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No. 3-09-0436

Order filed February 7, 2011

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT  
A.D., 2011

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REGER DEVELOPMENT, LLC, and	)	Appeal from the Circuit Court
KEVIN W. REGER,	)	of the 12 <sup>th</sup> Judicial Circuit
	)	Will County, Illinois,
Plaintiffs-Appellants,	)	
	)	
v.	)	
	)	
THOMAS F. COURTNEY,	)	
THOMAS F. COURTNEY &	)	No. 08 L 911
ASSOCIATES, STANDARD BANK &	)	
TRUST CO., As Trustee under Trust No.	)	
19408 dated April 10, 2006, JB LUCKY	)	
DEVELOPMENT, LLC, JULIE CRAIG,	)	
ROBERT CRAIG, BRIAN FORDON and	)	
JOHN FORDON,	)	The Honorable
	)	Michael J. Powers,
Defendants-Appellees.	)	Judge, Presiding.

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JUSTICE McDADE delivered the judgment of the court.  
Presiding Justice Carter and Justice Schmidt concur in the judgment.

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**ORDER**

*Held:* Where alleged defamatory statements bear some relation to pending litigation, the statements are protected by absolute litigation privilege.

## FACTS

Plaintiffs, Reger Development, LLC and Kevin W. Reger, and defendant, Standard Bank & Trust Co. (Standard), are parties to an underlying lawsuit arising from a real estate transaction. Specifically, Standard is the owner of a vacant parcel of real estate located in Mokena, Illinois. Plaintiffs and Standard entered into a contract whereby plaintiffs agreed to purchase the vacant lot. After plaintiffs allegedly failed to comply with certain contractual conditions, plaintiffs brought the underlying lawsuit against Standard.

Defendants, Thomas F. Courtney and Thomas F. Courtney & Associates (Courtney) represent Standard in the underlying lawsuit. Courtney filed a counterclaim on behalf of Standard against plaintiffs alleging common law fraud. The counterclaim alleged, in pertinent part:

“9. There is evidence that the [plaintiffs] ha[ve] a pattern of using deceptive and misleading real estate contracts without making any payment and fraudulently to cloud title and negotiate favorable terms without any legal duty to close the purchase.

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11. The willful conduct of [plaintiffs] caused a common law fraud against the [defendants'] interests. The [plaintiffs] willfully failed to disclose termites in the Real Property Disclosure.”

Plaintiffs subsequently brought the instant cause of action against defendants for defamation, alleging that Courtney knowingly made false statements in the counterclaim that it

filed on behalf of Standard. Specifically, plaintiffs allege that Courtney “knowingly made the false statement[s] \*\*\* without ever producing even one document of the ‘evidence,’ because not even one shred of such evidence exists.” Plaintiffs further claim that the statements are defamatory *per se* and plaintiffs have been damaged by the conduct of Courtney in an amount in excess of \$10 million.

Defendants filed a motion to dismiss on the ground that plaintiffs failed to state a valid claim for defamation because statements made by an attorney representing clients in the course of a judicial proceeding are absolutely privileged. Upon hearing argument, the trial court granted defendants’ motion to dismiss. This appeal followed.

#### ANALYSIS

Plaintiffs contend that the trial court erred in granting defendants’ motion to dismiss.<sup>1</sup> Specifically, plaintiffs argue that the court erroneously found their defamation complaint barred by the absolute litigation privilege. Because the alleged defamatory statements bear some relation to pending litigation, we find the court did not err in granting defendants’ motion to dismiss.

The court in *Ficaro v. Funkhouser*, 2009 Ill. App. LEXIS 1398, \*17-18 (2009) recently summarized the law in this State relating to the absolute litigation privilege as follows:

“ ‘An attorney at law is absolutely privileged to publish  
defamatory matter concerning another in communications

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<sup>1</sup> We review *de novo* a dismissal pursuant to either section 2-619 or section 2-615 of the Code of Civil Procedure. See *Van Meter v Darien Park District*, 207 Ill. 2d 359, 368 (2003) (section 2-619), *Young v. Bryco Arms*, 213 Ill. 2d 433, 440 (2004) (section 2-615).

preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding.’ [Citations.] The privilege affords complete immunity, irrespective of the attorney's knowledge of the statement's falsity or the attorney's motives in publishing the defamatory matter. [Citation.] The only requirement is that the communication pertain to proposed or pending litigation. [Citation.] The pertinency requirement is not applied strictly, and the privilege will attach even where the defamatory communication is not confined to specific issues related to the litigation, with ‘[a]ll doubts resolved in favor of a finding of pertinency.’ [Citation.]”

In this case, defendants’ statements regarding plaintiffs’ alleged history of deceptive practices and failure to disclose the existence of termites pertains to its counterclaim alleging common law fraud. First, we note that the statements are contained within a judicial pleading, namely defendants’ counterclaim for common law fraud. Second, the statements relate to two common law fraud elements. In order to establish a claim for common law fraud in Illinois, a plaintiff must allege and prove: (1) a false statement of material fact, (2) the party making the statement knew or believed it to be untrue, (3) the party to whom the statement was made had a right to rely on the statement, (4) the party to whom the statement was made did rely on the statement, (5) the statement was made for the purpose of inducing the other party to act, and, (6) the reliance by the person to whom the statement was made led to that person's injury. *Siegel v.*

*Levy Organization Development Co.*, 153 Ill. 2d 534, 542-43 (1992). Here, the statements *may* show that plaintiffs had knowledge that their representations were untrue or that their statements were made for the purpose of inducing defendants to act. Finally, evidence of a pattern of deceptive conduct may support an award of punitive damages in a common law fraud action. *Vance Pearson, Inc. v. Alexander*, 86 Ill. App. 3d 1105, 1113 (1980).

While plaintiffs argue that the absolute litigation privilege does not apply because defendants' pleadings are insufficient to establish a viable claim for common law fraud, this argument misses the point. The applicability of the absolute litigation privilege does not revolve around the question of whether defendants have properly pled a common law fraud claim. Instead, the pertinent question is merely whether the alleged defamatory statements pertain to pending litigation. See *Ficaro*, 2009 Ill. App. LEXIS, at \*17-18. Because we have already answered this question in the affirmative, we hold the trial court did not err in granting defendants' motion to dismiss.

For the foregoing reasons, we affirm the order granting defendants' motion to dismiss.

Affirmed.