a few days, Lyle replaced it with another sign that said:

"BOBBY S
SHAME ON YOU
LIAR-THIEF-ROBBER
YOU ROBBED YOUR FATHER"

Robert Lee again contacted his attorney, and, this time, Lyle permanently removed the sign.

¶ 6 October 25, 2012, Robert Lee filed a two-count complaint against Lyle, Route 50 Auto Sales, and Taylor. Count I alleged libel and claimed that defendants "maliciously and

wrongfully posted a large sign facing the public right-of-way that contained false and defamatory [statements]" and that "[b]y reason of there [sic] publication, plaintiff has been greatly injured in his reputation." Robert Lee sought judgment in the amount of \$40,000 but did not request punitive damages. Count II was entitled "Causing the Conveyance of Property by Duress." In that count, Robert Lee claimed that his father forced him to convey three properties to Denver Taylor by pointing a loaded handgun at his head. In the prayer for relief, Robert Lee asked that the quitclaim deed transfers be declared null and void and that the property be conveyed back to him.

¶ 7 Lyle filed an answer on behalf of all three defendants. He admitted that he posted the sign but otherwise denied the allegations in the complaint. He asserted the truth of the statement on the sign as an affirmative defense. He also stated that Robert Lee signed "three blank, undated quitclaim deeds" and delivered them to him on May 29, 2012.

¶ 8 At trial, Lyle testified that he believed his son was a sex offender because he had knowledge that Robert Lee took a 15-year-old girl to Shelbyville. He also heard from other people that his son committed bestial sex acts in 1990 and 1993. He further testified that he believed his son was a thief because he "robbed me ever since he was 10 years old." Lyle stated that about six weeks before he posted the sign, Robert Lee stole \$500,000 from a safe at his house. After further testimony, Lyle explained that his neighbors stole the safe and split the money with Robert Lee after they left his house.

¶ 9 On the allegations of conveyance by duress, Lyle testified that his son signed three quitclaim deeds on April 27 or April 28, 2012, transferring property that Robert Lee owned to Taylor, and that Taylor did not pay him for the properties. When questioned about Robert Lee signing and delivering blank quitclaim deeds on May 29, 2012, Lyle stated, "That's a lie."

¶ 10 Taylor testified that he worked for Lyle at Route 50 Auto Sales in the summer of 2012. He stated that he did not know whether Robert Lee was a thief or a sex offender. He did not help Lyle display the signs in front of the lot. Taylor further testified that the properties in question were deeded to him and that his mother, June Scroggins, notarized the deeds. He testified that he did not pay Robert Lee for the properties and that he was not present on the day Robert Lee signed the deeds. When Taylor signed the quitclaim deeds as the buyer, Robert Lee had already signed them. Taylor stated that Robert Lee was not present when his mother notarized the deeds.

¶ 11 All three deeds were admitted as exhibits. The deeds name "Robert Lee Scroggins" as the grantor and "Denver Taylor" as the grantee. They are dated and notarized, August 7, 2012.

¶ 12 Robert Lee testified that he is 37 years old and that, prior to the sign displays, his reputation in the Kankakee community was good. He was well-liked and everyone spoke to him. After the signs were posted, things changed; people in the community avoided him and would not talk to him. The signs were displayed at the front entrance to his father's used auto lot on the main highway through Kankakee, and they were viewed by many of his friends and family.

¶ 13 Robert Lee asked for \$40,000 in his complaint because he thought that figure would compensate him for the damage his father caused. Counsel asked if he still thought that was an adequate damage award. In response, Robert Lee noted that he believed his reputation was worth more. He stated, "I basically have to live with—and the embarrassment and psychological effects of it the rest of my life of knowing I'm not a thief and a sex offender."

¶ 14 Robert Lee further testified that on May 29, 2012, Lyle broke into his home, put a gun to his head, and forced him to sign three quitclaim deeds. Lyle then forced Robert Lee to give him a key to the property. Robert Lee did not fill out any other information on the quitclaim deed. He merely signed them and handed them back to Lyle. Robert Lee then left the property to run

some errands. When he returned, the locks had been changed and his key would not fit. He called his father, and his father told him that he signed the deeds over and no longer owned the property. He inquired as to the status of the property at the county clerk's office and learned that the property had been transferred.

¶ 15 Several weeks later, Robert Lee attempted to move back into the mobile home on the property, but it was no longer habitable. It was filled with garbage, and the roof and the floor had to be replaced.

¶ 16 On cross-examination, he testified that he could not have signed the deeds on August 7, 2012, the date they were notarized, because he was with his friends at a water park in Indiana that day. He identified his ticket for the water park, dated August 7, 2012, and the ticket was admitted as an exhibit.

¶ 17 In closing arguments, counsel requested \$40,000 in compensatory damages, as stated in the complaint, but noted that \$40,000 was "probably an inadequate amount" to compensate Robert Lee for his damages. Defense counsel argued that an award of \$100 was appropriate.

¶ 18 On October 3, 2014, two months after the trial had concluded, Robert Lee moved for leave to file an amended complaint. The amendment added a third count and demanded reimbursement for living expenses from June of 2012 to February of 2013, based on the wrongful removal from his property. The trial court denied his motion.

¶ 19 On January 14, 2015, Robert Lee filed a "Motion to Amend Complaint Before Judgment to Conform the Pleadings to the Proofs." His second amended complaint, which was attached to the motion, contained six counts. Counts I and II were the same as those in the original complaint, alleging libel and conveyance of property by duress. Counts III through VI were new counts. Count III alleged that the three deeds signed by Lyle and Taylor were forged and

therefore void. Count IV claimed that defendants took the property "for little or no consideration by oppression, fraud or duress." Count V asked the court to rescind the deeds "because of lack of consideration and fraud." Count VI sought to recover \$16,903.75 in expenses between June 2012 and February 2013 due to the wrongful taking, including hotel expenses and lot rental fees for the mobile home. The trial court denied Robert Lee's request to amend his pleading.

¶ 20 At the conclusion of the hearing on the motion to amend, the trial court entered judgment in favor of Robert Lee on count I and in favor of defendants on count II. In awarding damages for libel, the court stated:

"There is no question but that [the signs] were despicable allegations *** that were untrue. That the—and they were defamation, per se. No question about that. They were hurtful. They were harmful. *** So the plaintiff has proven the allegations with regards to the liable [sic] count.

The issue of damages is more complicated. Because the Court—because he has not done a good job of proving up specific damages. So the Court is left with awarding only nominal damages of \$1,000 as compensatory damages. However, because of the outrageous nature of the allegations and the deliberate intent of calling your son a sex offender to the world by posting a sign on your business at one of the most prominent locations in the county is something that is punish—that the Court is not going to tolerate and that for which punitive damages are appropriate."

The court then awarded plaintiff \$1,000 in compensatory damages and \$15,000 in punitive damages. Plaintiff's motion to reconsider was denied, and both parties appeal.

¶ 21

ANALYSIS

¶ 22

I

¶ 23

Defendants argue that the punitive damages award should be reversed because Robert Lee failed to request punitive damages in his complaint and defendants were unfairly surprised by the trial court's assessment.

¶ 24

A

¶ 25

In a defamation cause of action, a plaintiff may recover nominal, compensatory and punitive damages, depending on the nature and severity of the statement. *Gibson v. Philip Morris, Inc.*, 292 Ill. App. 3d 267, 278 (1997); *Lorillard v. Field Enterprises, Inc.*, 65 Ill. App. 2d 65, 78-79 (1965). Nominal damages refer to a damage award issued when a legal wrong has occurred but there was no actual financial loss as a result of the legal injury. *Krejci v. Capriotti*, 16 Ill. App. 3d 245, 247 (1973). Such damages are awarded when the insignificant character of the defamation or the plaintiff's bad character leads the jury to believe that no substantial harm has been done to his reputation and there is no proof that serious harm has resulted from the defendant's defamatory statement. Restatement (Second) Torts § 620 (1977). Compensatory damages may be recovered for harm to a plaintiff's reputation and are awarded under two categories: (1) general, which the law presumes to follow inevitably from a defamatory statement *per se* and are recoverable without actual proof of injury, or (2) special, such as loss of business, which are recoverable only if the plaintiff can show proof of loss of specific economic benefits. See *Lorillard*, 65 Ill. App. 2d at 78-79; see also *Westlake Financial Group, Inc. v. CDH-Delnor Health System*, 2015 IL App (2d) 140589, ¶¶ 30-31. A defamation plaintiff may recover general damages, including nonquantifiable damages such as humiliation or anxiety, under the doctrine of presumed damages; but he may not recover economic damages, such as loss of employment opportunities, unless those damages are pleaded and proven as special damages. *Jones v.*

Western & Southern Life Insurance Co., 91 F. 2d 1032 (1996). Factors to consider in awarding general or presumed damages include (1) the wide publicity of the statement, (2) the plaintiff's prominence in the community, (3) the plaintiff's reputation, (4) his injured feelings, and (5) his mental suffering and anguish. *Van Norman v. Peoria Journal Star*, 31 Ill. App. 2d 314 (1961). Under the doctrine of presumed damages, a party is not required to show specific loss. *Leyshon v. Diehl Controls North America, Inc.*, 407 Ill. App. 3d 1, 10-11 (2010).

¶ 26 Punitive damages, on the other hand, are imposed as a penalty to deter others inclined to commit similar acts and are justified based on malicious and reckless behavior. *BMW North America, Inc. v. Gore*, 519 U.S. 559, 568 (1996). Because of their penal nature, courts must exercise caution to assure that punitive damages are not improperly or unwisely awarded. *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 188 (1978). Punitive or exemplary damages may not be awarded where the plaintiff fails to plead them in the complaint or notice to the defendant is otherwise lacking. See *Yates v. Brock*, 191 Ill. App. 3d 358, 363 (1989) (affirming trial court's refusal to allow plaintiffs' punitive damage instruction where plaintiffs did not pray from punitive damage award in complaint); *People ex rel. Scott v. Police Hall of Fame, Inc.*, 60 Ill. App. 3d 331, 348 (1978) (reversing *sua sponte* bench award of punitive damages where plaintiff's prayer did not ask for punitive award).

¶ 27 Here, Robert Lee filed a complaint against defendants stating a cause of action for libel (defamation) *per se* and requesting compensatory damages. He did not request punitive damages. The question of punitive damage first arose in the trial court's oral pronouncement of the judgment at the end of trial. Defendants had no notice that punitive damages would be an issue at trial and no opportunity to preserve the record as to the appropriateness of the award.

Adherence to the standard of caution in awarding punitive damages leads to the conclusion that, under the circumstances, the trial court erred in awarding punitive damages *sua sponte*.

¶ 28

B

¶ 29 In reversing the punitive damage award, we also find that the trial court erred in assuming Robert Lee had to prove specific loss or injury to receive compensatory damages.

¶ 30 Under Illinois law, five categories of statements are considered actionable *per se* and give rise to a cause of action for defamation without a showing of actual damages: (1) words that impute the commission of a crime; (2) words that impute infection with a communicable disease; (3) words that impute inability to perform the duties of an officer or employment; (4) words that prejudice a party or impute lack of ability in his or her profession; and (5) false accusations of fornication or adultery. *Bryson v. News America Publications, Inc.*, 174 Ill. 2d 77, 88-89 (1996). *Myers v. the Telegraph*, 332 Ill. App. 3d 917 (2002). Statements that are actionable *per se* are considered to be so harmful that injury to the plaintiff's reputation will be presumed. *Thomas v. Fuerst*, 345 Ill. App. 3d 929 (2004). As a result, actual or special damages need not be pleaded or proved. *Philip Morris, Inc.*, 292 Ill. App. 3d at 278.

¶ 31 The Restatement (Second) of Torts states that damages for defamation *per se* include (1) nominal damages, (2) general damages for harm to the plaintiff's reputation, (3) damages for special harm that a plaintiff alleges and proves he has sustained, and (4) punitive damages. Restatement (Second) of Torts §§ 620-623 (1977). Illinois follows the Restatement. *Gibson*, 292 Ill. App. 3d at 278. In Illinois, presumed damages for defamation *per se* are (1) general damages for mental suffering, personal humiliation, and impairment of personal and professional reputation and standing in the community, and (2) special damages for economic loss. *Byson v.*

News America Publication, Inc., 174 Ill. 2d 77 (1996). Presumed damages may be awarded as compensatory damages without proof of specific injury or loss. *Gibson*, 292 Ill. App. 3d at 278.

¶ 32 In this case, the trial court found that the statement Lyle published was defamation *per se*, but then concluded that it could only award nominal damages of \$1,000 because plaintiff failed to prove specific damages. When defamation *per se* is proved, the plaintiff is entitled to general compensatory damages, without proof of injury. See *Leyshon*, 407 Ill. App. 3d at 10-11. Here, Robert Lee pleaded libel *per se*, and the trial court found that the statement Lyle posted on the sign was actionable *per se*. Plaintiff is therefore entitled to general, or presumed, damages that serve a compensatory function.

¶ 33 The trial court's award of \$1,000 does not equate to an award of compensatory damages. Although the trial court said it was awarding nominal damages as compensatory damages, they are different measures of damages. Nominal damages for legal injury are awarded separately from general compensatory damages that are presumed in defamation *per se* cases. See *Philip Morris*, 292 Ill. App. 3d at 278 (in determining appropriate damage award, general compensatory damages are not merely nominal damages). Here, the trial court stated that it was awarding nominal damages because plaintiff failed to prove specific damages sufficient to award compensatory damages. However, presumed damages may be awarded as general compensatory damages without proof of special or actual injury. Thus, the trial court erred in finding that it could not award compensatory damages. Accordingly, we vacate the \$15,000 award of punitive damages and remand this case to the trial court to assess general compensatory damages using the appropriate factors.

¶ 34

II

¶ 35 Robert Lee cross-appeals, arguing that the trial court erred in denying his motion to amend his complaint before judgment was entered.

¶ 36 Section 2-616 of the Code of Civil Procedure states:

"(a) At any time before final judgment amendments may be allowed on just and reasonable terms, introducing any party who ought to have been joined as plaintiff or defendant, dismissing any party, changing the cause of action or defense or adding new causes of action or defenses, and in any matter, either of form or substance, in any process, pleading, bill of particulars or proceedings, which may enable the plaintiff to sustain the claim for which it was intended to be brought or the defendant to make a defense or assert a cross claim.

A pleading may be amended at any time, before or after judgment, to conform the pleadings to the proofs, upon terms as to costs and continuance that may be just."

735 ILCS 5/2-616 (West 2014).

¶ 37 Before the entry of final judgment, a trial court has broad discretion in granting or denying motions to amend pleadings. *Tongate v. Wyeth Laboratories*, 220 Ill. App. 3d 952, 970 (1992). The right to amend pleadings, however, is not absolute. *Trans World Airlines, Inc. v. Martin Automatic, Inc.*, 215 Ill.App.3d 622, 627 (1991) (trial court did not abuse its discretion in denying defendant's motion to file third affirmative defense). "The test to be applied in determining if the trial court's discretion was properly exercised is whether allowance of the amendment furthers the ends of justice." *Id.* at 628. The relevant factors the court should consider include (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) the timeliness of the proposed amendment, and (4) whether previous opportunities to amend the pleadings could be identified. *Kupianen v. Graham*, 107 Ill. App. 3d 373, 377 (1982).

¶ 38 Robert Lee maintains that he had the right to amend his complaint prior to judgment. The right to amend a pleading is not absolute. In this case, count II in the original complaint claimed that the deeds were void because they were signed under duress. The motion to amend the complaint introduced four new causes of action after all the witnesses had testified and the trial had concluded. The additional counts claimed that the deeds were void based on forgery, duress and fraud, and sought damages based on a claim of wrongful taking. Robert Lee informed the trial court that his motion was necessary because he needed to amend his complaint to include additional theories of recovery based on the evidence presented at trial. However, the evidence at trial was not unusual or unexpected; the facts Robert Lee used in support of the additional theories of recovery were available to him before trial. As the trial court appropriately noted, neither party revealed a witness or testimony that surprised plaintiff. The trial evidence was anticipated by both parties and plaintiff had ample opportunity to amend his pleadings to add the additional counts before judgment was entered.

¶ 39 The trial court considered the efficacy of Robert Lee's additional claims and found that the tendered amendments did not advance a cognizable legal theory and that the ends of justice would not be furthered. In light of the evidence, the belated amendment would not have cured the defective counts. Thus, the trial court did not abuse its discretion in denying Robert Lee's motion to amend the complaint.

¶ 40

CONCLUSION

¶ 41 We reverse the order of the circuit court awarding punitive damages on the claim of libel and remand for further consideration of compensatory damages. The remaining portion of the order denying plaintiff's motion to amend the complaint is affirmed.

¶ 42 Affirmed in part and reversed in part; cause remanded for further proceedings.

¶ 43 JUSTICE SCHMIDT, dissenting.

¶ 44 I respectfully dissent. I concur with the majority insofar as they vacate the trial court's award of punitive damages and affirm the trial court's dismissal of plaintiff's motion for leave to file an amended complaint. *Supra* ¶¶ 26, 39. But I disagree with the majority's decision to remand this matter to the trial court to reassess its award of general compensatory damages. *Supra* ¶¶ 28-33.

¶ 45 We should not remand this case to the trial court to recalculate damages. The trial court awarded Lyle "nominal damages of \$1,000 as compensatory damages." *Supra* ¶ 20. Lyle's arguments on appeal address the trial court's award of punitive damages and its ruling on filing an amended complaint. Nowhere in his appeal brief does Lyle allege that the trial court erred in not awarding presumed compensatory damages. We should not make this argument for him *sua sponte*. Must the trial court award more than \$1,000 in unproven yet presumed damages? How much must the trial court presume?

¶ 46 Illinois Supreme Court Rule 341(h)(7) explicitly provides that "[p]oints not argued [by the appellant on appeal] are waived." (eff. July 1, 2008). Appellate courts need not consider arguments that fail to meet the requirements of Illinois Supreme Court Rule 341(h)(7). See, e.g., *American Federation of State County & Municipal Employees, Council 31 v. Illinois Labor Relations Board*, 2014 IL App (1st) 132455, ¶ 36; *United Legal Foundation v. Papaas*, 2011 IL

App (1st) 093470, ¶ 15. Since Lyle never argued we should reconsider the trial court's award of compensatory damages, he could not possibly satisfy the requirements of Rule 341(h)(7).

¶ 47 I would vacate the trial court's award of punitive damages and otherwise affirm.