2016 IL App (2d) 150864-U
No. 2-15-0864
Order filed June 9, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

WILLIAM HAGEMANN and CRAIG HAGEMANN, d/b/a Hagemann Farms, Plaintiffs-Appellants, v. CODY S. CHRISTENSEN, Defendant-Appellee.	)	Appeal from the Circuit Court of Ogle County. No. 13-L-23 Honorable John B. Roe, Judge, Presiding.

PRESIDING JUSTICE SCHOSTOK delivered the judgment of the court.
Justices McLaren and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in awarding plaintiffs only nominal damages and no punitive damages on plaintiffs' claim of defamation *per se*, as the court wrongly believed that plaintiffs could not prove compensatory damages with only their testimony and that punitive damages required actual malice; thus, we vacated and remanded for the court to reconsider its award.

¶ 2 Plaintiffs, William Hagemann and Craig Hagemann, d/b/a Hagemann Farms, appeal the judgment of the circuit court of Ogle County awarding them $5 in nominal damages and no punitive damages on their claim of defamation *per se* against defendant, Cody S. Christensen. Because the trial court erred in ruling that plaintiffs offered insufficient evidence that defendant's

defamatory statement actually damaged them and applied the wrong legal standard for awarding punitive damages, we affirm in part, vacate in part and remand.

¶ 3 I. BACKGROUND

¶ 4 Plaintiffs filed a single-count complaint[1] that alleged that defendant defamed plaintiffs when he posted a false statement on the website Craigslist. The trial court granted plaintiffs' motion for summary judgment as to liability and conducted a bench trial on damages.

¶ 5 The following evidence is from the bench trial. On October 14, 2012, defendant, plaintiffs' former employee, posted the following statement on Craigslist: **"BILL AND CRAIG HAGEMANN OWE DELONG COMPANY $250,000-$250000 (they are located in stillman valley, IL.)** THE HAGEMANNS OWE THIS MONEY TO US THE DELONG COMPANY THIS IS 100 percent true information and needs to be taken care of BILL and CRAIG have no intentions on repaying there [*sic*] dues and will be prosecuted in a court of law this is public information this information came from the delong family! THIS INFORMATION NEEDS TO BE SHARED WITH Surrounding farms and businesses that the hagemann family might owe money to!"

¶ 6 William first learned of the posting from Darryl Thompson, one of his landlords, who also sent him a copy. When William went to Craigslist, the posting had been removed. William did not know how long the posting had been on Craigslist.

¶ 7 When the statement was posted, William was a candidate for township supervisor. The supervisor's four-year term paid $12,000 per year. According to William, a copy of the posting was "floated throughout the community" and as he campaigned "people would bring [it] up" and

[1] Plaintiffs originally filed their complaint in Winnebago County, but the case was transferred for improper venue to Ogle County.

some "showed [him] the posting." When asked what he meant by "floating around the community," William stated that "one guy" showed him a copy that the man was given at a local gas station. William lost the April 9, 2013, election by 30 votes.

¶ 8 According to William, he lost several farm leases after the Craigslist posting. He pointed to a 163-acre parcel that he had leased for 27 years. There was no written lease, but instead a "handshake" agreement. He was not given an opportunity to bid on the lease for the 2013 farming season. He admitted that he still rented another farm from the same landlord and that the 163-acre parcel was now owned by someone else. Although William did not calculate what his per-bushel profit would have been for the 163-acre farm, he estimated that in 2013 his typical per-bushel profit for corn was $4.

¶ 9 He also lost a 2014 lease on a 60-acre farm and a 16-acre farm, because he was not given a chance to bid. He estimated that the profit on corn for 2014 was $2 per bushel. Both of those farms had been under an oral lease. William did not lose any other farm leases. According to William, he and Craig were "flat told" that they could not bid on those leases.

¶ 10 According to William, he experienced rent increases after the Craigslist posting. The rent on a 180-acre parcel increased from $150 to $240 per acre. The rent on a 40-acre parcel increased from $200 to $300 per acre. The per-acre rent on a 97-acre farm increased from $150 to $200. According to William, the landlord of that latter parcel showed him a copy of the posting.

¶ 11 William testified that he had had accounts with several vendors that allowed 30 or 60 days to pay, but that those "days are gone" and now he must "pay up front." As an example, he pointed to having to prepay recently for a feed delivery and a tire repair on a grain wagon.

¶ 12 To be able to have the cash flow to pay the vendors, plaintiffs had to open an operating account with a bank. They paid 6% on that note.

¶ 13 William testified that he had a revolving account with a veterinary office but that "they like [him] paid up." He admitted that they allow him to use credit but that "it's not like it was." He explained that one of the veterinarians discussed the payment situation and, in doing so, brought up the posting.

¶ 14 William testified that, before he learned of the posting, his youngest son came home from school and was upset because the kids were talking about his combine being repossessed. William called defendant about the rumor, and defendant said "why don't you look on Craigslist." According to William, he did not know what defendant meant until he received a call from Thompson the next day regarding the posting.

¶ 15 Craig testified that he also learned about the Craigslist posting from Thompson. Craig subsequently received a copy of the posting.

¶ 16 Craig, who leased farm land separate from William, had his rent increased on two farms. On one, a 112-acre parcel, the rent increased from $165 to $245 per acre. In 2013, the average rent per acre in the Stillman Valley area was "probably" $200. Although he used to pay the entire seasonal rent at the end of the year, he now must pay half "up front" and the balance in November.

¶ 17 The per-acre rent was increased on a 113-acre parcel from $200 to $345. Craig used to pay 50% of that rent on March 1 and the balance on December 1. Now he must pay in full on March 1. On cross-examination, Craig explained that rent is typically based, in part, on grain futures.

¶ 18 According to Craig, before the posting, plaintiffs could "pick up whatever [they] needed and they [would] send [them] a bill" that they had 30 or 60 days to pay. After the posting, most of the vendors required "cash only."

¶ 19 Because of the new payment requirements, Craig had to borrow $150,000 to $200,000 at 6% interest. He must also borrow money at 6% to pay the upfront rent. The loans are paid back once a crop is sold.

¶ 20 The vendors that switched to cash did so within a year of the posting. Craig contacted some of the vendors and told them that the posting was false. Although no vendors ever sent Craig anything stating that they were changing to a cash-only system because of the posting, some vendors told him as much "in a phone conversation or in person."

¶ 21 Defendant worked for various farmers in the Stillman Valley area for eight or nine years. According to defendant, rent is based on projected grain prices and the yield potential of the particular farm ground. Rent generally increased in 2012 and 2013. He estimated that the average 2013 per-acre rent in the Stillman Valley area was $250.

¶ 22 According to defendant, when he posted the statement, he believed that plaintiffs owed the DeLong Company $250,000. Although he admitted that the word "us" made it sound like it was from the DeLong Company, he did not intend to do so. He denied intending to harm plaintiffs. He testified that he posted the statement "to show people that the [plaintiffs] are not fair people," because they owed him money. He denied delivering the statement to, or discussing it with, any of plaintiffs' landlords. According to defendant, he heard the story from someone else who he believed was telling the truth and he "simply restat[ed] the story." Defendant conceded that the statement "could possibly be harmful."

¶ 23 Brian Johnson, a local farmer and former employer of defendant, testified on behalf of defendant. Johnson rented farmland in the Stillman Valley area. He was currently growing hay and did not know the average rent per acre to grow corn in 2013. According to Johnson, rent varies depending upon crop prices and land quality.

¶ 24 Johnson, who was a township road commissioner, had seen the Craigslist posting. He never heard anyone mention the posting in relation to the township supervisor election. He did not know by how many votes William lost the election.

¶ 25 In ruling on damages, the trial court noted that the Illinois Supreme Court "has [not] yet discussed whether as a matter of state law punitive damages may be awarded in a defamation action absent a showing of actual malice." The court found that, based on the testimony, plaintiffs did not prove "actual malice" and therefore it was not awarding any punitive damages.

¶ 26 The court added that emotional distress was not "relevant to the case" and accordingly awarded no damages for emotional distress.

¶ 27 The trial court stated that, besides emotional and punitive damages, it must consider "special, general, and nominal" damages. The court noted that, as to general or special damages, plaintiffs must prove that such damages were caused by defendant. The court found that the damages related to the election were "too speculative," because it was "too difficult to determine" whether the posting affected the election.

¶ 28 Although the trial court found that the evidence of business losses related to rent increases and leases was "quite extensive," it had "difficulty" with the evidence coming from plaintiffs only and not the vendors or landlords. Recognizing that circumstantial evidence could be considered, the court noted the "lack of further testimony" connecting defendant's conduct with the business losses. Without such evidence to "provide what the Court believ[ed] [was]

necessary testimony" to corroborate plaintiffs' testimony, the court could not find for plaintiffs on damages. Accordingly, the court stated that it "would be speculative" to draw any reasonable inferences as to what the damages should be. Thus, the court found that plaintiffs failed to meet their burden of proving general or special damages.

¶ 29 The trial court awarded plaintiffs $5 in nominal damages and ordered defendant to pay court costs. Plaintiffs filed a motion to reconsider, in which they argued that they need not prove damages in a *per se* defamation action and that the court could award punitive damages without a showing of actual malice. The court denied the motion to reconsider, and plaintiffs filed this timely appeal.

¶ 30 II. ANALYSIS

¶ 31 On appeal, plaintiffs contend that: (1) because the statement was defamatory *per se*, they did not need to prove actual damage to their reputations and therefore the award of nominal damages was against the manifest weight of the evidence; (2) because plaintiffs were not public figures and the subject matter was not a matter of public concern, the trial court erred in ruling that plaintiffs could not obtain punitive damages without proving that defendant acted with actual malice; and (3) even if actual malice was required, plaintiffs proved that defendant acted with actual malice, because he knew that the statement was false.

¶ 32 Defendant responds that: (1) even if damages are presumed, plaintiffs were still required to prove that they were entitled to substantial damages; (2) the evidence of business loss was insufficient to show that defendant caused such loss; (3) actual malice must be proved to obtain punitive damages; and (4) the finding that plaintiffs did not prove actual malice was not against the manifest weight of the evidence.

¶ 33 Generally, when a party appeals a ruling after a bench trial, the standard of review is whether the trial court's judgment was against the manifest weight of the evidence. *Commercial Mortgage & Finance Co. v. Life Savings of America*, 129 Ill. 2d 42, 49 (1989). A finding is against the manifest weight of the evidence when an opposite conclusion is apparent or when the finding appears to be unreasonable, arbitrary, or not based on the evidence. *Zebra Technologies Corp. v. Topinka*, 344 Ill. App. 3d 474, 480 (2003). The trier of fact is in a superior position to determine the credibility of witnesses and the weight to give to their testimony. *1472 N. Milwaukee, Ltd. v. Feinerman*, 2013 IL App (1st) 121191, ¶ 21. Unless the opposite conclusion is evident from the record, the reviewing court will not substitute its judgment for that of the trier of fact on matters of witness credibility, the weight of the evidence, or the inferences to be drawn from the evidence. *Feinerman*, 2013 IL App (1st) 121191, ¶ 21. However, *de novo* review applies to an appeal from a bench trial where the question is whether the trial court applied the correct legal test to the evidence. *In re A.H.*, 207 Ill. 2d 590, 593 (2003).

¶ 34 To establish a claim for defamation, a plaintiff must prove that a 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. There are two types of defamatory statements: *per quod* and *per se*. *Naleway v. Agnich*, 386 Ill. App. 3d 635, 638 (2008). If a defamatory statement does not fall into the *per se* category, a plaintiff must prove that he sustained actual damage of a pecuniary nature, otherwise known as special damages. *Kurczaba v. Pollock*, 318 Ill. App. 3d 686, 694 (2000) (citing *Bryson v. News America Publications, Inc.*, 174 Ill. 2d 77, 87-88 (1996)). Put another way, a plaintiff in a *per quod* action must prove actual damage to his reputation and pecuniary loss resulting from the defamatory statement. *Kurczaba*, 318 Ill. App. 3d at 694.

¶ 35 However, in an action for defamation *per se*, a plaintiff need not prove actual damage to his reputation. *Naleway*, 386 Ill. App. 3d at 639 (citing *Bryson*, 174 Ill. 2d at 87). Rather, statements that are defamatory *per se* are so obviously and materially harmful that injury to the plaintiff's reputation may be presumed. *Naleway*, 386 Ill. App. 3d at 639 (citing *Bryson*, 174 Ill. 2d at 87). A statement that imputes that a person lacks ability or otherwise prejudices that person in his profession is defamatory *per se*. *Naleway*, 386 Ill. App. 3d at 369.

¶ 36 Presumed damages are those that the law presumes must actually, proximately, and necessarily result from the publication of the defamatory statement. *Winters v. Greeley*, 189 Ill. App. 3d 590, 598 (1989). The amount awarded is an estimate of the extent of the loss that the plaintiff has suffered. *Winters*, 189 Ill. App. 3d at 598. Although there is no scale by which to measure the monetary value of reputation, good will, or loss of esteem, the law nevertheless recognizes the impairment of reputation and community standing, loss of esteem, personal humiliation, and anguish as actual injuries that necessarily flow from a *per se* defamatory statement. *Winters*, 189 Ill. App. 3d at 598.

¶ 37 In this case, defendant does not dispute that his statement was defamatory *per se*.[2] Indeed, because it spoke to plaintiffs' professional business relationships as farmers, it was. See *Naleway*, 386 Ill. App. 3d at 639. That being so, to establish liability, plaintiffs were not required to prove that the statement actually damaged their reputations. See *Naleway*, 386 Ill. App. 3d at 639. Nonetheless, to obtain more than nominal damages, plaintiffs were required to prove the amount of damages necessary to compensate them for their injuries.

[2] Although the complaint does not allege that the statement was defamatory *per se*, and plaintiffs did not argue as much at trial, in their motion to reconsider plaintiffs contended that, because the statement was defamatory *per se*, they need not prove actual damages.

¶ 38 Although damages must be proved to be recovered (*Poeta v. Sheridan Point Shopping Plaza Partnership*, 195 Ill. App. 3d 852, 858 (1990)), absolute certainty about the amount of damage is not necessary to justify a recovery if damage is shown (*In re Application of Busse*, 124 Ill. App. 3d 433, 438-39 (1984)). Nonetheless, damages may not be predicated on mere speculation, hypothesis, conjecture, or whim. *In re Application of Busse*, 124 Ill. App. 3d at 438-39. Rather, the evidence must show a basis for computing damages with a fair degree of probability. *Barnett v. Caldwell Furniture Co.*, 277 Ill. 286, 289 (1917); see also *Posner v. Davis*, 76 Ill. App. 3d 638, 645 (1979).

¶ 39 Here, William sought to prove economic loss based on his having lost the election. The trial court found that evidence to be too speculative to support an award of more than nominal damages. We agree. William failed to establish any concrete connection between defendant's statement and the election results. It was purely speculative to conclude that William lost the election even in part because of the statement. That is particularly so where the statement did not mention the election or William's candidacy and there was no evidence that anyone failed to vote for William because of the statement. The court's finding that the evidence relating to the election was too speculative to support William's claim of economic loss was not against the manifest weight of the evidence. Thus, we affirm that part of the judgment.

¶ 40 However, we do not agree with the trial court's finding that the evidence of plaintiffs' economic loss relating to their farming business was too speculative to support a damages award. Although the court was obligated to assess the credibility of William and Craig and to give the appropriate weight to their testimony (see *1472 N. Milwaukee Ltd.*, 2013 IL App (1st) 121191, ¶ 21), it did not do so. Instead, it ruled that plaintiffs were required to submit the testimony of third parties to corroborate their testimony. That was error, as plaintiffs were entitled to rely on

their own testimony and have it assessed by the court. Because the court never did so, we remand for the court to consider plaintiffs' evidence and determine whether it was sufficient to justify an award of damages for economic loss. Of course, we do not imply that the court should reach any particular conclusion.

¶ 41 We turn next to the issue of punitive damages. In doing so, we initially note that the trial court ruled that to obtain punitive damages plaintiffs must prove that defendant acted with actual malice. That was error. Where a cause of action is based on defamatory statements concerning a matter of public concern, punitive damages may not be imposed absent proof of actual malice. *Imperial Apparel, Ltd. v. Cosmo's Designer Direct, Inc.*, 227 Ill. 2d 381, 395 (2008). Actual malice is defined as knowledge that the statement is false or having a reckless disregard as to whether it is true or false. *Kuwik v. Starmark Star Marketing & Administration, Inc.*, 156 Ill. 2d. 16, 24 (1993). However, where defamatory statements involve a purely private matter, an award of punitive damages does not depend upon proof of actual malice. *Imperial Apparel, Ltd.*, 227 Ill. 2d at 395.

¶ 42 In this case, defendant does not contend that his statement involved a matter of public concern. We agree. Although William contends that the statement caused him to lose the township-supervisor election, the statement itself did not mention the election or William's candidacy. Because the statement concerned a purely private matter, it was not necessary that plaintiffs prove actual malice to obtain punitive damages.

¶ 43 In a private matter, where words are held to be actionable *per se*, malice is implied and punitive damages may be awarded. *Mullen v. Solber*, 271 Ill. App. 3d 442, 444 (1995). Once a court rules that a statement is defamatory *per se*, a plaintiff is entitled to have the trier of fact determine the amount of punitive damages. *Mullen*, 271 Ill. App. 3d at 444.

¶ *44* Here, the trial court found that the statement was defamatory *per se*. Therefore, malice was implied and plaintiffs were entitled to have the court determine the appropriate amount of punitive damages. Thus, upon remand, the court is to assess the proper measure of punitive damages.

¶ 45 III. CONCLUSION

¶ 46 For the reasons stated, we vacate that part of the judgment of the circuit court of Ogle County awarding nominal compensatory damages and no punitive damages and remand for further proceedings.

¶ 47 Affirmed in part and vacated in part; cause remanded.