2018 IL App (1st) 171759-U

THIRD DIVISION
August 8, 2018

No. 1-17-1759

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

JOHN J. PAPPAS, SR., individually and d/b/a SHAMROCK FARMS, and SARAH SCOTT GRUBNER,	)	Appeal from the Circuit Court of Cook County
Plaintiffs-Appellants,	)	No. 12 L 414
v.	)	The Honorable Brigid Mary McGrath,
PATRICK HURST and CHRIS DICKERSON,	)	Judge Presiding.
Defendants-Appellees.	)	

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Cobbs and Justice Howse concurred in the judgment.

ORDER

¶ 1 *Held:* In a cause of action for defamation *per se*, all of the allegedly defamatory statements established by the evidence to have been spoken by the defendants could reasonably be given an innocent construction and therefore as a matter of law were not actionable as defamation *per se*. The trial court did not abuse its discretion in sanctioning the plaintiffs for submitting an affidavit from an occurrence witness whose later deposition testimony contradicted his affidavit.

¶ 2 This appeal involves a claim of defamation *per se*. The trial court resolved the claim in

favor of the defendants, partially by the granting of summary judgment and partially by the granting of dismissal under section 2-619(a)(9) of the Code of Civil Procedure. 735 ILCS 5/2-1005(b), 2-619(a)(9) (West 2016). The plaintiffs appeal these orders, as well as a ruling by the trial court ordering the plaintiffs to pay the defendants' attorney fees and costs as a sanction for their submission of the affidavit of an occurrence witness whose later deposition testimony contradicted his affidavit.

¶ 3 This is the second time that this case has been before this court. In *Pappas v. Hurst*, 2014 IL App (1st) 131656-U, we affirmed the dismissal of all counts of the plaintiffs' complaint except the one count for defamation *per se* that is now the subject of this appeal. Our previous order set forth the factual background of this case in great detail. Here we restate only those facts necessary to an understanding of the issues presented in this appeal.

¶ 4 The plaintiffs are John J. Pappas, Sr., individually and doing business as Shamrock Farms, and Sarah Scott Grubner. Pappas, who is an attorney, owns Shamrock Farms, which is a boarding and training facility for horses. Grubner is the farm manager for Shamrock Farms. She is a professional horsewoman who trains, cares for, markets, and sells horses owned by third parties. The defendants are Patrick Hurst and Chris Dickerson. Hurst was involved in a joint venture with the plaintiffs, whereby on May 8, 2010, they bought the horse at issue in this case as an investment. Dickerson was a potential purchaser of the horse as of May 28, 2011.

¶ 5 According to the complaint, the plaintiffs and Hurst planned to market and sell the horse following the 2010 horse show season. However, in January 2011, the horse developed a quarter crack on the side of her left front hoof. That delayed the parties' plans to market and sell the horse until it healed. By the spring of 2011, a dispute had arisen between Hurst and the plaintiffs about whether the horse would remain at Shamrock Farms and about the exact nature of the

parties' ownership interests in the horse. On May 5, 2011, a horse shipper arrived at Shamrock Farms, as arranged by Hurst and his wife, for the purpose of moving the horse to a different farm. The police became involved, and the horse was not moved that day. The next day, an attorney for Hurst sent Pappas a letter demanding that the plaintiffs relinquish possession of the horse, and stating that the parties' joint venture agreement did not provide Shamrock Farms with any legal ownership of the horse or require it to remain boarded at Shamrock Farms. A few days after that, Pappas sent a letter back to Hurst's attorney stating that anyone who attempted to remove the horse from the property would be prosecuted for trespass.

¶ 6 On the morning of May 28, 2011, the plaintiffs were away from Shamrock Farms at a horse show. Hurst went to Shamrock Farms that morning and again attempted to have the horse moved. Dickerson was also with Hurst that morning, as Hurst had purportedly sold the horse to Dickerson (although, for reasons not important to this appeal, Dickerson did not end up actually purchasing it). Also with them were Lauren Hurst (Hurst's daughter), Katherine Dickerson (Dickerson's daughter), and a horse shipper named Jack Jones. The complaint alleges that at about 9:30 a.m., Pappas received a call from one of his employees, who informed him that five people had arrived at Shamrock Farms with a horse trailer and were in the process of loading the horse into it. Pappas told his employee to block the trailer from leaving Shamrock Farms with the horse, which the employee did. Pappas then called the Barrington Hills Police Department, and Sergeant David M. Kann went to Shamrock Farms in response to that call. It was upon Sergeant Kann's arrival at Shamrock Farms that, according to the complaint, the first statement constituting defamation *per se* was spoken. The complaint alleges that upon Kann's arrival, Hurst and Dickerson told him "that the horse was dehydrated, abused, neglected, mistreated, injured, lame, and was given illegal drugs and medications by [Pappas] and [Grubner]."

¶ 7 Sergeant Kann contacted Donna Ewing and asked her to come to Shamrock Farms in response to the situation. Ewing is the founder and president of the Hooved Animal Rescue and Protection Society and the founder and former director of the Hooved Animal Humane Society. She is also licensed by the Illinois Department of Agriculture to investigate potential instances of animal abuse. Ewing explained in her deposition that she is occasionally called by the Barrington Hills Police Department and other area law enforcement agencies to assist with incidents involving horses. The complaint alleges that upon Ewing's arrival at Shamrock Farms that day, the second statement constituting defamation *per se* was spoken by Hurst and Dickerson when they "repeated their untrue claims that the horse was lame, sore, mistreated, neglected, abused and dehydrated to Donna Ewing."

¶ 8 Two equine veterinarians also came to Shamrock Farms that morning. One was Nicole Wessel, D.V.M., who had been providing veterinary care to the horse at issue since May 2010. Dr. Wessel was contacted by the plaintiffs and asked to examine the horse. The second was Kristin Baumgartner, D.V.M. She was called by Dickerson and asked to examine the horse. The complaint alleges that the third statement constituting defamation *per se* was spoken when Hurst and Dickerson told Dr. Baumgartner that the horse "was abused, neglected, mistreated, dehydrated, lame, and given illegal medications and drugs." It alleges the fourth statement constituting defamation *per se* was when Hurst and Dickerson advised Dr. Wessel "of the aforementioned slanderous *per se* statements as to the horse's condition." The complaint alleges that each of these four statements by Hurst and Dickerson were untrue. It alleges the statements were defamatory *per se* because they accused the plaintiffs of the crime of inhumane mistreatment of an animal, and they demeaned and defamed the plaintiffs in their profession and business of boarding, training, and caring for horses.

¶ 9 After our mandate issued from the first appeal, the defendants filed a motion under section 2-619(a)(9) of the Code of Civil Procedure to dismiss the plaintiff's cause of action for defamation *per se* on the basis that Hurst and Dickerson made the above statements in anticipation of litigation, which they had an absolute privilege to do. 735 ILCS 5/2-619(a)(9). The trial court denied that motion, and it is pertinent to this appeal only because in responding to it, the plaintiffs submitted the affidavit of Jack Jones for which they were sanctioned. After the plaintiffs submitted Jones' affidavit, the defendants took his discovery deposition. The defendants then moved to strike certain allegations from Jones' affidavit which were inconsistent with his deposition testimony and to sanction the plaintiffs. The trial court granted the motion and ultimately ordered the plaintiffs to pay $3,053.10 in attorney fees and costs to the defendants as a sanction. The plaintiffs appeal this order sanctioning them.

¶ 10 The defendants next filed a combined motion for partial summary judgment and to dismiss the count alleging defamation *per se* under section 2-619 of the Code of Civil Procedure. 735 ILCS 5/2-1005(b), 2-619. The defendants relied upon the discovery depositions of Sergeant Kann, Ewing, and Dr. Wessel, and an affidavit from Dr. Baumgartner, the pertinent parts of which we discuss in greater detail below. In summary, the defendants argued that the depositions and affidavits did not substantiate the plaintiffs' allegations as to what was actually said by the defendants. They argued that the statements actually supported by the evidence were not defamatory as a matter of law because they were subject to innocent construction. The plaintiffs responded and relied upon the discovery depositions of Jones, the medical records of Dr. Baumgartner, and the materials above. The plaintiffs argued in summary that the deposition testimony and Dr. Baumgartner's medical records established that both defendants made statements that were defamatory *per se* and not subject to innocent construction.

¶ 11 The trial court granted summary judgment in favor of the defendants concerning the statements alleged to have been made by Hurst to Sergeant Kann, by Dickerson to Dr. Wessel, and by both defendants to Ewing and Dr. Baumgartner. It granted the defendants' motion to dismiss concerning the statements alleged to have been made by Dickerson to Sergeant Kann and by Hurst to Dr. Wessel. This appeal followed.

¶ 12 ANALYSIS

¶ 13 Section 2-619.1 of the Code of Civil Procedure permits the filing of a single motion seeking involuntary dismissal or other relief under section 2-619 and summary judgment under section 2-1005. 735 ILCS 5/2-619, 619.1, 2-1005 (West 2016). An appeal from involuntary dismissal under section 2-619 is similar to an appeal from a grant of summary judgment, and both are subject to *de novo* review. *Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill. 2d 248, 254 (2004). "In both cases, the reviewing court must determine whether the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether the dismissal is proper as a matter of law." *Id.* Materials of the same nature, such as pleadings, depositions, admissions, and affidavits may be considered in support of or opposition to motions for both kinds of relief. *Kedzie and 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116 (1993); 735 ILCS 5/2-1005(c). Under both standards, we consider the evidence in the light most favorable to the non-moving party, the plaintiffs in this case. *Garland v. Morgan Stanley & Co., Inc.*, 2013 IL App (1st) 112121, ¶ 31.

¶ 14 To prevail in a cause of action for defamation, a plaintiff must present facts showing the defendant made a false statement about the plaintiff, the defendant made an unprivileged publication of that statement to a third party, and the publication caused damages. *Hadley v. Doe*, 2015 IL 118000, ¶ 30. A defamatory statement is one that harms a person's reputation because it

lowers the person in the eyes of others or deters others from associating with her or him. *Id.* Statements may be considered defamatory *per se* or defamatory *per quod*. *Tuite v. Corbitt*, 224 Ill. 2d 490, 501 (2006). A statement is defamatory *per se* if its defamatory character is obvious and apparent on its face, and injury to the plaintiff's reputation may be presumed. *Id.* By contrast, in an action for defamation *per quod*, damage to the plaintiff's reputation is not presumed, and a plaintiff must plead and prove special damages to recover. *Id.* Here, the plaintiffs are pursuing only a claim of defamation *per se*. Under Illinois law, there are five categories of statements considered defamatory *per se*, only three of which are relevant to this case: (1) "words that impute a person has committed a crime," (2) "words that impute a person is unable to perform or lacks integrity in performing her or his employment duties," and (3) "words that impute a person lacks ability or otherwise prejudices that person in her or his profession." *Green v. Rogers*, 234 Ill. 2d 478, 491-92 (2009).

¶ 15 On appeal, the plaintiff argues that the pleadings, depositions, affidavits, and exhibits on file demonstrate that genuine issues of material fact exist about whether Dickerson and Hurst made statements about both of the plaintiffs that were defamatory *per se*. While the plaintiffs are not required to prove that all of the words that are charged in the complaint were spoken, they must "prove substantially any set of words in some one or more of the statements of slanderous words contained in the [complaint]." (Brackets in original.) *Medow v. Flavin*, 336 Ill. App. 3d 20, 30 (2002) (quoting *Iles v. Swank*, 202 Ill. 453, 455 (1903)). In the plaintiffs' brief, they identify four such statements which they contend are supported by the evidence and constitute defamation per se. First, the plaintiffs argue that the evidence establishes that Dickerson informed Sergeant Kann that the horse was dehydrated and mistreated. Second, they argue that the testimony of Jones establishes that either Hurst or Dickerson told Sergeant Kann that the

horse was abused, malnourished, dehydrated, and lame, and Jones was "pretty sure it was Hurst." Third, the plaintiffs argue that Dr. Baumgartner's veterinary records from May 28, 2011, establish that Dickerson indicated to her that the horse had an improper hydration status and received illegal drugs. Finally, the plaintiffs argue the evidence establishes that Hurst told Dr. Wessel that the horse was dehydrated, drugged, lame, mistreated, and given illegal drugs. They make no argument on appeal that any defamatory statements were made to Ewing.

¶ 16 A. Statements Supported by the Summary Judgment Record

¶ 17 We begin our analysis by determining which statements alleged by the plaintiffs to be defamatory find sufficient support in the summary judgment record. In doing so, we construe the evidence in the light most favorable to the plaintiffs and draw all reasonable inferences in their favor. We first address the statements that the plaintiffs argue were spoken to Sergeant Kann. As stated above, the plaintiffs first argue that the evidence establishes that Dickerson said to Sergeant Kann that the horse was dehydrated and mistreated.

¶ 18 Sergeant Kann testified that when he spoke to Dickerson on May 28, 2011, Dickerson told him he had just purchased the horse. He wanted to take it to a different farm, and he had hired Jones to transport it there. Sergeant Kann testified that Dickerson did express a concern to him that the horse was dehydrated and its cracked hoof was not being treated, a statement which Sergeant Kann's documented in his police report. Sergeant Kann testified that in making this statement, Dickerson was relaying a concern brought to his attention by his daughter, although Sergeant Kann stated that Dickerson expressed this as his own concern also. He testified that Dickerson also stated to him that he was concerned about the care of the horse and did not want it to stay at Shamrock Farms. However, Dickerson was not any more specific than this about his concerns regarding the care of the horse. Sergeant Kann testified he did not recall that Dickerson

made any statement about the cause of the cracked hoof or the dehydration. Based on Sergeant Kann's testimony, we do find support in the record that Dickerson expressed concern that the horse was "dehydrated."

¶ 19 With respect to the word "mistreated," Sergeant Kann testified that although he wrote in his report that there was "concern that the horse was being mistreated," that was a word Sergeant Kann used which "summarizes the whole event." Asked if Dickerson used the word "mistreated," Sergeant Kann answered, "As far as the word mistreated, they were concerned about the treatment of the horse." Pressed further as to whether Dickerson used this word, he stated, "Again I don't know what the word really was. As far as on the report, it's my word on the report, but who brought up the mistreatment was Mr. Dickerson." Based on this, we disagree with the plaintiffs that Sergeant Kann's testimony is sufficient to establish a genuine issue of material fact about whether Dickerson used the word "mistreated" to describe the horse.

¶ 20 Second, the plaintiffs argue that the testimony of Jones establishes that either Hurst or Dickerson told Sergeant Kann that the horse was abused, malnourished, dehydrated, and lame, and Jones was "pretty sure it was Hurst." We note that in Sergeant Kann's testimony, he stated that he did not recall Dickerson saying to him that the horse was abused. Asked if Dickerson said to him that the horse was "lame," Sergeant Kann said he did not know what the definition of lame was, but Dickerson did report that the horse "had a cracked hoof and was mistreated." As to Hurst, Sergeant Kann testified he spoke with Hurst, but he did not recall Hurst making any statement to the effect that the horse was dehydrated, abused, neglected, mistreated, injured, lame, or that it had been given illegal drugs or medications by the plaintiffs. Sergeant Kann stated that the only issues he discussed with Hurst involved issues of his ownership of the horse and the sale of it to Dickerson, as well as its boarding at Shamrock Farms.

¶ 21 Jones, however, testified that, when Sergeant Kann arrived at Shamrock Farms, he could overhear the conversation that Dickerson and Hurst had with him. Jones testified that Dickerson and Hurst first told Sergeant Kann that Dickerson had just bought the horse and they wanted to move the horse off the farm. Jones testified that Hurst and Dickerson said to Sergeant Kann "that the horse was not being taken care of properly and they wanted to get him out of there." Jones stated that "they told the police officer that they wanted to move the horse because they thought he had been abused, plus Mr. Dickerson had bought the horse and they wanted to get the horse off the property." Asked specifically whether he heard one of the men say, "This horse has been abused," Jones testified that one of the two men did say this: "They said he was abused, he was malnutrition [*sic*] and dehydrated. * * * And he was lame." Asked if he could distinguish which of the men said these words, Jones said he could not tell who said it. Jones said he was "pretty sure" it was Hurst who said these words, but he could not say for certain. Jones testified that the person who mentioned "abuse" did not indicate his basis for making the statement, but "he just said that they had—they thought the horse was being abused and they wanted to move it." Jones stated that whichever of the men made the comment did not say it was either of the plaintiffs who had abused the horse, caused it to be dehydrated, caused it to be mistreated, or caused it to become lame. Jones testified that he interpreted this as an opinion of whichever man made the statement.

¶ 22 Jones testified also that "they wanted to get the veterinarian and an animal rights person there to look at the horse, inspect it, and if they—and then they could move the horse out of there." Jones testified either Hurst or Dickerson said this, but he cannot say which one said it. Jones testified that the two veterinarians arrived at the same time. At first, Jones testified that he overheard either Hurst or Dickerson tell them "that he wanted them to inspect the horse

* * * [f]or the abuse and, you know[.]" Jones testified again he is not sure which man said this, but he thinks that it was Hurst. Jones testified that he could not state what exactly was said by whichever man spoke to the veterinarians. He later testified he did not hear the conversation Hurst or Dickerson had with the veterinarians, and he did not know what was said.

¶ 23 Jones testified at some point after the veterinarians and Ewing had arrived but before any of the women went to examine the horse, there was a conversation involving the three women, the police officer, Hurst, and Dickerson. Jones testified that he "heard them talk to the officer explaining they wanted the veterinarian to look at this horse and inspect it." Jones said "they told the veterinarian and the animal rights lady what they wanted them to look at and why." Jones agreed that although he was using the word "they," he meant it was really one person stating this. Asked if he remembered anything else said in this conversation, he stated, "They just wanted them to look at the horse and confirm what they were saying." Jones testified he did not know if it was Hurst who said this, but he thinks it was Hurst. He testified that was all he remembers overhearing of that conversation. Jones confirmed that after this conversation, he did not have any other conversations with Hurst or Dickerson, and he did not overhear any other conversations that Hurst or Dickerson had with anybody else that day.

¶ 24 The trial court rejected Jones' testimony as a basis for creating a genuine issue of material fact about what either defendant said to Sergeant Kann. While it did so on several bases, one of its bases for doing so was that Jones testified he was not sure which of the two defendants made the statements at issue. On appeal, the plaintiffs do not address this basis of the trial court's ruling or make any argument pertaining to the fact that Jones was unable to distinguish which of the two defendants spoke the allegedly defamatory words. The plaintiffs direct us to no case in which a reviewing court found a genuine issue of material fact to exist about whether a particular

defendant made a statement allegedly constituting defamation *per se*, where the witness who heard the statement was unable to distinguish which of multiple defendants said it.

¶ 25 We believe that Jones' inability to distinguish which of the two defendants spoke the allegedly defamatory statements prevents the plaintiffs from establishing a genuine issue of material fact as to the actual words spoken by each defendant individually. In the analogous context of pleading a complaint for defamation *per se*, we have held that a complaint lacks the requisite specificity to state a cause of action for defamation where the complaint does not "specifically identify which statement was made by which defendant and to whom." *Doherty v. Kahn*, 289 Ill. App. 3d 544, 556 (1997), *abrogated on other grounds by Soh v. Target Mktg. Sys., Inc.*, 353 Ill. App. 3d 126 (2004). We see no basis for relaxing this standard at the summary judgment stage, where after obtaining discovery the plaintiffs are unable to support a claim for defamation *per se* with some evidence as to which one of multiple defendants spoke the words alleged to be defamatory. If the plaintiffs succeeded in proving a claim of defamation *per se*, they would be relieved of the need to prove actual damages. *Green*, 234 Ill. 2d at 495. Because of this principle of presumed damages, courts generally require more of plaintiffs who avail themselves of a defamation *per se* theory than a defamation *per quod* theory. See *id.* (requiring a "heightened level of precision and particularity" to plead a defamation *per se* cause of action, premised on principle that plaintiff is relieved from proving damages); *Tuite*, 224 Ill. 2d at 504 ("tougher standard" of requiring a statement not be susceptible to innocent construction is warranted in a defamation *per se* claim because damages are presumed).

¶ 26 Here, it is evident that, for the plaintiffs to survive summary judgment and continue to avail themselves of the presumption of presumed damages that attaches in a defamation *per se* claim, they must present evidence that would permit the trier of fact to distinguish which of the two

defendants spoke the words alleged to be defamatory and thus caused the injuries to their reputations. This is not a situation where one defendant can be held vicariously liable for the defamatory statements of the other. Here, Jones' testimony provides no basis for the jury to determine which of the two defendants spoke the words at issue, and the plaintiffs have presented no other evidence in this regard. Thus, we conclude the trial court correctly granted summary judgment in favor of the defendants as to any allegations that Dickerson or Hurst said to Sergeant Kann that the horse was "abused," "malnourished," or "lame," and that Hurst said to Sergeant Kann that the horse was "dehydrated."

¶ 27 Third, the plaintiff argues that Dr. Baumgartner's veterinary records from May 28, 2011, establish that Dickerson said to her that the horse had an improper hydration status and received illegal drugs. The evidence in the record includes Dr. Baumgartner's affidavit stating that, on May 28, 2011, she received a phone call from Dickerson in which he asked her "to come to Shamrock Farms since he had purchased a horse and wanted me to check the welfare and hydration status of the horse." Her veterinary records from that day include a notation stating, "Purchaser's [*sic*] of [the horse] are concerned for [the horse's] welfare, mainly hydration status and whether she has received drugs." Her records state that the previous day, the Dickersons had purchased the horse from the Hursts without a pre-purchase examination. The records go on to state: "Purchaser was concerned [the horse's] gums are pale and she may have been sedated. Jack [Jones], the hauler, reports he did not give any sedation to load the horse on the trailer. Purchaser also concerned about LF medial quarter crack." We conclude from these statements that the evidence supports Dickerson having said to Dr. Baumgartner that he was concerned about the horse's "hydration status" and whether it had "received drugs." However, we do not find this evidence supports the plaintiffs' contention that Dickerson said its hydration status was

"improper" or that it had received "illegal" drugs.

¶ 28 Finally, the plaintiffs argue that the evidence establishes that Hurst told Dr. Wessel that the horse was dehydrated, drugged, lame, mistreated, and given illegal drugs. As discussed below, it is clear from Dr. Wessel's deposition testimony that Hurst told her he was concerned the horse was dehydrated, drugged, and lame. The words "mistreated" and "illegal" drugs come from a line in her affidavit submitted prior to the time of her discovery deposition, which states, "That when I arrived at Shamrock Farms on May 28, 2011[,] I was told by Patrick Hurst, a client of mine, and an adult man that accompanied him that [the horse] was dehydrated, mistreated, abused, lame, and had been given illegal drugs." The trial court rejected the contention that the plaintiffs had established a genuine issue of material fact about whether Hurst had also stated that the horse was "mistreated" and "abused," based this paragraph of her affidavit. The trial court found that it was clear from Dr. Wessel's deposition testimony that Hurst had only made comments to her concerning the horse being dehydrated, drugged, and lame. Based on this, the trial court found that her deposition testimony "supersedes the affidavit because during her discovery deposition she testified at length regarding the lameness issue, the cracked hoof, the dehydration, and never testified about mistreatment or abuse."

¶ 29 Dr. Wessel, upon questioning in her deposition by the defendants' attorney, testified that she came to Shamrock Farms after receiving a call from Grubner. She stated that she spoke with Hurst when she arrived prior to examining the horse. She testified that Hurst said to her that the horse was "turned out and did not have any water, [and] he was concerned that the horse was dehydrated, drugged, and lame." She explained that "turned out" means it was outside in the paddock (a small field next to the barn) and not in its stall, and the concern about water was that it did not have water outside in the paddock. She stated that Hurst's exact words were

"dehydrated, drugged, and lame." She testified Hurst did not name either plaintiff or any other person in connection with the concerns he expressed about the horse. She testified that she did not ask Hurst what his basis was for expressing these concerns. She testified that after she left and confirmed the horse was normal, Hurst thanked her for coming. She testified that she had told the defendants' attorney everything that had transpired on May 28, 2011.

¶ 30 Then, on examination by the plaintiffs' attorney, Dr. Wessel was shown the affidavit she signed which was attached to the plaintiffs' response to the motion for summary judgment. The following colloquy then occurred:

> "Q. Is everything that is stated in that affidavit true and correct?
> A. Yes.
> Q. Okay. Would you turn to paragraph 8?
> A. Yes.
> Q. Paragraph 8 reads as follows: That when I arrived at Shamrock Farms on May 28, 2011, I was told by Patrick Hurst, a client of mine, and an adult man that accompanied him that [the horse] was dehydrated, mistreated, abused, lame, and had been given illegal drugs?
> A. Yes."

Dr. Wessel was asked no further questions about anything Hurst said in paragraph 8 of her affidavit. Then, on follow-up questioning by the defendants' attorney, Dr. Wessel testified:

> "Q. Okay. Now, you were shown [your affidavit]. Okay? Your—In response to my questions, you did tell me everything that Mr. Hurst said to you, correct?
> A. Yes.
> Q. Okay. And he said nothing else to you, am I correct?
> A. Yes."

¶ 31 On appeal, the plaintiffs do not discuss the ruling by the trial court concerning the divergence between Dr. Wessel's affidavit and her later testimony at her discovery deposition. They merely cite paragraph 8 of her affidavit and her answers to the plaintiffs' attorney's questioning above as support for the statement that Hurst said to Dr. Wessel that the horse as "mistreated" and given "illegal" drugs. We conclude that the trial court correctly determined that

there was no genuine issue of material fact that Hurst made any statement to Dr. Wessel beyond expressing concern that the horse was dehydrated, drugged, and lame. In *Vesey v. Chicago Housing Auth.*, 145 Ill. 2d 404, 419-22 (1991), the supreme court held that a genuine issue of material fact was not created by an affidavit submitted in support of summary judgment stating that the affiant had complained to the Chicago Housing Authority about the absence of a certain covering over a steam pipe, where the affiant's subsequent deposition testimony contradicted the assertion in her affidavit that she had made this complaint.

¶ 32 The same principle from *Vesey* applies here. Throughout her deposition, Dr. Wessel testified in answers to open-ended questioning that in her conversation with Hurst that day, he stated the horse had been turned out without water and he was concerned it was "dehydrated, drugged, and lame." She testified these were his exact words. She was then asked by the plaintiffs' attorney to confirm that everything in her affidavit was true and correct, and she was then asked to confirm what paragraph 8 said. Paragraph 8 contained the words "mistreated," "abused," and "illegal" drugs, none of which she had mentioned in her previous answers to open-ended questions about what Hurst said to her. She was not asked any questions in follow-up about whether Hurst said these words in addition to her previous statements about what he did say. Instead, upon further questioning by the defendants' attorney, Dr. Wessel confirmed that, in response to his previous questions to her, she had told him everything Hurst had said to her and he had said nothing else. Based on this, we conclude that the trial court correctly concluded that Dr. Wessel's deposition testimony contradicted the statement in her affidavit that Hurst mentioned anything beyond expressing concern that the horse was dehydrated, drugged, and lame, and the statement in the affidavit was insufficient to create a genuine issue of material fact about whether Hurst also said it was "mistreated" or given "illegal" drugs. *Vesey*, 145 Ill. 2d at

422.

¶ 33 B. Whether the Statements are Subject to Innocent Construction

¶ 34 Based on the above analysis, we must determine whether those statements supported by the summary judgment record are actionable as a matter of law in a claim of defamation *per se*. To reiterate, we have found that the summary judgment record supports the plaintiffs' contentions that Dickerson expressed concern to Sergeant Kann that the horse was "dehydrated," that Dickerson made a statement to Dr. Baumgartner that he was concerned about the horse's "hydration status" and whether it had "received drugs," and that Hurst expressed concern to Dr. Wessel that the horse was "dehydrated, drugged, and lame." The trial court concluded that these statements were non-actionable under the innocent construction rule as statements of concern about the horse in which the plaintiffs were not mentioned. The plaintiffs argue on appeal that these statements cannot be couched as "concerns," but rather these were concrete statements of fact and not opinion. They argue the statements were defamatory *per se* in that they impute the commission of a crime, specifically a violation of the Humane Care for Animals Act, 510 ILCS 70/1 *et seq.* (West 2016). They argue that "illegally drugging, not feeding or giving water to a horse and allowing [it] to walk, trot and gallop with a limp impute a lack of ability in Pappas' and Grubner's profession and employment—namely training, boarding, and caring for horses."

¶ 35 "It is well settled that, even if an alleged statement falls into one of the categories of words that are defamatory *per se*, it will not be actionable *per se* if it is reasonably capable of an innocent construction." *Green*, 234 Ill. 2d at 499. The "innocent-construction rule" requires a court to consider a written or oral statement in context and to give the words of the statement, and any implications arising from them, their natural and obvious meaning. *Tuite*, 224 Ill. 2d at 503. "[I]f, as so construed, the statement may reasonably be innocently interpreted or reasonably

be interpreted as referring to someone other than the plaintiff it cannot be actionable *per se*." *Id.* (quoting *Chapski v. Copley Press*, 92 Ill. 2d 344, 352 (1982)). This preliminary determination is a question of law. *Id.* Our supreme court has clarified that courts should not balance a reasonable innocent construction of a statement with a reasonable defamatory construction, but instead statements reasonably capable of an innocent construction must be interpreted as non-defamatory. *Id.* at 504 (citing *Mittelman v. Witous*, 135 Ill. 2d 220, 232 (1989)). The supreme court has explained that this "tougher standard is warranted because of the presumption of damages in *per se* actions." *Mittelman*, 135 Ill. 2d at 234.

¶ 36 Assuming for the sake of argument that a statement that the horse was dehydrated could constitute defamation *per se* to the plaintiffs, we conclude that any statement that the horse was "dehydrated" may reasonably be interpreted innocently in the context of this case. Both Sergeant Kann and Jones testified that after Sergeant Kann arrived, the horse became agitated inside the horse trailer. Thus, all parties agreed that the horse should be taken out of the trailer and placed into a paddock outside of the barn. As discussed above, Dr. Wessel testified in her deposition that Hurst said to her that the horse was "turned out and did not have any water," and he was concerned the horse was dehydrated. She testified that "turned out" meant it was outside the barn in a paddock. In Dr. Wessel's veterinary records from that day, for which a foundation was established during her deposition, she described that Hurst, his daughter, and Sergeant Kann "stopped me at the gate to tell me they were concerned that the horse was dehydrated from being outside without any water." Consistent with this statement, Sergeant Kann testified that the horse was not given water or food in the paddock, although it was given water and food when it was later returned to its stall in the barn, prior to the veterinarians arriving to examine it. Ewing also testified in her deposition that she looked to see if there was water or feed in the paddock, and

there was not.

¶ 37 Given this evidence, we find that any statement that the horse was "dehydrated" may reasonably be given an innocent interpretation, specifically as an expression of concern for the welfare of the horse. *See Heerey v. Berke*, 188 Ill. App. 3d 527, 532 (1989) (holding comments must be given an innocent construction because they "may reasonably be interpreted as indicating a concern"). Further, it is undisputed that the plaintiffs were not present at Shamrock Farms on the day at issue to provide water to the horse. Thus, these comments may also reasonably be interpreted as referring to someone other than the plaintiffs.

¶ 38 We find the same can be said for any statement that the horse was "lame." It is undisputed from the evidence that the horse had been suffering from a quarter crack in its left front hoof for at least four months as of May 28, 2011. Dr. Wessel had been treating the horse for this problem. She testified that, with respect to a horse, "lame" means that the horse is limping or otherwise has a gait that is not normal. She testified that a quarter crack is something that can cause a horse to limp. However, she confirmed the horse was not lame at that time, although the quarter crack had caused the horse to be considered lame when it had first appeared. Dr. Wessel confirmed that she had repeatedly discussed the problem of the quarter crack with Hurst's wife. Dr. Wessel testified that a quarter crack is something that "just happens," and she did not know the cause of it in this horse. Given this evidence, we find that any statement that the horse was "lame" may reasonably be given an innocent interpretation, again as an expression of concern for the welfare of the horse. Although the veterinarians may not have considered the horse "lame," a layperson such as Hurst could innocently use the word "lame" when referring to a horse with a problem with its hoof that could cause it to limp.

¶ 39 Finally, we reach the same conclusion that any statement that the horse was "drugged" or

had "received drugs" may reasonably be given an innocent interpretation as an expression of concern for the horse's welfare. The specific statements in Dr. Baumgartner's veterinary records were that Dickerson was "concerned for [the horse's] welfare, mainly hydration status and whether she has received drugs," and he was "concerned [the horse's] gums are pale and she may have been sedated." Dr. Wessel's veterinary records likewise state that Hurst, his daughter, and Sergeant Kann "were concerned that the horse *** seemed drugged." In her deposition testimony, Dr. Wessel likewise characterized Hurst's statement to her as a concern. Further, as these statements were made only to the equine veterinarians, they can be innocently interpreted as statements of inquiry to them about the horse's condition, as opposed to positive assertions of fact that the horse was in fact drugged. Finally, we note Dr. Baumgartner's records indicate that she questioned Jones about whether he gave sedation to load the horse on the trailer. Thus, the statements may reasonably be interpreted as referring to someone other than the plaintiffs.

¶ 40 In conclusion, the precedent of our supreme court requires us to interpret statements that are reasonably capable of an innocent construction as nondefamatory, instead of balancing a reasonable innocent construction of a statement against a reasonable defamatory construction. *Tuite*, 224 Ill. 2d at 504 (citing *Mittelman*, 135 Ill. 2d at 232). As we have determined that all statements that the plaintiffs allege to constitute defamation *per se* are reasonably susceptible to an innocent construction, we hold that they are non-actionable as a matter of law.

¶ 41 C. Sanctions

¶ 42 The plaintiffs also argue that the trial court abused its discretion when it granted the defendants' petition for attorney fees and a costs as a sanction for submitting Jones' affidavit, which was inconsistent with his deposition testimony. As referenced above, this issue came before the trial court not in conjunction with the dispositive motion discussed above, but in

conjunction with the defendants' earlier motion under section 2-619(a)(9) of the Code of Civil Procedure arguing the defendants had an absolute privilege to make the defamatory statements in anticipation of litigation. 735 ILCS 5/2-619(a)(9). The plaintiffs submitted Jones' affidavit in response to this motion, and the defendants took his deposition. The defendants then moved to strike certain paragraphs of his affidavit that were inconsistent with his deposition testimony, which the trial court granted. The trial court struck the following two paragraphs:

> "7. After I unloaded the horse, two veterinarians and Donna Ewing, a state humane animal inspector, came to Shamrock Farms and spoke with Mr. Dickerson and Mr. Hurst. I heard Mr. Dickerson and Mr. Hurst tell the two veterinarians, and Donna Ewing that John Pappas and Sarah Grubner had caused the horse to become dehydrated, mistreated and abused the horse, and the horse was lame.
>
> 8. After the two veterinarians and Donna Ewing examined the horse and its stall, I heard the veterinarians and Ms. Ewing tell Mr. Dickerson and Mr. Hurst that the horse was not abused, neglected, dehydrated, abused or lame."

In his deposition, Jones testified that he did not overhear the conversation that Hurst and Dickerson had with the two veterinarians and Ewing, and he does not know what was said. He further clarified that the plaintiffs' names were not mentioned in connection with any comment about the horse being dehydrated, mistreated, abused, or lame.

¶ 43 The trial noted that the testimony set forth above, which it struck, was "the strongest affidavit that was proffered in support of the plaintiffs' allegations and it was directly contradicted by Mr. Jones during his testimony." As such, the trial court granted also granted the defendants' motions for sanctions. The trial court ordered the defendants to pay the plaintiffs' attorney fees and costs in connection with Jones' deposition and the motion to strike his

testimony.

¶ 44 Our task in reviewing the propriety of the sanctions in this case is made unnecessarily difficult by the fact that the defendants did not specify in their motion the rule or other authority under which they were seeking sanctions, nor do we find where the trial court in its order or ruling specified the authority under which it was sanctioning the plaintiffs. While we do not doubt that a trial court has the authority to sanction a party for submitting a false affidavit from an occurrence witness (see *Sanchez v. City of Chicago*, 352 Ill. App. 3d 1015, 1021 (2004) (sanctioning party under Illinois Supreme Court Rule 137 (eff. Jan 1, 1994))), our review of the issue is different depending on the rule under which the sanctions were issued. We remind trial judges and parties who obtain orders granting sanctions that "[a] sanction order, at the minimum, should specifically identity the rule under which the order was entered *** as well as the specific reasons for entry of the sanction order." *Cirrincione v. Westminster Gardens Ltd. Partnership*, 352 Ill. App. 3d 755, 761 (2004). In their briefs to this court, both parties exclusively discuss Illinois Supreme Court Rule 219(c) (eff. July 1, 2002) as the basis under which sanctions were entered in this case. Thus, we will analyze the issue under this rule also. However, the plaintiff makes no argument about whether Rule 219(c), which applies when a party "unreasonably fails to comply with any provision of part E of article II of the rules of [the Illinois Supreme Court] *** or fails to comply with any order entered under these rules," extends to an affidavit submitted in conjunction with a motion to dismiss under section 2-619 of the Code of Civil Procedure. 735 ILCS 5/2-619. We decline to address this issue *sua sponte*, and we confine our analysis to the argument specifically made by the plaintiffs.

¶ 45 The plaintiffs argue that they did not engage in "misconduct" warranting a sanction. (They further argue that any misconduct they did engage in was not "wilful." However, Rule 219(c)

does not require misconduct to be "wilful" unless the sanction is a "monetary penalty" imposed in addition to the payment of reasonable expenses and attorney fees incurred as a result of the misconduct. Ill. S. Ct. R. 219(c). Here, the sanction imposed was only the payment of attorney fees and costs, and thus wilful misconduct would not be required.) They argue that Grubner interviewed Jones, he told her what he recalled about the events of May 28, 2011, and he then reviewed and signed an affidavit. They argue there was no evidence that either plaintiff told Jones what to put in his affidavit. They argue the fact that his "deposition testimony was then not fully consistent with his affidavit" is merely a basis for impeachment.

¶ 46 The imposition of sanctions is a matter largely within the discretion of the trial court and should not be disturbed on review unless the order constitutes an abuse of discretion. *Dyduch v. Crystal Green Corp.*, 221 Ill. App. 3d 474, 480 (1991). We find no abuse of discretion under the facts of this case. As the trial court noted, the paragraphs that were stricken from Jones' affidavit would be powerful evidence in support of the plaintiffs' claim if Jones actually said this at trial. While it appears that the plaintiffs adequately put in the affidavit the words Jones said he heard—dehydrated, mistreated, abused, and lame—the rest of his affidavit appears embellished. In his deposition testimony, he stated that he did not hear the conversation that Hurst and Dickerson had with the three people mentioned in this affidavit, and he does not know what they said. Significantly, he also testified he did not hear Hurst or Dickerson mention that the plaintiffs had caused the horse to become dehydrated or lame or had mistreated or abused the horse. He also clarified that only one of the two defendants stated the words above, not both of them. Thus much of what was purported in the affidavit to be powerful testimony turned out to be false.

¶ 47 When parties and attorneys prepare affidavits on behalf of witnesses to sign under penalties of perjury, care must be taken to ensure their testimony is being set forth accurately. Sloppiness

in preparing accurate witness affidavits cannot be excused on the basis that opposing counsel may impeach the witness if an inconsistency is discovered later. It does not appear that a sufficient level of care was taken in this case to prepare Jones' affidavit accurately. This lack of care resulted in a waste of judicial resources in resolving the motion to strike portions of Jones' affidavit. The trial court did not abuse its discretion in sanctioning the plaintiffs.

¶ 48 CONCLUSION

¶ 49 In conclusion, we affirm the judgment of the trial court granting partial summary judgment in favor of the defendants and dismissing the remainder of the plaintiffs' complaint under section 2-619(a)(9) of the Code of Civil Procedure. 735 ILCS 5/2-619(a)(9). We also affirm the order of sanctions against the plaintiffs.

¶ 50 Affirmed.