2019 IL App (2d) 180634-U
No. 2-18-0634
Order filed August 19, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

EAGLE RIDGE TOWNHOUSE ASSOCIATION, INC.,	)	Appeal from the Circuit Court of Jo Daviess County.
Plaintiff and Counterdefendant,	)	
v.	)	No. 11-CH-40
GENE H. SNAPP, JR. and EAGLE RIDGE TOWNHOUSE MANAGEMENT LLC,	)	
Defendants and Counterplaintiffs and Third-Party Plaintiffs-Appellants	)	
(Kenneth P. Simpson, Individually and as Agent, Director and President of Eagle Ridge Townhouse Association, Inc.; Eagle Ridge Townhouse Association, Inc.; Scott Thede, Individually and as Board Member of Eagle Ridge Townhouse Association, Inc.; Gerald D. Gray, Individually and as Board Member of Eagle Ridge Townhouse Association, Inc.; John Numrich, Individually and as Board Member of Eagle Ridge Townhouse Association, Inc., Counterdefendants and Third-Party Defendants; Galena Territory Association, Inc., Third-Party Defendant-Appellee).	)	Honorable William A. Kelly, Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Hutchinson and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed the trial court's orders granting summary judgment as to counts IX, X, and XI of the fourth amended counterclaim and third-party complaint; the appellate court affirmed the trial court's order denying defendants', counterplaintiffs', and third-party plaintiffs' motion for leave to file their fifth amended counterclaim and third-party complaint.

¶ 2 I. BACKGROUND

¶ 3 This case began with a lawsuit filed by Eagle Ridge Townhouse Association (ERTA) against Gene Snapp, who was the former president of its board of directors (Board), and the owner and manager of its recently dismissed property management company, Eagle Ridge Townhouse Management (ERTM). ERTA sought the return of records and equipment in Snapp's possession that ERTA claimed rightfully belonged to it. Snapp countersued, alleging that ERTA, the Galena Territories Association (GTA), and several individuals made false statements about him, which caused him to be ousted as president of the Board, and caused ERTM to be fired as property manager. As to Snapp's claims against GTA, the court entered two orders granting summary judgment in favor of GTA, and those orders are the subject of this appeal.

¶ 4 In 1982, Gene and Mary Snapp purchased their home in the Galena Territory, a 6800-acre residential resort community located several miles southeast of the city of Galena in Jo Daviess County. The Galena Territory circumscribes Lake Galena and comprises more than 4000 properties.

¶ 5 GTA is the property owner association for all of the properties located within the Galena Territory. GTA manages and maintains the common property areas and provides other services for its members, such as operating a marina, preserving green spaces, managing a general store,

maintaining an equestrian center, and more. Any owner of a home or a vacant lot within Galena Territory automatically becomes a member of GTA by covenant.

¶ 6 Located within the Galena Territory are eight homeowner associations that represent owners of multifamily homes, such as townhouses and condominiums. If a person owns a home within one of these satellite associations, he or she is a member of that satellite association and GTA. GTA currently serves as property manager for each of these eight associations, providing a broad array of services, including individual and common area lawn care and snow plowing, exterior maintenance, and assessment collections. GTA also maintains pages for each satellite association on its website, where association members may log in to view their related declarations, bylaws, and minutes from their governance meetings.

¶ 7 ERTA is the oldest of the eight satellite associations. ERTA is an Illinois not-for-profit corporation, consisting of 142 properties and common areas, including 40 acres of private roads, in several subdivisions within the GTA. According to its bylaws, ERTA's purpose is to act on behalf of its members concerning the preservation, care, and maintenance of both real and personal property for the common use and enjoyment of its members. To that end, ERTA employs GTA as its property manager. ERTA funds its operations through annual assessments of its members and is governed by the Board. The Board consists of five elected members serving staggered two-year terms (the number of Board members was amended from its original seven to five, effective February 25, 2006). The Board elects officers from among its membership, which consists of a president, a vice-president, a secretary, and a treasurer. The president is the chief executive officer of ERTA. All Board members serve without compensation.

¶ 8 In 1982, Gene and Mary Snapp became members of GTA and ERTA upon the purchase of their home. ERTA was initially under the authority of the property developer, before governance was transferred to the owners. Beginning in 1985, GTA operated as the first property manager for ERTA. Snapp served as president of the Board from 1991 until March of 2011. In 1997, the Board terminated its property management agreement with GTA over disputes concerning fees and quality of work. In 1998, GTA filed a lawsuit against ERTA, seeking to collect what it claimed were outstanding fees. ERTA counterclaimed for various actions involving quality of workmanship. The parties settled in 2004, with GTA agreeing to pay ERTA $420,000.

¶ 9 Following GTA's termination as property manager, Snapp formed ERTM. Snapp and his wife were the majority owners among four members, and Snapp was the sole manager. According to plaintiffs' fourth amended counterclaim and third-party complaint, ERTA and ERTM entered into an oral agreement in 1998, whereby ERTM would serve as property manager for ERTA in return for an annual fee, payable to Snapp, and additional costs for workers, equipment, and supplies. Snapp's management fees were to be determined each year at the time that ERTA approved its budget. Also according to plaintiffs' pleading, the "oral contract" required that ERTA pay for a compensation package for ERTM members Bill Sutter and Kurt Farrey, for work they performed for ERTA on behalf of ERTM.

¶ 10 The ERTA bylaws, as initially adopted, did not allow officers of the Board to receive compensation, either as Board members or for services rendered to ERTA outside of their capacity as Board members. According to a set of bylaws attached to plaintiffs' pleading, ERTA amended its bylaws, effective February 20, 1999, to allow compensation to officers "for services so rendered as the Board of Directors may from time to time deem appropriate."

Snapp was then serving as president of the ERTA Board. This amendment, along with the agreement of the Board, allowed Snapp to disperse ERTA funds to himself as owner and manager of ERTM.

¶ 11 Snapp's management fee ranged from $20,000 in 1999 to $40,000 in 2010. Snapp wrote checks to himself, however, for more than the amount of his management fees. The record contains a partial check register for ERTA's checking account between September 2004 and December 2005 that indicates that Snapp wrote 76 checks during the period, payable to himself, which totaled $176,134. The purposes of these checks became a subject of this litigation.

¶ 12 The precise nature of the relationship between ERTA and ERTM is unclear from the record. Many of ERTM's functions as property manager for ERTA were comingled with ERTA bank accounts. For example, persons performing the work on behalf of ERTM were not ERTM employees, but rather ERTA employees, paid by checks written by Snapp against the ERTA bank account. At a membership meeting in March 2009, Snapp attempted to clarify the relationship: "Essentially, the ERTA Board self-manages the ERTA." He informed the owners that the management company was formed in 1998 to "inspire" and "motivate" core leaders. By performing the work themselves, Snapp suggested that the Board was able to do more work for the homeowners while keeping the assessments comparably low. According to Snapp, equipment purchased, such as work trucks, plows, utility vehicles, and mowers were normally paid for by ERTA but owned by ERTM. A document that Snapp claims to have distributed at the March 2009 meeting explained his view of the relationship between ERTA and ERTM:

> "ERTM owns all equipment and carries separate liability insurance. ERTA makes all bank payments for equipment purchased and financed by ERTM. ERTA also pays for

> gas, insurance and repairs with respect to the equipment. *** This arrangement is viewed by the ERTA Board as a way to reward the leadership and dedication of these key personnel."

¶ 13 Snapp further explained that ERTM began doing "inside" work in order to lower the cost of payroll for ERTA, which would, in turn, allow ERTM to keep a larger crew that could better perform the regular outside maintenance and upkeep for ERTA. ERTM began entering into agreements for repair and remodel work inside the homes of ERTA members, beyond its ordinary function as property manager for ERTA. Homeowners paid for this work over and above their usual assessments. According to Snapp, the goal was to use the profits from that venture to help defray the cost of the crew maintained by ERTM, but paid as ERTA employees. Snapp assured the membership that all proceeds resulting from the "inside" work went directly to ERTA, with no "cut" for ERTM.

¶ 14 ERTA member Kenneth Simpson and other members perceived this "self-management" explanation as being inconsistent with ERTA hiring ERTM as a separate company to manage its property. ERTM was not a wholly owned subsidiary of ERTA, but a separate, for-profit corporation whose majority owners were Gene and Mary Snapp. ERTM's other minority owners, Bill Sutter and Kurt Farrey, were both on the books as employees of ERTA, but performing services on behalf of ERTM.

¶ 15 Further complicating matters, Snapp took offsets against his "management fees" by paying personal expenses through ERTA. One of the disputes in this lawsuit involved the ownership of a 2005 Ford F-150 truck. Snapp pleaded that in August 2005, ERTA reached an oral agreement with ERTM. The deal was made with Snapp acting both as chief executive officer of ERTA and owner of ERTM. According to Snapp, the terms of the deal included

ERTA purchasing the truck with a bank note and holding the title, but Snapp making the loan payments until the note was fully paid. Then, ERTA would transfer title to ERTM. Snapp claimed that many of the payments were made by "having ERTA make the payment and charging the payment to Snapp's management fee expense account on the books and records of ERTA."

¶ 16 On December 31, 2009, Snapp executed a promissory note as president of the Board, purportedly at the suggestion of other Board members. Snapp and ERTM pleaded that the note was compensation for unpaid management fees that ERTA owed to Snapp. The note was payable "on demand" to Gene H. Snapp, Jr. in the amount of $95,208, and signed by Gene H. Snapp, Jr., President. It had no other Board member's signatures. In other words, Snapp executed a promissory note from himself as the president of ERTA to himself as the owner of ERTM. Later, a newly elected Board contested the validity of the promissory note. On February 21, 2012, before the issue of the note's validity had been resolved, Snapp's attorney demanded payment on the note in a letter sent to the Board. The letter stated, in answer to allegations that Snapp had failed to pay assessments on his home since 1999, that Snapp had charged personal assessments for his home against his management fees that ERTA owed him throughout the years. The attorney further stated that ERTA should charge an unpaid 2011 special assessment and the 2012 annual assessment for Snapp's home against the promissory note.

¶ 17 On March 4, 2006, Simpson wrote to Snapp, offering to serve on the Board. He stated that he received "unsolicited encouragement" from many ERTA members to stand for election to the Board after the membership meeting on February 25, 2006. Simpson also asked for copies

of the minutes from the past eight Board meetings, ERTA's last three state and federal tax returns, and a copy of the bylaws, so that he could be better informed.

¶ 18 On March 21, 2006, Snapp answered Simpson's letter. He informed Simpson that the bylaws had already been amended to reduce the size of the Board from seven members to five, and thus, there were no openings. He also asked Simpson why he was requesting copies of the meeting minutes and tax returns, and suggested that the Board might be able to answer the questions that prompted him to request the documents.

¶ 19 In his next letter, Simpson stated that he did not think that he needed to provide a reason to see the documents, but that he had spoken to other Board members who were unable to answer his questions. Simpson said that those Board members referred him to Snapp. He further stated that others were watching to see how responsive the Board was to his inquiries, and that they were concerned with how the Board was spending ERTA funds.

¶ 20 On March 29, 2006, Simpson's attorney sent a demand letter to Snapp and the Board. Simpson's attorney stated that, pursuant to section 107.75 of the General Not For Profit Corporation Act of 1986 (805 ILCS 105/107.75 (West 2004)), Simpson was demanding access to (1) current ERTA bylaws, (2) federal and state tax returns for the years 2002 through 2004, (3) minutes of the previous eight Board meetings, (4) ERTA's membership list, and (5) all ERTA financial records since 1998.

¶ 21 In his response, Snapp did not address most of the issues raised by Simpson's attorney. He stated that ERTA reported the 2004 GTA lawsuit settlement funds as income in 2004, but that ERTA had paid no taxes in the years 1998 through 2004 because expenses exceeded income in each of those years. Snapp avowed that the Board would not release any information about

the ERTA homeowners and again asked why Simpson was requesting to see the tax returns and meeting minutes.

¶ 22 On April 6, 2006, Snapp sent another letter to Simpson's attorney. In it, he emphasized that records may only be reviewed by an owner for a "proper purpose," and that Simpson had failed to state a purpose of his inspection. He also restated his refusal to release a membership list, citing policies of the GTA.

¶ 23 The next letter from Simpson's attorney reiterated that Simpson sought to ensure there had been prudent financial management by the ERTA Board. He repeated that Simpson was entitled to receive the membership list by statute as he was considering running for a seat on the Board. Snapp responded that Board has not allowed inspection of the books and records requested because Simpson had not stated a proper purpose.

¶ 24 The record does not indicate that Snapp ever provided Simpson with the tax returns, meeting minutes, or financial records. The Board agreed to release the membership list to Simpson in the month prior to the 2010 Board election.

¶ 25 On March 20, 2010, the ERTA membership elected Simpson to the Board. The Board elected him as its secretary.

¶ 26 On June 10, 2010, Snapp sent an e-mail to ERTA member, John Menton, who had requested an accounting of the GTA lawsuit settlement funds and two special assessments collected during the pendency of the lawsuit. A two-page attachment to the email contained a list of creditors with an amount next to each name. The sum of the amount next to the names was $422,567. Simpson and others came to possess this letter. In an October 2010 e-mail to fellow Board members, including Snapp, Simpson complained about the insufficiency of the accounting in the document:

"This is a total of $590,400 for which we have no credible explanation as to what happened to these funds.

At a minimum, we were told by Gene the special assessments would be returned to us when the legal action was completed. Then he decided to keep the money. Did the other board members ask for justification of this action?

Considering the large sum of money involved, one would expect there would be a detailed paper trail of where the funds went, not this fragmented explanation."

¶ 27 On October 23, 2010, at a Board meeting with homeowners present, Simpson again complained about his access to financial records, stating that his requests for records continued to be ignored, and that as a Board member he now had a fiduciary responsibility to view those records.

¶ 28 On December 8, 2010, Simpson sent a letter to ERTA members. To execute this mailing, Simpson employed GTA to stuff envelopes and affix mailing labels of ERTA members that GTA generated from its database. Simpson's letter began by stating that the opinions expressed therein were Simpson's based on the facts as he knew them. He stated that there was a looming "financial crisis." He accused Snapp of allowing unlawful assessment discounts, covering up deficits in financial reports, misstating income, and failing to explain what happened to the lawsuit settlement and the special assessments. He also asked homeowners if they knew that ERTA had a bank loan that Snapp had been renewing yearly, and that the bank was now refusing to renew the note. Finally, he related that he had obtained a copy of the final report of a 2009 ERTA financial audit, despite Snapp's refusal to provide one and that the audit was dire in what it revealed about ERTA's finances.

¶ 29 Sometime in the month leading up to the March 2011 membership meeting, Scott Thede, John Numrich, Jerry Gray, and Simpson all sent campaign letters to the ERTA membership. Thede, Numrich, and Gray were running for seats on the Board and Simpson was supporting them. Just as Simpson had done in 2010, they used GTA to assist in their mailings. GTA's service included printing, copying, stuffing envelopes, affixing mailing labels, and applying postage to prepare the letters for delivery by the United States Postal Service. GTA Chief Operating Officer, Susan Miller, testified in her deposition that GTA offered this type of secretarial service to all of its members, and that Thede, Numrich, Gray, and Simpson were all charged the customary fee for the service. She stated that GTA played no role in drafting, reviewing, or editing the letters, and that it had no interest in the outcome of the ERTA election.

¶ 30 On March 26, 2011, Thede, Numrich, and Gray, all Simpson supporters, were elected to the Board. The Board's makeup was then Snapp, Simpson, Thede, Numrich, and Gray. That same day, the Board voted to install Simpson as its president.

¶ 31 Also on March 26, 2011, at the end of the meeting, a letter from an attorney representing the Board was hand-delivered to Snapp. The letter demanded that Snapp produce a list of 17 items, including ERTA records, documentation of ERTA assets, tax records, and all personal property owned by ERTA.

¶ 32 On March 27, the Board, with Simpson as president, terminated ERTA's relationship with ERTM. In an e-mail from Simpson to Snapp that copied all Board members, Simpson requested Snapp meet the Board at ERTA's attorney's office the following Monday to hand over "all other ERTA related property, control of assets, documentation, and other items." Simpson advised Snapp that the checking account had been "locked down" and that he was no longer

authorized to use ERTA checks or debit cards. Regarding ERTM, he advised that any implied or alleged relationship between ERTA and ERTM was immediately severed and terminated.

¶ 33 On April 27, 2011, ERTA filed a two-count complaint against Snapp, which was later amended to include ERTM as a codefendant. The first count sought a writ of *mandamus* directing Snapp to deliver ERTA books, records, and documents, which he had failed to turn over upon demand of the Board. The second count was a replevin action, seeking the return from Snapp of two 2005 Ford F-150 trucks, which ERTA alleged were titled in ERTA's name and purchased with ERTA funds.

¶ 34 On June 3, 2011, Snapp and ERTM filed their answer to ERTA's amended complaint. They denied the relevant allegations in ERTA's amended complaint and brought their own counterclaim and third-party complaint against Simpson, both as a Board member and personally, and ERTA, for breach of an "oral contract" and replevin.

¶ 35 On June 25, 2011, the Board held a meeting where it discussed the steps the Board had taken since the March election. Snapp did not attend this or any other meetings before his term on the Board expired in 2012. During the meeting, according to the minutes, Simpson discussed the possibility of filing a fidelity insurance claim:

> "Simpson explained that if a board member or a retained agent of ERTA were to abscond with association funds or property, causing a loss to the members of the association this is covered by the association fidelity insurance. Such a claim is filed with an insurance company which would then initiate an investigation by the insurance company. The claim merely states that there is the possibility that someone of trust may have been the direct cause of a loss to the association. Simpson explained that many association members are uncomfortable with Snapp's explanation as to what happened to

> the money from the settlement of the lawsuit against the GTA, as well as the special assessments charged to the membership during the period of the suit, assessments members believed they were told would be returned after the suit settlement."

The Board voted unanimously to file the claim with Philadelphia Insurance Company (Philadelphia Insurance).

¶ 36 Miller testified in her deposition that ERTA and GTA signed a property management agreement in late August 2011, and that GTA began performing its property management duties for ERTA in September 2011. Joe Mattingly, general manager of GTA, averred in his affidavit that GTA began transcribing ERTA meeting minutes on September 27, 2011, as part of its property management duties. According to Mattingly, GTA transcribed the meeting minutes of each of the satellite associations, furnished those drafts to the respective associations, and, upon approval, posted the minutes to GTA's website. Mattingly further stated that GTA did not review, fact-check, edit or modify association meeting minutes before uploading them to its website.

¶ 37 On November 1, 2011, Simpson, on behalf of the Board, filed the fidelity insurance claim with Philadelphia Insurance. Simpson claimed a loss of $590,000 ($420,00 for the settlement funds and $170,000 for the special assessments), stating that the discovery date of the loss was "ongoing, as the ERTA Board obtains financial records." Philadelphia Insurance engaged the Chicago-area forensic accounting firm of SDC CPAs, LLC (SDC) to review the claim.

¶ 38 On February 4, 2012, Simpson sent a letter to Regina Singer of SDC, explaining why he believed there was a potential loss that was covered under ERTA's policy. He enclosed with the letter at least 12 documents and a computer "memory stick" to support ERTA's claim. He

copied eight persons, including Board members, attorneys, and Philadelphia Insurance, making a notation on the letter that those parties were copied "without attachments."

¶ 39 Simpson described attachment "H" in the body of his letter to SDC as a memo to the file about a conversation between a former ERTM employee and a GTA manager. The conversation purportedly took place in August 2001 between GTA employee, Dave Oldenburg, and a former ERTM employee known only as Knupp. Oldenburg purportedly memorialized the conversation in a handwritten letter (Oldenburg notes), which is reproduced here as written without corrections:

> "8-30-01
>
> While do an inspection at a house under construction on Longwood one of the carpenters came up and introduced himself as [name redacted in original]. We were talking about changes on the interior when he asked if we were still dealing with Gene Snapp. I said yes and he said he use to be his partner but had just recently quite. He and Snapp worked on the first section of the Farmsteads and he knows Snapp started personally taking things that should have been the Assoc. There really needs to be an audit.
>
> He would write checks at bars on Assoc. checks, had a stripper at his house to entertain employees, gives beer to underaged employees, pays them by hand fulls of cash to share, doesn't pay taxes on them, he said he treats them as sub contractors which they are not. He and his wife drink alot & thinks they do candy. [Snapp] would call him at 2:00 a.m. from a bar drunk on his ass and screem at him.
>
> He heard Snapp is going to special access for a $1000 this coming year.
>
> He covers alot of personal expenses with Assoc. money."

It is not clear if August 30, 2001, is the date of the conversation, the date the letter was written, or both. The letter is not signed and its author is not identified on its face.

¶ 40 On February 25, 2012, the ERTA Board held its annual membership meeting. In recounting the "President's Report," the minutes of the meeting stated that Simpson discussed the search for a new property management company, which included seeking bids from companies in Illinois, Iowa, and Wisconsin. After consideration, the Board decided to hire GTA as ERTA's property manager. Simpson went on to discuss the challenges faced by the new Board since the March 2011 election:

> "The decision (hiring GTA) freed up the board members who were working seven days a week on association business. It has taken time to get even partial records from the previous management firm (ERTM). The Board knew that there were problems, but no one was ready for the financial mess that was encountered and that the board is still dealing with."

¶ 41 SDC reviewed the fidelity claim filed by ERTA. On July 22, 2013, it delivered its findings in a report to John Gavin, senior claims examiner at Philadelphia Insurance. SDC stated that it had "analyzed books and records made available to date" per Philadelphia Insurance's request. SDC did not interview witnesses or conduct an independent investigation. Upon review of the documents, SDC was unable to verify or refute that Snapp had unlawfully taken any monies or that he received a personal financial benefit as a result. Accordingly, it categorized the claim at that time as "Not Documented." SDC provided a list of documents that it would need should Philadelphia Insurance wish it to conduct further review. On the final page of its report, SDC stated:

> "We were not engaged to and did not perform an examination, the objective of which would be the expression of an opinion on the truth and fairness of the financial information provided for our review. Accordingly, we do not express such an opinion. Had we performed additional procedures, other matters might have come to our attention that would have been reported to you."

Philadelphia Insurance provided the Board with a copy of the report, and ERTA continued to pursue the claim.

¶ 42 In February 2014, Simpson's second two-year term on the Board was coming to an end. On February 11, 2014, he sent a campaign letter to the membership recounting his service and asking that he be elected to another term. As one of the reasons offered for his reelection, he stated that his work to date made him "uniquely positioned" to continue shepherding the fidelity insurance claim. If the claim was successful, Simpson reminded the membership, ERTA would receive the benefit of $500,000.

¶ 43 On March 20, 2015, Snapp and ERTM filed their fourth amended counterclaim and third-party complaint. Counts IX and XI alleged defamation *per se* and false light invasion of privacy by GTA and were based largely on the same set of facts contained in count V, which alleged defamation *per se* by Simpson and ERTA. Relevant to this appeal, plaintiffs alleged that the campaign letters sent by Simpson on December 8, 2010, and February 11, 2014, as well as the letter sent by Thede on February 18, 2011, all contained false and defamatory statements. Plaintiffs further alleged that ERTA's meeting minutes from the June 25, 2011, and February 25, 2012, ERTA meetings contained false and defamatory statements. Plaintiffs alleged that GTA "published" all of these statements by posting them to its website or by helping to prepare letters that it sent out to the ERTA membership.

¶ 44 In count X, plaintiffs alleged that GTA intentionally interfered with their business relationship with ERTA, with the purpose of getting itself rehired as property manager for ERTA. This allegation was based on GTA's publication of the alleged defamatory statements in counts IX and XI.

¶ 45 On December 19, 2016, the trial court heard arguments on GTA's motion for summary judgment on counts IX and XI. It entered judgment in favor of GTA on both counts.

¶ 46 On July 21, 2017, the trial court heard arguments on GTA's motion for summary judgment on count X, and on plaintiffs' motion for leave to file a fifth amended counterclaim and third-party complaint. The court granted summary judgment in favor of GTA on count X and denied plaintiffs leave to file their amended complaint. This order resolved all matters in this suit involving GTA, but there were still pending matters as to several other parties.

¶ 47 On July 16, 2018, on the first day of trial, the remaining parties settled all outstanding matters. On that day, the trial court dismissed the suit with prejudice. Plaintiffs timely appealed.

¶ 48 II. ANALYSIS

¶ 49 Plaintiffs appeal the trial court's rulings in its order of December 19, 2016, granting GTA's motion for summary judgment as to counts IX and XI of plaintiffs' fourth amended counterclaim and third-party complaint. Plaintiffs also appeal the court's order of July 21, 2017, which granted GTA's motion for summary judgment as to count X and denied plaintiffs' motion for leave to file a fifth amended counterclaim and third-party complaint. Plaintiffs argue that GTA published false and defamatory statements, offensively placed them in a false light before the public, and interfered with their business relationship with ERTA. They further

contend that the trial court erred by not granting them leave to file a fifth amended counterclaim and third-party complaint.

¶ 50 GTA responds that it did not defame plaintiffs because GTA (1) cannot be treated as a publisher pursuant to section 230(c)(1) of the Communications Decency Act (CDA) (47 U.S.C. § 230(c)(1) (2018)), (2) is not an "information content provider" as defined in section (f)(3) of the CDA (47 U.S.C. § 230(f)(3) (2018)), (3) is not liable for "publishing" the campaign letters when it was only performing secretarial services, and (4) is protected by qualified privileges under section 1-30 of the Common Interest Community Association Act (765 ILCS 160/1-30 (West 2018)) and section 107.75 of the General Not for Profit Corporation Act of 1987 (805 ILCS 105/107.75) (West 2018)). Moreover, argues GTA, the trial court did not abuse its discretion in denying plaintiffs' motion for leave to file a fifth amended counterclaim and third-party complaint.

¶ 51 A. Standards of Review

¶ 52 We review the trial court's orders granting summary judgment and its denial of leave to file the fifth amended counterclaim and third-party complaint. "Summary judgment is appropriate where the pleadings, affidavits, depositions, and admissions on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *Hiatt v. Western Plastics, Inc.*, 2014 IL App (2d) 140178, ¶ 68. An order granting summary judgment presents a question of law, which we review *de novo*. *A.B.A.T.E. of Illinois, Inc. v. Quinn*, 2011 IL 110611, ¶ 22. In that review, we look only to the record and arguments as they existed at the time the trial court made its ruling. *Laverty v. CSX Transportation., Inc.*, 404 Ill. App. 3d 534, 539 (2010); see also *Rayner Covering Systems, Inc. v. Danvers Farmers Elevator Co.*, 226 Ill. App. 3d 507,

509-10 (1992). We may affirm, however, on any basis found in the record, regardless of the trial court's stated reasoning. See *Wofford v. Tracy*, 2015 IL App (2d) 141220, ¶ 27.

¶ 53 The decision to permit or deny amended pleadings lies within the sound discretion of the trial court, and we will not disturb such a ruling absent a manifest abuse of that discretion. *Loyola Academy v. S & S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 273-74 (1992). The rulings that plaintiffs appeal arise from the court's orders on December 19, 2016, and July 21, 2017. We take each order in turn.

¶ 54 B. Trial Court Order—December 19, 2016

¶ 55 On December 19, 2016, the trial court entered a written order granting GTA's motion for summary judgment as to counts IX (defamation) and XI (false light invasion of privacy) contained in plaintiffs' fourth amended counterclaim and third-party complaint.

¶ 56 1. *Count IX—Defamation*

¶ 57 A defamatory statement is one 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." *Green v. Rogers*, 234 Ill. 2d 478, 491 (2009). To prevail on a claim of defamation, a plaintiff must plead and prove that there was a false and defamatory statement concerning the plaintiff, the defendant made an unprivileged publication of the false statement to a third party, and the plaintiff suffered damages as a result of the publication. *Krasinski v. United Parcel Service, Inc.*, 124 Ill. 2d 483, 490 (1988).

¶ 58 Statements may be actionable as defamation *per se* or defamation *per quod*. *Schaffer v. Zekman*, 196 Ill. App. 3d 727, 731 (1990). A statement is defamatory *per se* if its harm is obvious and apparent on its face, and damages to the plaintiff's reputation may be presumed. *Tuite v. Corbitt*, 224 Ill. 2d 490, 501 (2006). A statement is actionable *per quod* if the defamatory

character of the statement is not apparent on its face, but instead requires extrinsic facts to connect the statement to its defamatory meaning. *Bryson v. News America Publications, Inc.*, 174 Ill. 2d 77, 103 (1996).

¶ 59 Illinois recognizes five categories of defamation *per se*: (1) words imputing that a person has committed a crime, (2) words imputing that a person is infected with a loathsome communicable disease, (3) words imputing that a person is unable to perform or lacks integrity in performing her or his employment duties, (4) words imputing that a person lacks ability or otherwise prejudices that person in her or his profession, and (5) words imputing that a person has engaged in adultery or fornication. *Green*, 234 Ill. 2d at 491-92.

¶ 60 a. Campaign Mailings

¶ 61 In count IX of their fourth amended counterclaim and third-party complaint, plaintiffs alleged that GTA "managed" the mailings of more than a dozen campaign letters to ERTA homeowners concerning the ERTA Board of Directors elections between March 2010 and February 2014. Plaintiffs pleaded that GTA typed or copied letters, stuffed them into envelopes, affixed mailing labels with names and addresses of ERTA homeowners, and supplied the postage to mail the letters. Plaintiffs' theory was that GTA wished to unseat Snapp as president of the Board, which would open the door to GTA replacing ERTM as property manager for ERTA, and that GTA assisted with the campaign mailings as a means of accomplishing those goals. According to plaintiffs, "GTA was essentially serving as 'campaign headquarters' for the people who wanted to campaign against Snapp's supporters." In their opening brief, plaintiffs argue that GTA defamed them by "publishing" seven of the campaign letters. Plaintiffs narrow this claim, however, to three letters in their reply brief: the Simpson

letter of December 8, 2010; the Thede letter of February 18, 2011; and the Simpson letter of February 11, 2014.

¶ 62 GTA concedes that it provided the services described, but disputes plaintiffs' conclusions that it did so to effectuate the ousters of Snapp and ERTM. Susan Miller, Chief Operating Officer of GTA, testified at her deposition that GTA offered on-demand secretarial services to all of its property owners. The services included typing, copying, stuffing envelopes, and affixing labels and postage to letters. GTA charged an hourly labor rate plus cost for supplies to any GTA property owner wishing to avail himself or herself of the service. Miller testified that GTA charged these fees for the services it provided with regard to the campaign letters.

¶ 63 GTA general manager, Joseph Mattingly, averred in his affidavit that GTA "handle[d] the mailing of campaign letters" on behalf of Simpson, Thede, and two others. Mattingly stated that GTA did not allow the candidates access to its mailing list because it wanted to protect the privacy of its members. Instead, Simpson and Thede paid GTA a fee to prepare the letters for mailing, which included copying letters, stuffing envelopes, applying address labels, and affixing postage. Mattingly averred that GTA did not "review, edit, or otherwise modify" the letters.

¶ 64 In its motion for summary judgment, GTA did not challenge whether any of the alleged defamatory statements were opinions, and therefore not actionable. Instead, GTA confined its defense to the publication element of a defamation action. Thus, we review only whether GTA's actions constituted publication.

¶ 65 i. *December 8, 2010, Simpson Letter*

¶ 66 Plaintiffs alleged in count V of their fourth amended counterclaim and third-party complaint that Simpson included false and defamatory statements in his campaign letter of December 8, 2010. They further alleged in count IX that GTA defamed them by publishing

that letter. On December 16, 2016, the court granted partial summary judgment in favor of Simpson as to count V. In its ruling from the bench, the court stated that it was granting summary judgment in favor of Simpson on the defamation *per se* claim pertaining to statements in the December 2010 letter based on Simpson's statute of limitations defense. Because the court found that the one-year statute of limitations barred using the letter in plaintiffs' defamation *per se* action (see 735 ILCS 5/13-201 (West 2018)), plaintiffs must first demonstrate that the trial court erred in that ruling before we may consider whether GTA published the Simpson letter. Plaintiffs address this issue in footnote four of their opening brief. They assert that the trial court erred in ruling that the statute of limitations applies because the amended pleading arose out of the same transaction as the original pleading and that the letter satisfies both prongs of the test outlined in section 2-616(b) of the Code of Civil Procedure. 735 ILCS 5/2-616(b) (West 2018). Beyond this conclusory statement, plaintiffs make no cogent legal argument, and they cite no caselaw. Thus, plaintiffs have forfeited the argument that the court erred in barring their claims of defamation based on the December 2010 Simpson letter. See *Sakellariadis v. Campbell*, 391 Ill. App. 3d 795, 804 (2009) (failure to assert a well-reasoned legal argument that is supported by authority violates Illinois Supreme Court Rule 341(h)(7) (eff. May 25, 2018) and results in forfeiture).

¶ 67 ii. *Thede Letter (February 2011) and Simpson Letter (February 2014)*

¶ 68 Plaintiffs do not distinguish between the facts that caused GTA to publish the Thede letter of February 18, 2011, and the Simpson letter of February 11, 2014. Plaintiffs address both letters together in their brief. Therefore, as to the letters, we analyze whether plaintiffs presented disputed issues of material fact that went to the publication element of the defamation *per se* claim.

¶ 69 Plaintiffs based their allegation of defamation *per se* in Thede's campaign letter on two statements:

> (1) "ERTA defaulted on its US Bank loan. $45,000 [*sic*] was owed March 1, 2010 [*sic*] and was still not paid as of October 23, 2010 [*sic*] the date of the annual budget meeting. ERTA's credit has been damaged for any future borrowing for potential capital projects," and
>
> (2) "The current Board members Gene Snapp, Pat Brooks, Zaty Ortega and Stefan Zajczenko, in my opinion, are responsible for our Association's current financial disaster."

¶ 70 Plaintiffs argued that one paragraph in Simpson's February 2014 letter contained false and defamatory statements:

> "To ensure the ultimate successful completion of our fidelity insurance claim and other litigation matters, I am seeking re-election for a two year term. I am uniquely positioned to continue, and successfully finish, this critical work. The benefit to you as an ERTA owner, is a potential $500,000 fidelity claim insurance payment to ERTA . . . The new board could do much with an additional $500,000."

¶ 71 Plaintiffs argued that SDC's report to Philadelphia Insurance, which indicated that the claims were "not documented" at that time, were dispositive proof that the fidelity claim had been denied and that Simpson lied in his letter by implying that he might still achieve a successful outcome regarding the insurance claim. As noted above, we review only whether GTA "published" either of these letters, not whether the statements at issue were defamatory.

¶ 72 Plaintiffs assert that GTA defamed them by "publishing" Thede's and Simpson's statements when it "managed" their campaign mailings. If plaintiffs' assertions were true, then

GTA would have been a "republisher" of the statements, as the letters were originally "published" when the authors gave them to GTA. A defendant may indeed be held liable when he republishes statements made by another, but only when the plaintiff can prove by clear and convincing evidence that the defendant did so with "actual malice," which is to say that the defendant had knowledge that the statements were false or published them with reckless disregard for their truth or falsity. See *Catalano v. Pechous*, 83 Ill. 2d 146, 168 (1980).

¶ 73 In their opening brief, plaintiffs argue that GTA incorrectly identified "actual malice" as the required standard for republisher liability. Plaintiffs assert that "Illinois courts have applied two different standards in holding republishers liable for defamation: negligence and actual malice," asking us to compare *Brennan v. Kadner*, 351 Ill. App. 3d 963, 971 (2004) (clear and convincing evidence of actual malice required to find a republisher liable) with *Owens v. CBS, Inc.*, 173 Ill. App. 3d 977, 994 (1988) (threshold for recovery from a republisher is negligence). Plaintiffs inaccurately portray the status of republisher liability in Illinois. Plaintiffs ask us to compare appellate court cases when our supreme court has weighed in on the same subject.

¶ 74 In 1975, our supreme court adopted a negligence standard for a claim of republication:

> "We hold, therefore, that in a suit brought by a private individual to recover actual damages for a defamatory publication, *** recovery may be had upon proof that the publication was false, and that the defendant either knew it to be false, or, believing it to be true, lacked reasonable grounds for that belief. We hold further that negligence may form the basis of liability regardless of whether or not the publication in question related to a matter of public or general interest." *Troman v. Wood*, 62 Ill. 2d 184, 198 (1975).

In 1980, however, citing changes to the Restatement (Second) of Torts (1977), which had itself adopted new positions on republisher liability during the intervening five years, our supreme

court identified "actual malice" as the standard for finding a republisher liable for the defamatory statements of another:

> "At common law a person who republished a defamatory statement made by another was himself liable for defamation even though he gave the name of the originator (Restatement of Torts sec. 578 (1938)). Although the absolute liability which attached to defamation at common law was supplanted as to public officials and public figures by *New York Times Co. v. Sullivan* and its sequels, the republisher of a defamatory statement made by another remains subject to liability (Restatement (Second) of Torts sec. 578 (1977)), but *he cannot be held liable unless he himself knew at the time when the statement was published that it was false, or acted in reckless disregard of its truth or falsity. It is not sufficient that the originator of the statement made it with actual malice.*" (Emphasis added.) *Catalano*, 83 Ill. 2d at 168.

Accordingly, to recover on a claim of defamation against a republisher, a plaintiff must establish that the defendant republished the alleged defamatory statements with actual malice, notwithstanding *Owens*' erroneous citation of *Troman* after *Catalano* had already adopted "actual malice" as the standard for republisher liability.

¶ 75 In this case, plaintiffs alleged that Thede and Simpson gave their letters to GTA, who then readied them for mailing. They did not allege that GTA made or created any of the statements in the Thede or Simpson letters. Thus, if GTA could be guilty of defamation, it could only be as a republisher of the alleged defamatory statements. Accordingly, plaintiffs were required to plead and prove that GTA published the letters with actual malice. As noted, actual malice requires the plaintiff to show the defendant's "knowledge" of the falsity of the statement, or "reckless disregard" for its truth. *Krasinski*, 124 Ill. 2d at 491. Our supreme court

analyzed "recklessness" in connection with "actual malice," concluding that it must be carefully distinguished from negligence. *Wanless*, 115 Ill. 2d at 170. To demonstrate recklessness, the plaintiff must show that the defendant had serious doubts as to the truth of what he was publishing. *Wanless*, 115 Ill. 2d at 170. The court noted that "[R]ecklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." *Wanless*, 115 Ill. 2d at 171 (quoting *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968)).

¶ 76 Plaintiffs could conceivably establish actual malice only by showing that GTA had "knowledge" that the letter contained false statements or that GTA "recklessly disregarded" whether it was true or false. In their opening brief, plaintiffs argue that they made a sufficient showing of actual malice. They argue that GTA, motivated by the "embarrassing" settlement it paid to ERTA in 2004, was out "to get" Snapp by ousting him and replacing ERTM as property manager for ERTA. Plaintiffs contend that GTA served as campaign headquarters for candidates opposed to Snapp, and that GTA knew of the false content in the letters because it typed "several" of them. Alternatively, plaintiffs argue, GTA did not know of the false content but failed to fact check the campaign letters when it should have, and thus, acted with reckless disregard for the truth. Finally, plaintiffs contend that GTA engaged in systematic attempts to "harass and intimidate" Snapp when (1) Miller unjustifiably wrote off Snapp's management fees from ERTA's balance sheet, (2) "Miller drafted the first ever 'cat rule,' which was directly aimed at the Snapps," (3) GTA removed a picnic table and a flower bed from the Snapps' residence, and (4) GTA took Snapp's truck from his Iowa residence in the middle of the night. According to plaintiffs, GTA's motive to remove Snapp and replace him as property manager, coupled with its affirmative efforts to help elect candidates opposed to Snapp, and the

harassment and intimidation attempts, all "set forth evidence in the record that could support a reasonable jury finding of actual malice." We disagree.

¶ 77 The record does not support the harassment and intimidation allegations. It was the ERTA Board, not Miller, that excluded Snapp's disputed management fees from the ERTA balance sheet. Likewise, it was the Board, not Miller, that unanimously approved the "cat rule," which prohibited the feeding of wild animals and feral cats by all ERTA homeowners, not only the Snapps. GTA removed the picnic table and flower bed, but only at the direction of the Board, and it removed them from ERTA commonly owned property, not the Snapp's residence. Finally, the Board, not GTA, ordered the recovery of the truck when it discovered that ERTA had purchased the truck, made the loan payments on the truck, and held the title to the truck in ERTA's name. Nothing in the record supports plaintiffs' allegations of harassment or intimidation by GTA.

¶ 78 In addition, nothing in the record supports plaintiffs' allegation that GTA harbored ill will toward Snapp for the previous lawsuit that resulted in GTA paying ERTA a $420,000 settlement in 2004. Plaintiffs' citations to the record indicate only that a lawsuit existed and that it was settled, not that any animosity resulted from it. Plaintiffs point to an alleged conversation in 2007 where Snapp claimed that GTA general manager Joe Mattingly and GTA president Fran Petersen told him his time as property manager was over and that GTA should take over those duties. Snapp averred that, after that conversation, he felt GTA "would do whatever was needed to remove me." Nothing in the record beyond Snapp's own affidavit supports this allegation. Even if true, however, this conversation does not present a triable issue of actual malice. It was a single conversation that occurred four years before any of the events that gave rise to this lawsuit took place. Moreover, the record contradicts plaintiffs' assertion that GTA

was trying to topple him. In March 2009, Snapp began working in concert with Mattingly, the same person whom he now claims threatened him with ouster two years earlier. Upon Snapp's request, Mattingly and GTA began posting ERTA's meeting minutes to its website, though it had no obligation to do so, as GTA was not then serving as ERTA's property manager. Miller testified that Snapp would give ERTA's meeting minutes to Mattingly, and that Mattingly would then direct Miller to post them to the website. Mattingly's actions are not consistent with the actions of a person who had an ongoing feud with Snapp or was seeking to drive him out of his position. Plaintiffs failed to demonstrate any animosity that GTA directed toward Snapp.

¶ 79 We next turn to plaintiffs' allegations that GTA had knowledge of the false content of the campaign letters. Plaintiffs argued in their opening brief, and reiterated several times at oral argument, that GTA had knowledge of the content of the letters because it typed "several of the campaign letters." Therefore, according to plaintiffs, GTA knew that the letters contained falsities.

¶ 80 At oral argument, in response to the court's inquiry about how plaintiffs demonstrated actual malice, plaintiffs' counsel responded: "I think the record reflects that they [*sic*] typed out the letters, and so the act of typing it [*sic*] out and knowing exactly what the content was, *** coupled with all of the other things that GTA was also doing at that time shows malice." In their brief, plaintiffs cite Miller's deposition testimony to support their contention that GTA typed the letters and to demonstrate GTA's knowledge of the content of the letters. In the relevant portion of her testimony, Miller was asked to explain the nature of the secretarial services that GTA offered to its members:

> "We have provided secretarial services for property owners on occasion—it's become much more rare of recent—but at one time, we had a property owner that

> couldn't type, and he would bring documents to us to be typed, and then we'd print them and give them back to him."

This is the only place during her lengthy deposition where Miller referred to GTA typing any letters for its members. Miller gave this as an example of the general secretarial services that GTA offered, not as a specific instance of GTA typing a letter for an ERTA Board candidate. Remarkably, plaintiffs cite this passage as proof that GTA typed "several" of the campaign letters. The record does not support plaintiffs' contention.

¶ 81 Plaintiffs alleged in their fourth amended counterclaim and third-party complaint that GTA "knew that the seriousness of the allegations made by Snapp in these letters would have a harmful effect on Snapp's position as president of ERTA and Snapp's career as a manager of properties." The testimony and affidavits in the record directly refute those allegations. As discussed above, nothing in the record establishes that GTA had knowledge of the content of the letters, but even if it did, Miller testified that GTA had no interest in who was running for the ERTA Board. She stated that the secretarial services were available to all GTA members, including Snapp or "anybody else that was running [for] the ERTA board in the spring of 2011," and that GTA charged all of its members, including the candidates, a standard hourly rate for the services. Additionally, Mattingly averred in his affidavit that "GTA did not review, edit, or otherwise modify the individuals' campaign letters." By all accounts, this was an administrative service that GTA offered to its membership, which included these candidates. GTA had no reason to question the veracity of Thede or Simpson, nor did it have any reason to question the accuracy of the content of their letters. Therefore, GTA had no duty to investigate the truth or falsity of the content in the letters, and it did not act with reckless disregard. Plaintiffs presented no disputed issues of fact that could establish by clear and convincing

evidence that GTA republished these letters with actual malice.[1] Accordingly, summary judgment as it related to these letters was proper.

¶ 82 b. Meeting Minutes

¶ 83 Count IX of plaintiffs' fourth amended counterclaim and third-party complaint included allegations that GTA defamed them by publishing, both to its website and through direct mailings, the minutes of ERTA Board and membership meetings containing defamatory statements. GTA concedes that it posted the minutes to its website, but responds that it cannot be considered a publisher under the CDA. GTA does not respond to the allegation that it defamed plaintiffs by mailing the meeting minutes to ERTA members.

¶ 84 i. *Mailing of June 2011 and February 2012 Meeting Minutes*

¶ 85 We first address plaintiffs' allegations that GTA defamed them by mailing the meeting minutes of June 25, 2011, and February 25, 2012, to the ERTA membership. Paragraph 251 of the fourth amended counterclaim and third-party complaint alleged that the "process of mailing the transcribed minutes to homeowners *** constitutes publication for defamation purposes." Snapp averred in his affidavit that he received meeting minutes from the June 2011 and February 2012 meetings in the mail. He did not state, nor do we find any indication in the record, that GTA played a role in mailing those meeting minutes to ERTA homeowners. Mattingly averred in his affidavit that GTA posted meeting minutes of ERTA and the other satellite associations to GTA's website, but he made no mention of mailing the meeting minutes. In her deposition,

[1] Because we determine that plaintiffs did not demonstrate that GTA acted with actual malice as a republisher, we need not address whether GTA's publication of these letters was protected by qualified privileges under the General Not For Profit Corporation Act of 1986 or the Common Interest Community Association Act.

Miller testified at length on the process of recording, transcribing, and posting the meeting minutes. There was no mention, however, in any of the 12 pages of the transcript of her testimony on this subject, of GTA mailing the meeting minutes. Nor did any of the seven attorneys who were present ask questions regarding GTA's role, if any, in mailing the meeting minutes. Asked at oral argument if the record contains evidence of GTA's role in mailing the minutes, plaintiff's attorney responded that she thought that it did, but she offered no record citation. We find nothing in the record to support plaintiffs' allegation that GTA mailed either of the meeting minutes in question to ERTA members. Even if GTA did mail the meeting minutes, for the reasons explained below, it did so as a republisher, and we find nothing in the record that supports that it mailed the minutes with actual malice, which would be required to sustain a claim of defamation. Thus, summary judgment was proper as to plaintiffs' allegations that GTA defamed them by mailing the meeting minutes.

¶ 86 ii. *Posting of June 25, 2011, Meeting Minutes*

¶ 87 Plaintiffs argue that the following statement, taken from the minutes of the Board meeting on June 25, 2011, and published to GTA's website, was false and defamatory:

> "Simpson explained that many association members are uncomfortable with Snapp's explanation as to what happened to the money from the settlement of the lawsuit against the GTA, as well as the special assessments charged to the membership during the period of the suit, assessments members believed they were told would be returned after the suit settlement. The total amount in question is in excess of $590,000."

Plaintiffs contend that GTA knew that the statement insinuated that Snapp committed theft, and that it would have a harmful effect on his role as a member of the Board as well as his career as a

property manager. As with the letters, we review whether GTA published these meeting minutes, not the defamatory character of the statements.

¶ 88 The CDA preempts all state causes of action that would hold providers of an interactive computer service liable as a publisher of any information provided by another. *Barrett v. Fonorow*, 343 Ill. App. 3d 1184, 1188 (2003). Section 230(c)(1) of the CDA provides:

> "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1) (2010).

The CDA defines "interactive computer service" as:

> "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." 47 U.S.C. § 230(f)(2) (2010).

The definition includes, but is not limited to, Internet service providers. *Barrett*, 343 Ill. App. 3d at 1191.

The CDA defines "information content provider" as:

> "any person or entity that is *responsible, in whole or in part, for the creation or development* of information provided through the Internet or any other interactive computer service." (Emphasis added.) 47 U.S.C. § 230(f)(3) (2010).

¶ 89 Plaintiffs do not dispute in their brief that GTA is an "interactive computer service" as defined in the CDA. They argue instead that the CDA does not protect GTA's dissemination of the meeting minutes on its website because GTA is an "information content provider."

Plaintiffs argue that GTA participated in the meetings and the drafting of the minutes, so it was not merely a republisher, but a participant in the creation of the minutes.

¶ 90 As to the June 25, 2011, meeting minutes, plaintiffs' entire argument is presented in footnote seven of its opening brief:

> "The GTA is also an information content provider for the June 25, 2011 [*sic*] ERTA Board of Directors meeting minutes which it posted to its website."

Plaintiffs make no cogent legal argument as to why GTA was an information content provider, and they cite no authority whatsoever. Therefore, plaintiffs have forfeited their argument as to whether the CDA immunized GTA in connection with the June 2011 meeting minutes. *Sakellariadis*, 391 Ill. App. 3d at 804.

¶ 91 Forfeiture aside, the record is clear that GTA played no part in the creation or development of the June 2011 minutes. GTA had not yet been hired as property manager when this meeting took place. Miller testified that she did not attend the meeting. The ERTA Board drafted these meeting minutes and turned them over to GTA for posting on its website. GTA's only role was to post the minutes, which it had begun doing two years earlier upon Snapp's request. Therefore, because GTA had no role in creating or developing the meeting minutes, it was a republisher, not an information content provider. Accordingly, the CDA applies, and GTA cannot be treated as a publisher or speaker for posting the June 2011 minutes to its website.

¶ 92 iii. *Posting of February 25, 2012, Meeting Minutes*

¶ 93 Plaintiffs pleaded in their fourth amended counterclaim and third-party complaint that statements in the February 2012 meeting minutes, which GTA published on its website, defamed them. They first complained that the following statement was false and defamatory: "The Board knew there were problems, but no one was ready for the financial mess that was

encountered and that the board is still dealing with." Plaintiffs argued that the statement defamed them because there was no "financial mess left by Snapp after he was fired by Simpson."

¶ 94 Plaintiffs next argue that the following statement regarding the fidelity insurance claim defamed them:

> "President Simpson then reported that ERTA does maintain Fidelity Insurance [*sic*], also known as Crime Insurance [*sic*]. This type of policy provides coverage if there is any wrongdoing of board members who have access to association funds that creates a loss situation for the association. If ERTA can prove the claim the insurance company will pay and go after the perpetrator.
>
> Once this situation started to unfold, a claim was submitted to the insurance company. The accounting firm Frost, Ruttenberg and Rothblatt, PC of Deerfield, Illinois did a handout listing 13 warning signs that may be an indicator that fraud may be occurring, and ERTA matched 11 of the warning signs.
>
> ERTA continues to amend the claim as additional information becomes available. The claim includes the $420,000 settlement from the GTA in 2004 plus an additional $170,000 for two special assessments charged to the members. However, the policy limit is $500,000."

¶ 95 Plaintiffs argued that the statement was false because it stated that "ERTA has incurred losses because of a theft of $590,000 of association funds by Snapp." They further argued that the CDA did not insulate GTA from consideration as a publisher because GTA's employees played a part in creating or developing the meeting minutes, which made GTA an information content provider. See *Barrett v. Fonorow*, 343 Ill. App. 3d 1184, 1196 (2003) (a party is not

entitled to the protections of the CDA if that party is itself an information content provider of the defamatory material at issue). GTA responded that Miller did not "create" the minutes, in whole or in part, because her role was that of a transcriber, and it was the Board that conducted the meeting that "created" the minutes.

¶ 96 The issue surrounding the February 2012 meeting minutes is whether GTA was an information content provider, and thus, did not fall under the protection of the CDA for information published on its website. Plaintiffs argue that Miller and three other GTA employees attended the meeting and "presented on various topics," which made GTA a creator or developer of the content in the meeting minutes. Plaintiffs cite the minutes, which indicate that Miller reviewed the ERTA balance sheet for the membership. According to the minutes, another GTA employee, Jason Kevern, reviewed maintenance issues, such as shingle replacement, lawn mowing, and the work order system. GTA's general manager, Joe Mattingly, discussed the recently enacted Common Interest Community Association Act and the changes proposed by the Illinois Association of Lake Communities. The record shows that the Board hired GTA as property manager in September 2011, five months before this meeting. The GTA employees attended the meeting because GTA was the new property manager, and their input on particular subjects was relevant. None of these subjects, however, related to the alleged defamatory statements. All of the statements that plaintiffs argue defamed them were clearly attributed to Simpson in the minutes, and none of the GTA employees spoke about topics remotely related to Simpson's statements. The mere fact that GTA employees spoke at the same meeting as Simpson when he uttered the alleged defamatory statements did not make GTA a creator or developer, in whole or in part, of Simpson's statements. See *Federal Trade*

Commission v. Accusearch Inc., 570 F.3d 1187, 1198-99 (2009). Thus, GTA was not an information content provider based on its presentations in the February 2012 meeting.

¶ 97 Additionally, plaintiffs argue: "It was Miller who singlehandedly drafted the defamatory portion of the meeting minutes, with no assistance, edits or revisions by the ERTA Board." Plaintiffs assert that Miller's "preparation" of the minutes made them "visible," "usable," and "available" to others. According to plaintiffs, this made GTA a developer of the information, citing *Accusearch*, 570 F.3d at 1198.

¶ 98 The court in *Accusearch* adopted a broad interpretation of "develop" as it applies to the CDA. *Accusearch*, 570 F.3d at 1198. The court examined the roots of the word and determined that it was "the act of drawing something out, making it visible, active, or usable. (Internal quotation marks omitted.) *Accusearch*, 570 F.3d at 1198.

¶ 99 Miller testified at her deposition that she "transcribe[d]" what happened at the meeting. She also explained that GTA did not provide a word-for-word transcription, but rather, a summary of the topics discussed during the meeting. After she completed the "transcription," she forwarded it to the Board, which had the opportunity to review, edit, approve, or disapprove of the summaries Miller created on its behalf. After the Board completed its review, it sent the minutes back to GTA, in this case, without any edits.

¶ 100 Regarding whether Miller became a developer of the information by making it "visible" or "usable," or whether her role was more akin to that of a secretary, and that she merely did the bidding of the Board, even if Miller were a "developer" of the information for the purpose of the CDA, the inquiry would not end with that determination. See *Accusearch*, 570 F.3d at 1198. Section 230(f)(3) of the CDA requires that the party be "responsible, in whole or in part, for the creation or development of information." Thus, if GTA were a developer of the information, it

would still have to be responsible for the development of the alleged offending content. See *Accusearch*, 570 F.3d at 1198. In analyzing *responsibility* as it relates to an information content provider, the *Accusearch* court determined:

> "[T]o be 'responsible' for the development of the offensive content, one must be more than a neutral conduit for that content. That is, one is not 'responsible' for the development of the offensive content if one's conduct was neutral with respect to the offensiveness of the content (as would be the case with the typical Internet bulletin board). We would not ordinarily say that one who builds a highway is 'responsible' for the use of that highway by a fleeing bank robber, even though the culprit's escape was facilitated by the availability of the highway." *Accusearch*, 570 F.3d at 1199.

¶ 101 GTA began posting ERTA's meeting minutes upon Snapp's request. It posted minutes for each of the eight satellite associations. To the extent that it participated in drafting the meeting minutes, it did so only in its role as property manager for ERTA. The Board still had absolute authority to accept or reject anything drafted by GTA. Thus, it cannot be said that GTA's role in drafting the minutes was anything other than that of a "neutral conduit." See *Accusearch*, 570 F.3d at 1199. GTA can be no more responsible for the allegedly offensive content than the builder of a highway is responsible for facilitating the escape of a fleeing bank robber. Consequently, GTA was not an information content provider, and its posting of the February 2012 meeting minutes was protected under the CDA.

¶ 102 c. Oldenburg Notes

¶ 103 Plaintiffs argued that GTA defamed them when the Oldenburg notes were sent to the "ERTA Board, Philadelphia Insurance Company and the forensic accounting firm." In their

fourth amended counterclaim and third-party complaint, plaintiffs alleged that Oldenburg published the letter containing his notes:

> "Oldenburg distributed and published these notes to members of the ERTA Board (Simpson, Gray, Numrich[,] Michael LaTona and Dan Wachholz) and on information and belief to the GTA Board members and GTA employees. Simpson in turn mailed and published these notes to SDC CPAs and copied and published the letter to nine other parties."

Plaintiffs argued that Miller admitted in her deposition testimony that she had seen the Oldenburg notes at some time before her deposition, and that Simpson came into possession of the notes at some time before he forwarded them to SDC. According to plaintiffs, that was "sufficient evidence that the GTA published the Oldenburg notes to Simpson."

¶ 104 GTA responds that plaintiffs failed to present the trial court with any admissible evidence supporting these allegations, and summary judgment was therefore proper. We agree.

¶ 105 We first observe that the Oldenburg notes became part of the record as exhibit LL, which was attached to plaintiffs' fourth amended counterclaim and third-party complaint. The Oldenburg notes are contained within a handwritten, unsigned, two-page letter. In the notes, Oldenburg purportedly describes a conversation that he says took place between himself and a former ERTM employee in August 2001. While the letter is dated at the top of the first page, plaintiffs offered no evidence to corroborate that the letter was written contemporaneously or that Oldenburg actually wrote the letter. These obvious deficiencies aside, plaintiffs' frivolous argument misstates the facts surrounding the Oldenburg notes and misconstrues their meaning.

¶ 106 Plaintiffs alleged that Simpson sent the Oldenburg notes to SDC and that he "copied and published the letter to nine other parties." The Simpson letter to SDC, which plaintiffs attached

to their complaint, contradicts this assertion. The only reference to the Oldenburg notes in the body of Simpson's letter is a short paragraph describing the Oldenburg notes as an attached exhibit:

> "[Exhibit] H. A memo to the file concerning a conversation between a former ERTM employee and GTA manager on 08/30/2001, as to how Snapp was managing ERTA/ERTM at this time. This individual has said he will testify or sign an affidavit his comments are true."

Immediately following the signature line at the end of Simpson's letter to SDC are the words, "CC: (*without attachments*)" (Emphasis added.), which is followed by the list of eight people to whom Simpson sent the letter without including the attachments. It is clear from the plain language of Simpson's letter that the Oldenburg notes were sent only to Regina Singer at SDC, and not to any of the persons copied on the letter. Plaintiffs presented no evidence to the contrary, and their assertion that Simpson published the letter to nine other parties is a misstatement of the facts in the record. The fidelity insurance claim was a valid exercise of the Board's fiduciary duties, and Simpson's inclusion of the Oldenburg notes as a supporting document to that claim, however he came to possess them, was a reasonable application of his authority as Board president. He took care to send the Oldenburg notes only to the firm investigating the claim and did not "publish" the notes to any persons who had no need to see them.

¶ 107 At oral argument, the court noted that there appeared to be nothing in the record that would help establish how Simpson obtained the Oldenburg notes. Plaintiffs' attorney responded that the evidence of GTA's publication lay within Susan Miller's sworn deposition testimony. Counsel argued that Miller indicated that she knew that the Oldenburg notes were

kept at GTA's facilities, which, combined with GTA's motive to become ERTA's property manager, was enough for a jury to find that GTA had intentionally published the Oldenburg notes. A review of Miller's deposition testimony, where she was comprehensively questioned on her knowledge of the Oldenburg notes, does not support counsel's contentions. At no time during her testimony did Miller indicate that she knew that the Oldenburg notes were kept at any GTA facility. Indeed, she repeatedly indicated that she did not know where the Oldenburg notes were kept. Thus, there was no evidence that established how Simpson came to possess the Oldenburg notes. Without such evidence, plaintiffs could not prove that GTA published the notes to Simpson.

¶ 108 2. *Count XI—False Light Invasion of Privacy*

¶ 109 Count XI of plaintiffs' fourth amended counterclaim and third-party complaint alleged that GTA acted with actual malice when it placed him in a false light before the public by publishing Simpson's false and defamatory statements. The facts that formed the basis of this allegation are a part of the same facts that formed the basis of plaintiffs' defamation allegations: (1) the meeting minutes of June 25, 2011, (2) the fidelity insurance claim, and (3) the meeting minutes of February 25, 2012. Plaintiffs ask that we reverse the trial court's judgment regarding count XI only as it related to the meeting minutes, making no mention of the court's ruling as it related to the insurance claim, so we do not review the judgment on that ground. Plaintiffs do request, however, that we reverse the trial court's judgment as to false light regarding the Oldenburg notes, though they did not allege false light as to the Oldenburg notes in count XI. The issue of whether plaintiffs were placed in a false light by the Oldenburg notes was not before the trial court at the time of its ruling on summary judgment. Consequently, we will not review whether the trial court erred as to false light regarding the Oldenburg notes. *Rayner*, 226 Ill. App. 3d at 509-10 (an

appellant may only refer to the record as it existed at the time the trial court ruled and outline his arguments made at that time). GTA responds that, just as it was shielded from liability for defamation by the CDA, it is likewise shielded from liability for false light invasion of privacy.

¶ 110 To prevail on a cause of action for false light invasion of privacy, a plaintiff must plead and prove that: (1) the defendant's actions placed the plaintiff in a false light before the public, (2) the false light would be highly offensive to a reasonable person, and (3) the defendant acted with actual malice. *Kolegas v. Heftel Broadcasting Corp.*, 154 Ill. 2d 1, 17 (1992).

¶ 111 We previously analyzed whether the CDA applies to false light claims as it does to defamation claims:

> " 'Publishing' [a] matter for purposes of defamation and bringing that matter 'before the public' or creating 'publicity' differ only in degree.
>
> ***
>
> To 'create publicity' is simply to 'publish' a matter to a wider degree than is necessary for defamation. Thus, both false light and defamation contain the element of 'publication.' " *Barrett*, 343 Ill. App. 3d at 1192.

¶ 112 As discussed above, GTA was not an "information content provider" for either the June 2011 meeting minutes or the February 2012 meeting minutes. Accordingly, the CDA insulated GTA from consideration as a publisher for either of the meeting minutes because Congress intended section 230 to prevent the element of publication from being satisfied in any state cause of action where an interactive computer service disseminates information provided by another. *Barrett*, 343 Ill. App. 3d at 1193. Thus, summary judgment for the false light claims as they related to the meeting minutes was proper.

¶ 113 C. Trial Court Order—July 21, 2017

¶ 114 1. *Count X—Intentional Interference with a Business Relationship*

¶ 115 Plaintiffs argue that GTA was aware of their business relationships with ERTA, that it interfered with those relationships by the actions "set forth in Counts IX and XI," and that GTA benefitted by its interference when ERTA terminated Snapp and ERTM.

¶ 116 GTA responds that the tortious elements alleged in counts IX and XI were properly dismissed, and cannot form the basis of plaintiffs' intentional interference claim. GTA reasserts its protection from being treated as a "publisher" under the CDA, which was a necessary element of GTA's alleged interference. Alternatively, GTA argues that it could not have caused ERTA to breach a contract with ERTM by publishing and making ERTA aware of its own statements.

¶ 117 The tort action for interference with a business relationship developed to give recognition to the principles that a person's business is his property, and that the business is entitled to protection from harm by another. *City of Rock Falls v. Chicago Title & Trust Co.*, 13 Ill. App. 3d 359, 362 (1973). The elements that establish a *prima facie* tortious interference with a business relationship are: (1) the existence of a valid business relationship or expectancy, (2) knowledge of the relationship or expectancy by the interferer, (3) an intentional interference that induces or causes a breach or termination of the relationship, and (4) damage. *City of Rock Falls*, 13 Ill. App. 3d at 363. Furthermore, influencing a business relationship with a good-faith and proper purpose is not actionable; a plaintiff is required to show that the interferer acted without justification or with malice. See *H.F. Philipsborn & Co. v. Suson*, 59 Ill. 2d 465, 474 (1974).

¶ 118 In count X of their fourth amended counterclaim and third-party complaint, plaintiffs alleged that GTA interfered with the "contract" between ERTA and ERTM by publishing the Oldenburg notes, participating in mailing the "false and defamatory" campaign letters, and posting the "defamatory" meeting minutes. The gist of plaintiffs' allegations was that GTA wished to

oust Snapp and ERTM as property manager for ERTA with the purpose of opening the door for GTA to return to that position. To that end, according to plaintiffs, GTA worked collectively with other third-party defendants to interfere with the alleged oral contract between ERTM and ERTA by defaming Snapp and ERTM.

¶ 119 As discussed above, there was no evidence that GTA ever possessed or published the Oldenburg notes. Moreover, plaintiffs assert that Dave Oldenburg authored the Oldenburg notes, but the document is unsigned and unattributed to any individual on its face. The document, as it exists in the record, is unauthenticated double-hearsay that would not be admissible at trial, and plaintiffs made no effort to authenticate it or otherwise demonstrate why it might be admissible. For these reasons, the undisputed material facts establish that plaintiffs could not prove intentional interference based on defamation in the Oldenburg notes, and GTA was entitled to summary judgment.

¶ 120 Likewise, regarding the campaign mailings, the undisputed facts demonstrated that they did not constitute interference. Plaintiffs needed to demonstrate that GTA published the letters without justification or with malice. See *H.F. Philipsborn & Co.*, 59 Ill. 2d at 474. As discussed above, plaintiffs did not demonstrate actual malice with regard to GTA's role in mailing the campaign letters. Consequently, there was no interference with a business relationship having to do with the campaign letters, and the trial court did not err by granting summary judgment in favor of GTA.

¶ 121 As to the meeting minutes, we determined that GTA could not be considered a publisher for its dissemination of the minutes on its website. As such, it could not have interfered with the relationship by publishing the minutes.

¶ 122 2. *Denial of Leave to File Fifth Amended Counterclaim and Third-Party Complaint*

¶ 123 Plaintiffs argue that the trial court abused its discretion in denying them leave to amend their fourth amended counterclaim and third-party complaint. On May 25, 2017, six years and one month after ERTA filed the original complaint in this case, plaintiffs sought leave to file a fifth amended counterclaim and third-party complaint. Plaintiffs wished to add five new counts that included eight new causes of action against six new third-party defendants, along with seven new claims against ERTA, six new claims against GTA, and six new claims against Numrich. In total, the proposed fifth amended counterclaim and third-party complaint comprised 61 pages with 501 numbered paragraphs. It contained a range of new causes of action, from breach of fiduciary duty for failing to disclose documents, to defamation *per se*, to conversion. Count XV alleged defamation *per se* by an unnamed and unknown GTA employee, based on a witness's statement that "many years" ago, a person who she did not know, but whom she believed to be a GTA employee, told her that Snapp had embezzled money. Plaintiffs argued that they did not become aware of this or the other proposed claims until after they had already filed their fourth amended counterclaim and third-party complaint.

¶ 124 The right to amend a pleading is not absolute, but lies within the sound discretion of the trial court. *CitiMortgage, Inc. v. Parille*, 2016 IL App (2d) 150286, ¶ 44. We will not reverse the trial court's decision absent an abuse of its discretion, that is, when it acts arbitrarily to the point that no reasonable person would take the position adopted by the court. *Payne v. Hall*, 2013 IL App (1st) 113519, ¶ 12. In reviewing the trial court's discretion to amend a pleading, we consider (1) whether the proposed amendment would cure defects in the pleading, (2) whether the party opposing the amendment would be surprised or prejudiced, (3) the timeliness of the proposed amendment, and (4) whether the party seeking leave to amend had previous opportunities to amend. *Loyola Academy*, 146 Ill. 2d at 273.

¶ 125 In its ruling from the bench, the court alluded to the four *Loyola* factors, and stated explicitly that it was not considering the underlying merits of the proposed claims in the amended pleading. It based its decision on the second *Loyola* factor, prejudice:

> "I don't see that there's any surprise here but I think there is prejudice to have an ongoing system of litigation and at this point in time, this has been pending a long time, its been changed many, many times and I don't think that it would be fair for the Court, at this point in time to grant leave to file a Fifth Amended Counter-Claim and Third-Pary Complaint so your request with regard to that is being denied."

¶ 126 GTA argued that, should the court permit the amended pleading, it would be prejudiced by the additional time and cost that would be required to prepare itself for trial. Plaintiffs urged the court to consider prejudice to them for not being allowed to bring these claims over prejudice to the defendants.

¶ 127 Plaintiffs motion for leave to file their amended complaint came after discovery had closed and the case had been pending for more than six years. The trial court liberally granted plaintiffs leave to amend on four previous occasions. At this stage, the parties had deposed at least 29 witnesses and exchanged more than 12,000 pages of documents. A trial date was set. Under these facts, we cannot say that the trial court abused its discretion in denying plaintiffs leave to file their fifth amended counterclaim and third-party complaint.

¶ 128 III. CONCLUSION

¶ 129 For the foregoing reasons, we affirm the judgment of the circuit court of Jo Daviess County.

¶ 130 Affirmed.