2013 IL App (2d) 121317-U
No. 2-12-1317
Order filed October 16, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

HANNAH EISENBERG,	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 12-SR-780
	)	
MARCIN SIKORA,	)	Honorable
	)	Michael A. Wolfe,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices McLaren and Hutchinson concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in granting judgment for defendant on plaintiff's defamation claim, as plaintiff alleged defamation *per se* and thus, contrary to the court's ruling, did not have to prove damages; we vacated the judgment and remanded the cause for the entry of a new judgment for either party.

¶ 2 *Pro se* plaintiff, Hannah Eisenberg, appeals from a judgment entered for defendant, Marcin Sikora, on her small-claims complaint alleging defamation. The issue on appeal is whether the trial court erred in ruling in favor of defendant, where its ruling was based on its finding that plaintiff failed to prove that she had been damaged. We hold that, because plaintiff alleged defamation

per se, she was not required to prove that she had been damaged and thus the court erred. We vacate the judgment and remand.

¶ 3 I. BACKGROUND

¶ 4 On August 2, 2012, plaintiff filed an amended small-claims complaint against defendant, seeking $10,000 in damages arising out of "the malicious and willful libel and defamation that [defendant] posted on the Internet site Ripoff Report."

¶ 5 On September 24, 2012, the parties appeared *pro se* for a hearing and each testified. The testimony established generally that, in 2010, defendant started a company called MS Carriers with other individuals. His first contact with plaintiff was in April 2011. Plaintiff was an independent contractor and defendant hired her as a driver when needed. At some point, on an Internet site called Ripoff Report, plaintiff filed a claim against defendant concerning a wage dispute. It is defendant's response to plaintiff's claim, which he posted on the site, that gave rise to plaintiff's defamation claim. Plaintiff submitted multiple exhibits, including a copy of the allegedly defamatory statements as they appeared on the site. The statements follow:

> "The person who filed this is [plaintiff]. She requested to be paid cash. It wasn't until after we let her go that I found out that she had liens against her from the IRS (should have known). When I hired her, she refused to give me an address as well (due to the fact that she was likely homeless). I thought she was nice, so I gave her a chance. BIG mistake. Also, she realized that I owed her money 1.5yrs AFTER she was let go. She is a very shady individual with a very negative attitude. I would avoid this person at all costs.
>
> The deduction she is upset about was for a DOT violation from her refusal to adjust truck tandems (very standard procedure for truck drivers). Load was 2,000 pounds under

legal limit! The violation was due to the fact the truck was over weight on the drive axle because she was too lazy to scale after loading. We're not responsible for driver carelessness.

As far as the other claims:

-[S]he was not invited back to work due to the inability to drive more than 150 miles per day (that's 3-4 hours out of the 11 legally allowed by DOT). Again, laziness is not acceptable.

-Most of my drivers stayed with me for over a year (until I decided to sell the company)[.]

-We passed the most recent comprehensive DOT audit with flying colors and complements [*sic*] by the DOT agent. [Plaintiff] is obviously angry about being charged for a violation that occurred due to her laziness[.]

-All trailers were in top shape and passed DOT inspections regularly (I have all paperwork to prove this)[.]"

¶ 6 After hearing testimony from both parties, the trial court found in favor of defendant. The court stated:

"[P]laintiff had initiated this, quote, unquote, computer conversation about the other, which then triggered subsequent communication. But a lot of times employers and employees part ways and things work out.

It doesn't appear as though that was the case here. It was over a money judgment. That judgment is all being resolved and litigated in another courtroom. But in terms of libel and slander, the plaintiff must show that her reputation in the community has been damaged.

> And merely by alleging that in a Complaint doesn't make it so. So her request for the Court to make those findings, she just hasn't met that burden. So not having met that burden, there's no way for the Court to assess damages. That would have to come from another source as well.
>
> So based upon everything I've heard, the plaintiff has not met her burden of proof; therefore, there will be a finding for the defendant."

¶ 7 Following the denial of her motion for reconsideration, plaintiff timely appealed.

¶ 8 II. ANALYSIS

¶ 9 Plaintiff argues that the trial court erred in finding for defendant on the ground that plaintiff did not prove that she suffered damages.

¶ 10 Before proceeding further, we note that defendant did not file a brief in this court. In *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976), the supreme court explained the courses of action available to a reviewing court when the appellee provides no input in the appeal:

> "We do not feel that a court of review should be compelled to serve as an advocate for the appellee or that it should be required to search the record for the purpose of sustaining the judgment of the trial court. It may, however, if justice requires, do so. Also, it seems that if the record is simple and the claimed errors are such that the court can easily decide them without the aid of an appellee's brief, the court of review should decide the merits of the appeal. In other cases[,] if the appellant's brief demonstrates *prima facie* reversible error and the contentions of the brief find support in the record[,] the judgment of the trial court may be reversed."

One court has summarized these directives as follows:

> "In short, the supreme court set forth three distinct, discretionary options a reviewing court may exercise in the absence of an appellee's brief: (1) it may serve as an advocate for the appellee and decide the case when the court determines justice so requires, (2) it may decide the merits of the case if the record is simple and the issues can be easily decided without the aid of the appellee's brief, or (3) it may reverse the trial court when the appellant's brief demonstrates *prima facie* reversible error that is supported by the record." *Thomas v. Koe*, 395 Ill. App. 3d 570, 577 (2009).

We find that this appeal falls into the category of appeals that are so simple and easily evaluated that we may reach the merits without the aid of an appellee's brief.

¶ 11 We turn to the merits. Plaintiff argues that the trial court erred in finding for defendant on the basis that plaintiff did not prove that she had been damaged. To establish a defamation cause of action, a plaintiff must show "that the defendant made a false statement about the plaintiff, the defendant made an unprivileged publication of that statement to a third party, and that this publication caused damages." *Solaia Technology, LLC v. Specialty Publishing Co.*, 221 Ill. 2d 558, 579 (2006). "A defamatory statement is a statement that harms a person's reputation to the extent it lowers the person in the eyes of the community from associating with her or him." *Id*.

¶ 12 There are two types of defamatory statements: defamation *per se* and defamation *per quod*. *Tunca v. Painter*, 2012 IL App (1st) 093384, ¶ 40. In an action for defamation *per quod*, the plaintiff must plead and prove actual damages to recover. *Imperial Apparel, Ltd. v. Cosmo's Designer Direct, Inc.*, 227 Ill. 2d 381, 390 (2008). In an action for defamation *per se*, the plaintiff need not plead or prove actual damage to his or her reputation to recover. *Bryson v. News America*

Publications, Inc., 174 Ill. 2d 77, 87 (1996). "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). Illinois recognizes five categories of statements as defamation *per se*, two of which are relevant here: (1) words that impute an inability to perform or lack of integrity in performing employment duties; and (2) words that prejudice a party or impute a lack of ability in a person's profession. *Id*. at 491-92.

¶ 13 Here, defendant's comments concerned plaintiff's inability to perform in her profession and a lack of integrity in performing her duties. For instance, defendant stated that plaintiff was unable to drive more than 150 miles per day, that she was charged with a violation, that she did not follow standard procedures, and that she was careless and lazy at work. Thus, the statements, if defamatory at all, are defamatory *per se*, and damages are presumed. Accordingly, we hold that the court erred in ruling in defendant's favor based on plaintiff's inability to show that she had been damaged, as such proof was not required. We vacate the judgment and remand for the trial court to rule anew.

¶ 14 We note that, because the trial court's ruling was based only on plaintiff's failure to prove damages, the court did not determine whether defendant established a defense to plaintiff's claim. "Truth is an absolute defense to defamation and true statements cannot support a claim of defamation." *Seitz-Partridge v. Loyola University of Chicago*, 2013 IL App (1st) 113409, ¶ 21. " 'Only "substantial truth" is required for this defense.' " *Id.* (quoting *Wynne v. Loyola University of Chicago*, 318 Ill. App. 3d 443, 451 (2000)). In addition, a statement that is allegedly defamation *per se* is not actionable if it is reasonably capable of an innocent construction or an expression of the speaker's opinion. See *Jacobson v. Gimbel*, 2013 IL App (2d) 120478, ¶¶ 28, 35. On remand, neither the parties nor the court should infer from this disposition that the remaining issues of fact

or law favor either party. The trial court must decide the remaining issues of fact and law on their merits or lack thereof.

¶ 15 III. CONCLUSION

¶ 16 For the reasons stated, we vacate the judgment for defendant and remand for the entry of a new judgment.

¶ 17 Vacated and remanded.