2015 IL App (1st) 141930-U
No. 1-14-1930

Filed March 20, 2015

FIFTH DIVISION

IN THE APPELLATE COURT

OF ILLINOIS

FIRST JUDICIAL DISTRICT

DAVID C. OGBOLUMANI, Plaintiff-Appellant, v. STEVEN YOUNG, individually and as an employee of Kellogg Company, REBECCA RAMIREZ, individually and as an employee of Kellogg Company, and KELLOGG COMPANY, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County No. 13 L 062032 Honorable Roger G. Fein, Judge Presiding.

PRESIDING JUSTICE PALMER delivered the judgment of the court.
Justice Reyes concurred in the judgment.
Justice Gordon concurred in part and dissented in part.

ORDER

¶ 1 *Held*: The trial court's order dismissing plaintiff's complaint in its entirety is affirmed over plaintiff's assertions that he sufficiently stated causes of action for defamation, trespass to chattel, invasion of privacy and intentional infliction of emotional distress. The court's grant of summary judgment to defendants on the trespass to chattel and invasion of privacy counts is vacated.

¶ 2 Plaintiff David C. Ogbolumani filed an action asserting claims for defamation, trespass to chattel, invasion of privacy and intentional infliction of emotional distress

against his former employer Kellogg Company, his former supervisor David Young and Kellogg's director of human resources Rebecca Ramirez (defendants). Plaintiff's claims were based on Young's negative statements about plaintiff in a performance review and Ramirez's confiscation of a USB drive attached to plaintiff's company issued laptop computer.[1] The trial court dismissed the complaint in its entirety pursuant to section 2-615 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2012)) and also granted summary judgment to defendants on the trespass to chattel and invasion of privacy counts. Plaintiff appeals, arguing the court erred in dismissing his complaint and in granting summary judgment on the trespass to chattel and invasion of privacy counts as he satisfied all the elements of his four causes of action. We affirm the court's dismissal of the entire complaint pursuant to section 2-615 and vacate the court's order granting summary judgment to defendants on the trespass to chattels and invasion of privacy counts.

¶ 3 BACKGROUND

¶ 4 In 2008, Ogbolumani was employed by the Kellogg Company as Kellogg's director of "Global IT Security." Plaintiff reported to Young, the vice president of "IT security and risk management" at Kellogg. Plaintiff resigned from Kellogg in April 2013.

¶ 5 In August 2013, plaintiff filed a four-count complaint against Kellogg, Young and Ramirez asserting claims for defamation (Kellogg and Young), trespass to chattel and violation of privacy (Kellogg and Ramirez), and intentional infliction of emotional distress (Kellogg, Young and Ramirez). In his complaint, plaintiff alleged that, on or about March 3, 2013, Young conducted plaintiff's 2012 year-end performance review and, in the

[1] A "USB" drive is a "Universal Serial Bus" data storage device .

written performance review, made false statements regarding plaintiff's job performance. Plaintiff alleged his performance review was subsequently reviewed by "Ramirez [the director of human resources], Kellogg's Chief Information Officer, members of the Kellogg IT Senior Leadership team and other third parties." He asserted Young falsely stated, *inter alia,* that plaintiff (1) "failed to resolve several outstanding budgetary matters," (2) "performed below expectation on an identity and access management project," (3) "jeopardized the Kellogg Company's $2.7B acquisition of Pringles from Proctor and Gamble" and (4) "failed to deliver a set of metrics." He set forth factual allegations rebutting each of Young's allegedly false statements. Plaintiff claimed he had built Kellogg's "information security practice… from scratch," had been named "one of the top 100 IT security executives [among] 10,000 IT security executives and chief information security officers" and held "an advanced degree in Information Technology and management" as well as assorted information security certifications and that Young lacked any of these credentials.

¶ 6 Plaintiff also alleged that, on April 17, 2013, he had a conversation with Ramirez regarding a matter "relating to [his] employment status" and, after the conversation, Ramirez took plaintiff's company-issued laptop and a USB flash drive belonging to the plaintiff which was attached to the laptop. Plaintiff stated he "protested and demanded that he at least be able to retrieve some of the key files that he needed for his school work as he has a final exams [*sic*] the following week as well as important personal document [*sic*] that he frequently accesses." He alleged Ramirez refused to allow him access to his device, "claiming that Kellogg Company Policies prohibit the attachment of such devices on Kellogg Systems and she must confiscate it pending advice from the

Legal Department." Plaintiff alleged he wrote to Ramirez "asking for the return of his chattel as he needed access to his personal data since the USB drive is a backup of data contained in his company issued laptop, which had also been taken away." He asserted Ramirez offered to pay for the drive, but plaintiff "referred her back to his earlier mail [*sic*] since the real value is data and not the device itself." Plaintiff claimed Kellogg "still maintains possession of [his] chattel and continues to trespass on it and [he] continues to suffer harm as he is unable to retrieve and use his data." Plaintiff resigned his employment with Kellogg on April 19, 2013.

¶ 7 In his defamation count, plaintiff asserted Young either "knew or should have known" that Young's statements regarding plaintiff's job performance were false. He alleged Young "showed a reckless disregard for the truth or outright falsity" of the statements and "falsely, maliciously and wrongly intended to injure and destroy plaintiff's good name and reputation; and to expose Plaintiff to hatred, suspicion and financial injury." Plaintiff claimed Ramirez's refusal to return his USB drive and Kellogg's continued possession of the drive were trespass to chattels and Kellogg's accessing of the data on the drive invaded plaintiff's reasonable expectation of privacy. Plaintiff also claimed he suffered intentional infliction of emotional distress as a result of defendants' conduct.

¶ 8 Defendants filed a combined motion to dismiss the complaint pursuant to section 2-615 and for partial summary judgment on plaintiff's trespass to chattel and invasion of privacy counts. On June 4, 2014, the court granted the combined motion, finding plaintiff failed to explain how the complaint was sufficient or how any of his claims were valid under Illinois law. The court found persuasive defendants' arguments that the

defamation count should be dismissed because Young made the alleged defamatory statements in the context of an employee evaluation, they were therefore subject to a qualified privilege and plaintiff had not alleged facts that would overcome the privilege. It also agreed with defendants that plaintiff did not allege any facts suggesting that he suffered damages or Young made the statements with malice.

¶ 9 With regard to the trespass to chattel claim, the court stated: “no Illinois court has recognized the validity of that theory when applied to intangibles like digital information.” It also found that the USB drive and the information on the drive were taken pursuant to Kellogg’s policies and plaintiff failed to mitigate damages by refusing Kellogg’s offer to pay for the drive or otherwise return any non-Kellogg information on the drive. The court held plaintiff’s claims for invasion of privacy and intentional infliction of emotional distress were conclusory allegations unsupported by factual allegations and, because Kellogg’s conduct was consistent with its policies, plaintiff could not establish "unauthorized intrusion." The court lastly held that defendants presented uncontradicted evidence that entitled them to summary judgment. [2]

¶ 10 Plaintiff filed a timely notice of appeal from the court’s order on June 13 2014.

¶ 11 ANALYSIS

¶ 12 Plaintiff argues the court erred in granting (I) defendants’ motion to dismiss the complaint in its entirety pursuant to section 2-615 and (II) their motion for summary judgment on the trespass to chattel and invasion of privacy counts.

[2] The second and third counts in plaintiff’s four-count complaint are mislabeled as both the trespass to chattel and invasion of privacy counts are labeled as "Count II.” Recognizing the error, the court correctly granted summary judgment on "Count II (trespass to Chattel) and Count III (Invasion of privacy, mislabeled Count II)."

¶ 13 I. Dismissal Under Section 2-615

¶ 14 A section 2-615 motion to dismiss is based on the pleadings rather than the underlying facts, admits all well-pleaded facts on the face of the complaint and attacks the legal sufficiency of the complaint, alleging only defects on the face of the complaint. *Neppl v. Murphy*, 316 Ill. App. 3d 581, 584 (2000); *Elson v. State Farm Fire and Casualty Co.*, 295 Ill. App. 3d 1, 6 (1998). Viewing the complaint in the light most favorable to plaintiff, we must determine whether the complaint alleges facts sufficient to state a cause of action upon which relief may be granted (*Ziemba v. Mierzwa*, 142 Ill. 2d 42, 46-47 (1991)) and do not consider the merits of the case (*Elson*, 295 Ill. App. 3d at 5)). In making that determination, we must take as true all well-pleaded facts of the complaint, drawing all reasonable inferences therefrom in favor of the nonmoving party and disregarding mere conclusions of law unsupported by specific factual allegations. *Krueger v. Lewis*, 342 Ill. App. 3d 467, 470 (2003); *Ziemba*, 142 Ill. 2d at 47. In ruling on a section 2-615 motion, the court "may not consider affidavits, the products of discovery, documentary evidence not incorporated into the pleadings as exhibits, testimonial evidence or other evidentiary materials." *Elson*, 295 Ill. App. 3d at 6. Our standard of review is *de novo*. *Neppl*, 316 Ill. App. 3d at 583.

¶ 15 In granting defendants' section 2-615 motion to dismiss the four-count complaint, the court found plaintiff failed to state a cause of action for (1) defamation, (2) trespass to chattel, (3) invasion of privacy and (4) intentional infliction of emotional distress. Plaintiff challenges the court's findings, arguing that he satisfied all the elements of his four causes of action. We review the court's dismissal of each claim separately.

¶ 16 1. Defamation

¶ 17 Plaintiff argues the court erred in granting defendants' section 2-615 motion to dismiss his defamation count as he sufficiently alleged all three elements for defamation. In order to prove defamation, a plaintiff must show that (1) the defendant made a false statement about the plaintiff; (2) the defendant made an unprivileged publication of that statement to a third party; and (3) the publication caused damages. *Green v. Rodgers*, 234 Ill. 2d 478, 491 (2009). Internal office communication within a corporation has been previously determined to be a publication for purposes of a defamation action. *Popko v. Continental Casualty Co.*, 355 Ill. App. 3d 257, 261 (2005) (citing *Gibson v. Phillip Morris*, Inc., 292 Ill. App. 3d. 267, 275 (1997)). There are two types of defamatory statements: defamation *per se* and defamation *per quod. Mauvais-Jarvis v. Wong, 2013 IL App (1st) 120070,* ¶ 68*.* In an action for defamation *per quod,* the plaintiff must plead and prove actual damages in order to recover but if a defamatory statement is actionable *per se,* the plaintiff need not plead or prove actual damage to his or her reputation to recover. *Id*.

¶ 18 Plaintiff asserts he sufficiently alleged that Young's statements imputed his inability to perform his job and his lack of integrity, Young's statements were false and incapable of innocent construction, there was publication of the statements, the statements were not privileged and, in the alternative, if the statements were privileged, the privilege was abused. Plaintiff also argues that Young's statement were defamatory *per* se and he, therefore, need neither plead not prove actual damages to his reputation.[3]

[3] "A statement is defamatory *per se* if its harm is obvious and apparent on its face." *Green v. Rogers*, 234 Ill. 2d 478, 491 (2009). There are five categories of statements in Illinois that are considered defamatory *per se*:

¶ 19 Assuming *arguendo* that Young's statements are indeed defamatory *per se*, we find the statements are not actionable as Young made the statements in the context of an employee evaluation and for the purpose of assessing an employee's performance and his statements are, therefore, privileged. A defamatory statement is not actionable if it is privileged. *Solaia Technology, LLC v. Specialty Publishing. Co.*, 221 Ill. 2d 558, 585 (2006); *Mauvais-Jarvis v. Wong*, 2013 IL App (1st) 120070, ¶ 70. For public policy reasons, certain types of defamatory statements are considered privileged so that the person making the statements will not be deterred from speaking by the threat of civil liability. *Mauvais-Jarvis,* 2013 IL App (1st) 120070, ¶ 70. " ' "A privileged communication is one which, except for the occasion on which or the circumstances under which it is made, might be defamatory and actionable * * *." ' " *Kuwik v. Starmark Star Marketing & Administration, Inc.*, 156 Ill. 2d 16, 24 (1993) (quoting *Zeinfeld v. Hayes Freight Lines, Inc.*, 41 Ill. 2d 345, 349 (1968), quoting *Judge v. Rockford Memorial Hospital*, 17 Ill.App.2d 365, 376 (1958)). The existence of a privilege is a question of law we review *de novo*. *Solaia Technology, LLC*, 221 Ill. 2d at 585.

¶ 20 There are two types of privilege: absolute and qualified. *Id*. Absolute privilege, which provides complete immunity, is a narrow category generally limited to situations

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> "(1) words that impute a person has committed a crime; (2) words that impute a person is infected with a loathsome communicable disease; (3) words that impute a person is unable to perform or lacks integrity in performing her or his employment duties; (4) words that impute a person lacks ability or otherwise prejudices that person in her or his profession; and (5) words that impute a person has engaged in adultery or fornication." *Id*. at 491-92.

Per se defamatory statements must be pled with sufficient precision and particularity to permit judicial review of their alleged defamatory content. *Id*. at 492. "This higher standard is premised upon an important policy consideration, namely, that a properly pled defamation *per se* claim relieves the plaintiff of proving actual damages." *Id*. at 495.

that involve legislative, judicial, and quasi-judicial proceedings. *Belluomini v. Zaryczny*, 2014 IL App (1st) 122664, ¶ 21. No such proceeding is at issue here. Instead, the question is whether Young's statements are subject to a qualified privilege. It is defendants' burden to show that Young's statements are afforded a qualified privilege. *Kuwik,* 156 Ill. 2d at 27. In determining whether a qualified privilege exists, "a court looks only to the occasion itself for the communication and determines as a matter of law and general policy whether the occasion created some recognized duty or interest to make the communication so as to make it privileged." *Id* (adopting the approach taken by the Restatement (Second) of Torts §593 through 599 (1977)). There are three classes of qualifiedly privileged occasions: those involving (1) " 'some interest of the person who publishes the defamatory matter,' " (2) " 'some interest of the person to whom the matter is published or of some other third person,' " and (3) " 'a recognized interest of the public.' " *Id.* (quoting S. Harper, F. James & O. Gray, The Law of Torts § 5.25, at 216 (2d. 1986)).

¶ 21 Here, Young made the statements in the context of a written performance review and in his capacity as plaintiff's supervisor and manager. Considering Young's statements in the context of his role and the performance review shows he had an obvious interest in making the statements. One of the purposes of a performance review is for a manager to identify weak performance areas and outline a plan for the employee’s improvement. A manager is clearly entitled to express his concerns in what he believes, correctly or not, to be an employee’s poor performance or failure to perform expected tasks. Young made the statements in his interest as plaintiff's supervisor and in the interests of Kellogg, where plaintiff was employed as Kellogg's "director, IT

security." The parties to whom Young is alleged to have published the information, Kellogg's director of human resources Ramirez, Kellogg's chief information officer Brian Rice and unnamed "members of the Kellogg IT senior leadership team" all had an obvious interest in knowing whether plaintiff's job performance as director of Kellogg's IT security was adequate or in need of improvement. Accordingly, given that Young made and published the statements in his own interest and the interests of Kellogg's and its leadership staff, the statements are accorded a qualified privilege as a matter of law.[4] See *Muthuswamy v. Burke*, 269 Ill. App. 3d 728, 732 (1993) (remarks by chairman of hospital department of medicine made in context of two hospital meetings wherein the chairman was reviewing the plaintiff's performance as the chairman of the pulmonary medicine division was privileged; statements were limited in scope to the plaintiff's abilities as chairman of the pulmonary medicine division, made to a select group of other hospital administrators and made in the defendant's capacity as a superior to the plaintiff).

¶ 22 A qualified privilege is lost when defendants abuse the immunity the law affords them. *Fascian v. Bratz*, 96 Ill. App. 3d 367, 369 (1981). In order to overcome the qualified privilege established by defendants here, it is plaintiff's burden to show defendants abused the privilege. *Kuwik*, 156 Ill. 2d at 24. To that end, plaintiff argues that Young's statements in the 2012 year-end performance review are not privileged because Young abused the privilege by making the statements with malice or a

[4] Plaintiff also alleged that Young published the performance review to "other third parties" but did not identify these parties. His allegation is, therefore, inadequate for our review of whether publication to these individuals is privileged as well and it will not be considered.

reckless disregard for the truth.

> "[T]o prove an abuse of the qualified privilege, the plaintiff must show ' " 'a direct intention to injure another, or * * * a reckless disregard of [the defamed party's] rights and of the consequences that may result to him." ' [Citations.] Thus, an abuse of a qualified privilege may consist of any reckless act which shows a disregard for the defamed party's rights, including the failure to properly investigate the truth of the matter, limit the scope of the material, or send the material to only the proper parties." *Kuwik*, 156 Ill. 2d at 30.

¶ 23 Plaintiff's factual assertions on appeal, as were his allegations in the complaint, are all directed to showing that Young's statements were false. As such, he conflates the element of falsity required to establish defamation with the element of malice required to overcome the privilege. In order to overcome the privilege accorded Young's statements, plaintiff must allege facts from which actual malice may be inferred, *i.e.*, allege facts from which we can infer that that Young "either intentionally published the material while knowing the matter was false, or displayed a 'reckless disregard' as to the matter's falseness." *Coghlan v. Beck*, 2013 IL App (1st) 120891, ¶ 43 (quoting *Kuwik*, 156 Ill. 2d at 24). "Reckless disregard" is "publishing the defamatory matter ' "despite a high degree of awareness of probable falsity or entertaining serious doubts as to its truth." ' " *Id*. (quoting *Kuwik*, 156 Ill. 2d at 24-25 (quoting *Mittelman v. Witous,* 135 Ill. 2d 220, 237-38 (1989))). Plaintiff's burden " 'is not satisfied by the bare allegation that a defendant acted maliciously and with knowledge of the falsity of the statement; the plaintiff must allege facts from which actual malice may be inferred.' " *Coghlan*, 2013 IL

App (1st) 120891, ¶ 43 (quoting *Davis v. John Crane, Inc.,* 261 Ill. App. 3d 419, 431 (1994)).

¶ 24 Plaintiff variously alleged in his complaint that Young "willfully, maliciously and wantonly misrepresented the facts," made "untrue" statements "calculated to make Plaintiff look indolent and incompetent," showed "reckless disregard for the truth or outright falsity," "knew or should have known" the statements were false," "proceeded to make the statements with reckless disregard of their truth or falsity" and "falsely, maliciously and wrongfully intended to injure and destroy plaintiff's good name and reputation." He did not support these allegations with any specific facts from which the court can infer that Young made the statements with a reckless disregard for the truth, a high degree of awareness of their probable falsity or serious doubts as to their truth. We find plaintiff's bare conclusory allegations that Young published the statements maliciously and knowing that they were false are insufficient to allege facts from which actual malice may be inferred. *Coghlan*, 2013 IL App (1st) 120891, ¶ 56.

¶ 25 In support of his allegations that Young knew the statements were false and published them with malicious intent, plaintiff points to assorted emails between Young, plaintiff, Ramirez and others, asserting that the emails show the falsity of Young's statements that plaintiff (1) jeopardized the Pringles acquisition by failing to obtain "sign off" on an acceptable use policy from Kellogg's legal counsel despite repeated requests from Young, (2) asked Ernst and Young not to conduct a security evaluation of Kellogg's computer systems hosted by a third party named Rackspace, (3) improperly "pulled aside" employees of a vendor for a private discussion and (4) improperly asked the vendor to use its funds to pay travel expenses for a third party. However, except for a

single cursory reference to Young's involvement in emails regarding the Ernst and Young security evaluation, plaintiff did not refer to any of these emails in his complaint. He did not bring the emails or their contents to the trial court's attention until he filed his response to defendants' motion to dismiss. A section 2-615 motion to dismiss is based on the pleadings and not on the underlying facts and we do not consider the merits of the case. *Neppl*, 316 Ill. App.3d at 584; *Elson*, 295 Ill. App. 3d at 5. To that end, all section 2-615 motions to dismiss are limited to what is contained in the pleadings (*Barber-Colman Co. v. A & K Midwest Insulation Co.*, 236 Ill. App. 3d 1065, 1076 (1992)) and, in deciding a section 2-615 motion, the court "may not consider affidavits, the products of discovery, documentary evidence not incorporated into the pleadings as exhibits, testimonial evidence or other evidentiary materials" (*Elson*, 295 Ill. App. 3d at 6). Accordingly, as the email correspondence was not incorporated into plaintiff's complaint, we cannot consider it on appeal.

¶ 26 In sum, Young's statements are privileged and plaintiff has failed to sufficiently allege in his complaint that defendants abused the privilege. Therefore, Young's statements are not actionable and we affirm the trial court's dismissal of the defamation count pursuant to section 2-615.

¶ 27 2. Trespass to Chattel

¶ 28 Plaintiff argues the court erred in dismissing his trespass to chattel claim pursuant to section 2-615. As the parties recognize, there is a dearth of Illinois case law regarding the tort of trespass to chattel(s). The parties, therefore, rely on federal case law in their arguments, citing to *Sotelo v. DirectRevenue, LLC.*, 384 F. Supp. 2d 1219 (N.D. Ill. 2005). In *Sotelo*, the United States District Court noted "[t]here is sparse Illinois

case law from the last century addressing the elements of trespass to personal property, which had become a little-used caused of action." *Sotelo*, 384 F. Supp. 2d at 1229. Our research bears this out and we will, therefore, turn to recent federal cases for guidance when necessary in addressing plaintiff's argument.

¶ 29 As held in one of the few Illinois cases addressing trespass to chattel, the court held "[a]ny unlawful exercise of authority over the goods of another will support a trespass, even though no physical force is exercised." *Callagan v. American Trust & Savings Bank,* 196 Ill. App. 102, 106-07 (1st Dist. 1915). In a more recent case, the Fourth District held: "if one cuts, carves, lacerates, incises, or otherwise alters someone else's property except as authorized by that person, one commits a classic tort: either trespass to chattels or conversion, depending on the extent of the alteration." *Loman v. Freeman,* 375 Ill. App. 3d 445, 458 (2006). In *Sotelo*, citing the Illinois Law and Practice Treatise, the court stated " '[a]n injury to or interference with possession, with or without physical force, constitutes a trespass to personal property.' " *Sotelo*, 384 F. Supp. 2d at 1229 (quoting Illinois Law & Practice, § 3, Trespass to Personal Property). It explained the tort of trespass to a chattel may be committed in two ways: " 'by intentionally (a) dispossessing another of the chattel, or (b) using or intermeddling with a chattel in the possession of another.' " *Id.* (quoting Restatement (Second) Of Torts, § 217). Harm to the personal property or diminution of its quality, condition or value as a result of a defendant's use can also result in liability. *Id.*

¶ 30 Plaintiff's trespass to chattel claim arose from Ramirez's taking of plaintiff's personal USB drive when she confiscated his company-issued laptop to which he had attached the drive. In his trespass to chattel count, plaintiff alleged Ramirez denied his

verbal request for access to his USB drive to retrieve his school work and personal files stored on the device. He alleged she refused to allow him access to the drive on the basis "that Kellogg Company Policies prohibit the attachment of such devices on Kellogg Systems and she must confiscate it pending advice from the Legal Department." Plaintiff alleged Ramirez denied his written request "asking for the return of his chattel as he needed access to his personal data since the USB drive is a backup of data contained in his company issued laptop, which had also been taken away." He asserted Ramirez offered to pay for the drive but he "referred her back to his earlier mail *[sic*] since the real value is data and not the device itself." Plaintiff alleged "[t]o date, Kellogg Company still maintains possession of Plaintiff's chattel and continues to trespass on it and Plaintiff continues to suffer harm as he is unable to retrieve and use his data." He sought damages "in excess of $500,000 to compensate [him] for damages sustained."

¶ 31 On appeal, plaintiff argues that he sufficiently alleged trespass to chattel by his allegations that he owned the USB drive, Ramirez dispossessed him of the drive, she never claimed plaintiff was in unauthorized possession of the device or its contents and she prevented his access to the contents of the drive. Defendants respond that plaintiff's theory of liability is unclear from the face of the complaint as he failed to identify the chattel at issue. They assert it is unclear whether plaintiff was attempting to claim that the pertinent chattel was the USB drive itself or whether it was the digital information contained on the drive. They point to plaintiff's statement that "the real value is data and not the device itself," asserting he conceded the USB drive itself was worthless and his apparent theory was therefore that Ramirez exercised unauthorized control over

plaintiff's digital information contained on the drive. Defendants also note that, even if the pertinent chattel *is* the digital information on the USB drive, Illinois courts have not recognized the validity of trespass to chattel claims "when applied to intangibles like digital information."

¶ 32 Contrary to defendants' assertion, we do not find the allegations in plaintiff's trespass to chattel count to be unclear. They plainly show that plaintiff was claiming trespass to both the physical USB drive and to his personal digital information contained on the drive. As noted above, trespass to chattel can be shown by the intentional " 'dispossessing another' " of a chattel. *Sotelo*, 384 F. Supp. 2d at 1229 (quoting Restatement (Second) Of Torts, § 217). An intentional dispossession may be committed by:

> "(a) taking a chattel from the possession of another without the other's consent, or
>
> (b) obtaining possession of a chattel from another by fraud or duress, or
>
> (c) barring the possessor's access to a chattel, or
>
> (d) destroying a chattel while it is in another's possession, or
>
> (e) taking the chattel into the custody of the law." Restatement (Second) of Torts, § 221.

Plaintiff alleged that Ramirez took the USB drive and refused to allow him access to the device and that Kellogg "still maintains possession of Plaintiff's chattel and continues to trespass on it. These allegations are sufficient to show that Ramirez took the USB drive from plaintiff's possession without his consent (Restatement (Second) of Torts, §

221(a)) and that Ramirez and Kellogg barred his access to the USB drive and the data thereon (Restatement (Second) of Torts, § 221(c)), *i.e.*, that they intentionally dispossessed him of the actual USB device and access to the data thereon.

¶ 33 However, as the trial court noted and defendants point out, there is no recognized cause of action in Illinois for a trespass to chattel claim based on trespass to an intangible such as digital information contained on a USB drive. Digital information such as plaintiff's data files on the USB drive is not tangible personal property and therefore is not chattel.

¶ 34 Further, even if such a cause of action is recognized in Illinois, plaintiff did not sufficiently allege damages to support his trespass to chattel claim, whether based on the dispossession of his actual USB device or of his data files contained on the device. Plaintiff demands "in excess of $500,000 to compensate [him] for damages sustained" but does not allege how he was actually damaged beyond stating that he "continues to suffer harm as he is unable to retrieve and use his data." From this allegation and his statement in his complaint that he declined Kellogg's offer to pay him for the device, we infer that he is not seeking compensation for the cost of the USB drive, notwithstanding his contrary argument in his brief. Instead, he is apparently seeking compensation for defendant's dispossession of his access to the data on the USB drive that he "continues to suffer." As he has not alleged any harm or cost to him beyond the fact that he has been deprived of access to his data files, he has not stated any basis on which such damages could be awarded.

¶ 35 We affirm the decision of the trial court dismissing plaintiff's trespass to chattel counts pursuant to section 2-615.

¶ 36 3. Invasion of Privacy

¶ 37 Plaintiff argues the trial court erred in dismissing his invasion of privacy count pursuant to section 2-615. He asserts he sufficiently alleged that defendants invaded his private affairs when Ramirez forcefully took possession of his personal property, the USB drive, and she/Kellogg used technical means to pry into the contents of the USB, violating his reasonable expectation of privacy in the contents of his personal files on the drive. A cause of action for invasion of privacy can arise in four ways: "(1) intrusion upon the seclusion of another; (2) appropriation of another's name or likeness; (3) public disclosure of private facts; and (4) publicity placing another in a false light." *Cooney v. Chicago Public Schools*, 407 Ill. App. 3d 358, 366 (2010). The parties agree that plaintiff's invasion of privacy claim arises under the first of these as it is a claim for intrusion upon seclusion.

¶ 38 Citing the Restatement (Second) of Torts, our supreme court in *Lawlor v. North American Corp. of Illinois*, 2012 IL 112530, recognized a cause of action in Illinois for the tort of intrusion upon seclusion. *Lawlor*, 2012 IL 112530, ¶ 33. Under the Restatement, to establish intrusion upon seclusion, a plaintiff must show (1) an intentional intrusion, " 'physically or otherwise' " (2) " 'upon the solitude or seclusion of another or his private affairs or concerns,' " (3) and that the intrusion "' would be highly offensive to a reasonable person.' " *Lawlor*, 2012 IL 112530, ¶ 33 (quoting Restatement (Second) of Tort § 652B (1977)). "The tort does not depend upon the publication or publicity itself." *Jacobson v. CBS Broadcasting, Inc.*, 2014 IL App (1st) 132480, ¶ 46 (citing *Lawlor,* 2012 IL 112530, ¶ 33). The comments to section 625B of the Restatement "indicate that the nature of this tort depends upon some type of highly

offensive prying into the physical boundaries or affairs of another person." *Lovgren v. Citizens First National Bank of Princeton*, 126 Ill. 2d 411, 416-17 (1989).[5] Accordingly, in order to state a cause of action for intrusion upon seclusion, plaintiff must sufficiently allege: "(1) an unauthorized intrusion or prying [physically or otherwise] into [his] seclusion; (2) an intrusion that is highly offensive or objectionable to a reasonable person; (3) that the matter upon which the intrusion occurs is private; and (4) the intrusion causes anguish and suffering." *Jacobson*, 2014 IL App (1st) 132480, ¶ 47. Plaintiff has not sufficiently alleged any of these four elements.

¶ 39 Plaintiff's invasion of privacy claim consists of five short paragraphs. In the first, he incorporates his earlier allegations that Ramirez confiscated plaintiff's company-issued laptop and plaintiff's personal USB drive attached to the laptop and refused to return the USB drive or allow plaintiff access to the device. In the second, he states a sentence fragment devoid of clear meaning. In the last three paragraphs, he alleges (1) Ramirez informed him that Kellogg would be "accessing" his USB drive and using "tools to retrieve data therein" and "[t]his clearly denotes that Kellogg has already examined the drive to determine that some of the data are not in human readable form and will therefore need to be tampered with"; (2) Kellogg "has no policy which states that devices attached to Company systems will be confiscated and invaded Plaintiff's

[5] Examples of intrusion upon seclusion include: " 'investigation or examination into [a plaintiff's] private concerns, as by opening his private and personal mail, searching his safe or his wallet, examining his private bank account, or compelling him by a forged court order to permit an inspection of his personal documents' " (*Lawlor*, 2012 Ill 112530, ¶ 33 (quoting Restatement (Second) of Tort § 652B cmt. b, at 378-79 (1977))) and "invading an individual's home; an illegal search of his or her shopping bag in a store; eavesdropping by wiretapping; peering into the windows of a private home; and persistent and unwanted telephone calls" (*Jacobsen v. CBS Broadcasting, Inc.*, 2014 IL App (1st) 132480, ¶ 46 (citing *Lovgren,* 126 Ill. 2d at 417)).

reasonable expectation of privacy" and (3) he suffered $500,000 in unspecified damages.

¶ 40 Plaintiff did not, however, allege what the information contained on the USB drive was or how/why he had a reasonable expectation of privacy regarding that information. In his trespass to chattels claim, plaintiff asserted the USB drive contained "personal data *** a backup of data contained in his company issued laptop" and "some of the key files that he needed for his school work as he has a final exams [*sic*] *** as well as important personal document [sic] that he frequently accesses." Although not incorporated into his invasion of privacy count, if we consider those allegations here, we can infer that some of the data on the USB drive was personal as it consisted of plaintiff's schoolwork. We cannot, however, infer that it was "private" since that it was contained on a USB drive plaintiff attached to his Kellogg-issued company laptop and was accessing and using it at work. Further, "private" information for purposes of this tort consists of "extremely" and "highly personal" information, of "intimate life details" such as "family problems, romantic interests, sex lives, health problems, future work plans and attitudes about [the employer]." *Johnson v. K Mart Corp.*, 311 Ill. App. 3d 573, 579 (2000). Plaintiff has not alleged that the USB drive contained any such highly personal information, only school work. Therefore, plaintiff has not sufficiently alleged that the information on the USB drive that defendants allegedly intruded upon was private.

¶ 41 The privacy element of the tort "appears to be the predicate for the other three." *Busse v. Motorola, Inc.,* 351 Ill. App. 3d 67, 72 (2004). Thus, as plaintiff failed to sufficiently allege that the matters on the USB drive were private, we need not reach the

other three elements of the tort. *Id*. We will confine ourselves to noting that plaintiff stated neither allegations that the intrusion by defendants upon the USB drive would be "highly offensive or objectionable to a reasonable person" or that the intrusion caused him "anguish and suffering" nor facts from which we can infer such. Plaintiff was presumably offended by the intrusion into his personal files but to adequately plead a cause of action for unreasonable intrusion upon seclusion, "a plaintiff must demonstrate that the intrusion is not only offensive, but *highly* offensive to a reasonable person." (Emphasis added.) *Schmidt v. Ameritech Illinois*, 329 Ill. App. 3d 1020, 1030-31 (2002) (citing *Lovgren,* 126 Ill. 2d at 416-17). Plaintiff makes no such allegation here.

¶ 42 Plaintiff has failed to state a cause of action for invasion of privacy. We affirm the trial court's dismissal of this count pursuant to section 2-615.

¶ 43 4. Intentional Infliction of Emotional Distress

¶ 44 Plaintiff next argues that the trial court erred in dismissing his claim for intentional infliction of emotional distress. To establish a claim for intentional infliction of emotional distress, a plaintiff must set forth allegations showing: (1) the conduct was " 'truly extreme and outrageous,' " (2) the defendant " 'must either *intend* that his conduct inflict severe emotional distress, or know that there is at least a high probability that his conduct will cause severe emotional distress' " and (3) " 'the conduct must in fact cause *severe* emotional distress.' " (Emphases in original.) *Feltmeier v. Feltmeier*, 207 Ill. 2d 263, 268-69 (2003) (quoting *McGrath v. Fahey,* 126 Ill. 2d 78, 86 (1988)). To qualify as outrageous, the nature of defendants' conduct "must be so extreme as to go beyond all possible bounds of decency and be regarded as intolerable in a civilized community." *Feltmeier*, 207 Ill. 2d at 274. The distress inflicted must be "so severe that no

reasonable man could be expected to endure it." *McGrath*, 126 Ill. 2d at 86.

¶ 45 Plaintiff argues that his allegations that Young, his superior and supervisor, lied about him in multiple instances and used such lies to the mental, economical and professional detriment of plaintiff shows Young's conduct was extremely abusive of his authority and power over plaintiff and were sufficient to allege Young's extreme and outrageous conduct. We grant that the outrageousness of conduct can stem from an employer or supervisor's abuse of a position of power. See *Milton v. Illinois Bell Telephone Co.*, 101 Ill. App. 3d 75, 81 (1981) (court held that demand by plaintiff's supervisors that he falsify work reports and their coercion of him and retaliation against him for his unwillingness to do so was "so outrageous, extreme, and atrocious as to be considered intolerable in a civilized society"). However, "[l]iability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency." *Public Finance Corp. v. Davis*, 66 Ill. 2d 85, 90 (1976) (quoting Restatement (Second) of Torts § 46, comment *d* (1965)). "[T]he tort does not extend to 'mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.' " *McGrath*, 126 Ill. 2d at 86 (quoting Restatement (Second) of Torts § 46, comment *d,* at 73 (1965)).

¶ 46 Plaintiff alleged no such extreme conduct here. Instead, he alleged *inter alia* that Young made false statements on a performance review, knew or should have known they were false, maliciously and wrongfully intended to injure and destroy plaintiff's good name and reputation and "used his position of power to inflict severe injury that led plaintiff to cry several times, withdraw from activities at his home with his wife and children, suffer bouts of sleeplessness, was constantly worried and shamed by the

allegations that questions [*sic*] his professional ability and integrity." Even though plaintiff has alleged that Young acted with malice and intended to destroy plaintiff's good name and reputation, this is not sufficient to allege a cause of action for intentional infliction of emotional distress. " 'It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "*malice*," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort.' " (Emphasis added.) *Public Finance Corp.,* 66 Ill. 2d at 90 (quoting Restatement (Second) of Torts § 46, comment D (1965)). Rather, as noted previously, liability will be found "only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency." *Id*. There is no such showing here. Plaintiff made no factual allegations showing Young abused his power by coercing plaintiff in any way or that Young made the "false" statements as retaliation or retribution for something plaintiff had done or refused to do. To the contrary, here plaintiff only alleges that Young lacked the professional credentials that plaintiff possessed, was promoted to plaintiff's supervisor and made false statements in the performance review in order to make plaintiff "look disobedient, incompetent and failing [*sic*] to take instructions" in order to "injure plaintiff's integrity and lower his esteem and reputation." Plaintiff's allegations are insufficient to show that Young's conduct was so extreme and outrageous that it went beyond all possible bounds of decency.

¶ 47 Moreover, plaintiff's allegations regarding the distress he suffered as a result of Young's conduct are insufficient to state a cause of action for intentional infliction of emotional distress. There is no question that plaintiff's allegations are sufficient to show

that he suffered distress from Young's statements in the performance review. He allegedly cried, withdrew from his family, suffered sleeplessness and was worried and shamed by Young's statements regarding his job performance. However, "[a]lthough fright, horror, grief, shame, humiliation, worry, etc. may fall within the ambit of the term 'emotional distress,' these mental conditions alone are not actionable." *Public Finance Corp.*, 66 Ill. 2d at 90. " 'The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it. The intensity and the duration of the distress are factors to be considered in determining its severity.' " *Id.* (quoting Restatement (Second) of Torts sec. 46, comment J (1965)). Plaintiff does not allege any facts from which we can infer that his distress was so severe or long lasting that no reasonable man could be expected to endure it. Plaintiff was humiliated, angry, worried and possibly depressed but we cannot infer from his allegations that his distress was any more extreme than that suffered by any other employee who has received a performance review with which he does not agree from a supervisor he does not respect. Plaintiff's complaint is insufficient to state a claim for intentional infliction of emotional distress against Young.

¶ 48 Although plaintiff's intentional infliction of emotional distress claim also contained the allegation that he continued to suffer worry from Ramirez's seizure of his USB drive, he makes no reference to this alternate basis for his claim on appeal. He has, therefore, forfeited our consideration of this issue.

¶ 49 We find plaintiff's complaint insufficient to state a claim for intentional infliction of emotional distress and affirm the trial court's dismissal of this count pursuant to section 2-615.

¶ 50 II. Summary Judgment

¶ 51 Plaintiff also challenges the court's grant of summary judgment to defendants on the trespass to chattel and invasion of privacy counts. The trial court granted summary judgment to defendants on the two counts after it had already dismissed all counts on defendants' section 2-615 motion to dismiss. It is inconsistent to dismiss a cause of action under section 2-615 and then grant summary judgment to defendants on the same cause of action. Given our determination that the court properly dismissed all four counts of the complaint pursuant to section 2-615, we decline to discuss whether the court erred in also dismissing two of those counts on defendants' motion for summary judgment and we vacate the grant of summary judgment on the counts that were dismissed.

¶ 52 CONCLUSION

¶ 53 For the reasons stated above, we affirm the order of the trial court granting defendants' motion to dismiss the entire complaint pursuant to section 2-615 and we vacate the grant of summary judgment to defendants on the trespass to chattels and invasion of privacy counts.

¶ 54 Affirmed in part; reversed in part.

¶ 55 Justice Gordon, concurring in part and dissenting in part:

¶ 56 I must respectfully dissent as to the dismissal of the count on defamation without giving leave to plaintiff to amend.

¶ 57 A cause of action should not be dismissed on the pleadings unless it clearly appears that no set of facts could be proven which would entitle the pleader to relief. *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429 (2006); *Illinois Graphics Co. v.*

Nickum, 159 Ill. 2d 469 (1994); *Ogle v. Fuiten*, 102 Ill. 2d 356 (1984); *Fitzgerald v. Chicago*, 72 Ill. 2d 179 (1978). For this reason, as a general rule, leave to amend is freely granted when a pleading has been stricken.

¶ 58 As the majority has ably stated, given that Young made and published the statements in his own interest and the interests of Kellogg's and its leadership staff, the statements are accorded a qualified privilege. However, a qualified privilege is lost when defendants abuse the immunity the law affords them. *Fascian v. Bratz*, 96 Ill. App. 3d 367, 369 (1981). In order to overcome the qualified privilege established by defendants, here it is plaintiff's burden to show defendants abused the privilege. *Kuwik*, 156 Ill. 2d at 24. To that end, plaintiff argues that Young's statements in the 2012 year-end performance review are not privileged because Young abused the privilege by making false statements with malice or a reckless disregard for the truth.

¶ 59 In order to overcome the privilege accorded to Young's statements, plaintiff must allege facts from which actual malice may be inferred, *i.e.*, allege facts from which we can infer that Young "either intentionally published the material while knowing the matter was false or displayed a 'reckless disregard' as to the matter's falseness." *Coghlan v. Black*, 2013 IL App (1st) 120891, ¶ 43 (quoting *Kuwik*, 156 Ill. 2d at 24).

¶ 60 In support of his allegations that Young knew the statements were false and published them with a malicious intent, plaintiff points to assorted emails between Young, plaintiff, Ramirez and others, asserting that the emails show the falsity of Young's statements that plaintiff (1) jeopardized the Pringles acquisition by failing to obtain "sign off" on an acceptable use policy from Kellogg's legal counsel despite repeated requests from Young, (2) asked Ernst and Young not to conduct a security

evaluation of Kellogg's computer systems hosted by a third party named Rackspace, (3) improperly "pulled aside" employees of a vendor for a private discussion and (4) improperly asked the vendor to use its funds to pay travel expenses for a third party. However, except for a single cursory reference to Young's involvement in emails regarding the Ernst and Young security evaluation, plaintiff did not refer to any of these emails in his complaint.

¶ 61 The majority reasoned that, "based on the fact that plaintiff did not refer to any of these emails in his complaint," the emails did not come to the trial court's attention until he filed his response to defendant's motion to dismiss. It is on this basis that the majority affirms the trial court. It is obvious that if plaintiff alleged the facts in the emails in his complaint, the majority would have reversed the trial court. The majority's decision is contrary to well-established Illinois law that a cause of action should not be dismissed on the pleadings when a set of facts can be proven which would entitle the pleader to relief. *Marshall*, 222 Ill. 2d at 429. Given the complexity of the employee evaluation, there may be facts which plaintiff can allege with more clarity on remand which can state a claim for defamation, and so dismissal of this claim with prejudice was improper. As a result, I must respectfully dissent to that portion of the order that does not give plaintiff the right to amend.