2012 IL App (3d) 110103-U

Order filed July 9, 2012

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2012

KASSIE COURSON,	) Appeal from the Circuit Court
	) of the 9th Judicial Circuit,
Plaintiff-Appellant,	) McDonough County, Illinois,
	)
v.	) Appeal No. 3-11-0103
	) Circuit No. 08-L-16
JARED CALE, ROBIN CALE, DEBBIE	)
KOLTZENBURG, STEPHANIE TOLEDO,	)
and JENNIFER DAILEY,	) Honorable
	) Steven R. Bordner,
Defendants-Appellees.	) Judge, Presiding.

JUSTICE McDADE delivered the judgment of the court.
Justice Lytton concurred in the judgment.
Justice Carter dissented.

ORDER

¶ 1 *Held:* The trial court improperly granted summary judgment for the defendants because the plaintiff presented a viable claim that the defendants published a false statement about her and this statement was not capable of an innocent construction.

¶ 2 The defendants, Jared Cale, Robin Cale, Debbie Koltzenburg, Stephanie Toledo, and Jennifer Dailey, published a letter informing certain individuals that an emergency order of

protection had been issued against plaintiff, Kassie Courson. Following publication of the letter, plaintiff was terminated from her employment. Plaintiff sued the defendants for defamation and civil conspiracy. The trial court granted the defendants' motion for summary judgment. Plaintiff appeals, arguing that the trial court erred in granting summary judgment to the defendants and that Illinois should abandon the innocent construction rule. We reverse.

¶ 3 FACTS

¶ 4 On October 10, 2007, a McDonough County trial court issued an emergency order of protection, in the form of a temporary restraining order, against plaintiff based on allegations that plaintiff was abusive toward her stepson. The claim of abuse had been made on behalf of plaintiff's stepson by his biological mother. The order was the result of an *ex parte* hearing of which plaintiff had no notice and at which she had no opportunity to be heard.

¶ 5 The record establishes that at the time the court issued the emergency order of protection, plaintiff was the Executive Director of Mosaic, a not-for-profit behavioral health organization in Macomb, Illinois. Plaintiff's duties at Mosaic required close interaction with the home's disabled adult residents and the parents and guardians who were entrusting them to her care and the care of the employees whom she supervised. The defendants were among those employees.

¶ 6 During the pendency of the order of protection, the defendants prepared an anonymous letter and sent it, along with a copy of the order[1], to various parents and guardians of Mosaic

[1] The letter stated that a temporary restraining order was attached. In fact, the attached court document was an Order for Extension and/or Modification of Order of Protection, which represented it had been entered as an emergency order on October 10, 2007, and extended, still as an emergency order and still apparently *ex parte*, to November 26, 2007.

residents, the Guardian and Advocacy Commission of the State of Illinois, the Western Illinois Service Coordination, and Mosaic corporate officials. The letter included the following paragraph:

> "Please see the attached copy of the temporary restraining order placed on Mrs. Courson. This is due to her being under investigation for abusing her step-son. If Mrs. Courson can do this to her step-son, what would she do to your loved one?"

The defendants concluded the letter by stating that if the recipients were concerned about the matter, they should call the three named Mosaic corporate officials, and included the telephone numbers and the extensions, if applicable, of these individuals. As soon as the letter circulated, alarmed parents and guardians began to call Mosaic, and plaintiff was ordered to control the damage caused by the letter.

¶ 7 As a result of the accusation against the plaintiff of domestic violence, the McDonough County state's attorney and the Macomb police conducted an investigation of the allegations. The investigating officers concluded that the stepson and his mother had not been truthful. One of the police officers who investigated the allegations subsequently met with the McDonough County state's attorney and recommended that the case be dropped. According to his affidavit, the state's attorney did not file criminal charges against plaintiff because there was insufficient evidence of any physical abuse of the stepson by plaintiff.

¶ 8 On November 26, 2007, the court dismissed the order of protection against plaintiff. The record indicates that the defendants sent the letter three or four days before the court's dismissal and at a time when they allegedly knew that the order of protection would soon be dismissed.

Mosaic ultimately terminated plaintiff from her employment on December 14, 2007.

¶ 9 Plaintiff filed suit in the circuit court of McDonough County, alleging that the defendants' actions amounted to defamation and civil conspiracy. Plaintiff made the following allegations in her complaint: that after taking office supplies, including printed stationery, from Mosaic, and a confidential list of parent/guardian contact information, the defendants prepared the anonymous letter; that the defendants' letter portrayed her as a "child abuser" and someone who might harm a disabled person entrusted to Mosaic's care; that at the time the defendants sent the letter they knew that the order of protection would be dismissed in a few days; and that the defendants' letter contained false statements about plaintiff's character and job performance. Plaintiff further alleged that the defendants' actions constituted defamation *per se*, and that she suffered actual damages including the loss of her salary, accumulation of retirement benefits, her employer-paid health insurance, and also lost her reputation and standing in the community and her profession.

¶ 10 The defendants filed an answer stating among other things, that they were required to report incidents of abuse and suspected potential abuse involving their fellow employees. However, in their depositions, the defendants acknowledged that they were neither mandated nor authorized to report suspected abuse that was unrelated to a Mosaic resident to the parents and guardians of the residents. The defendants also did not witness plaintiff abuse a Mosaic resident, nor had they heard any rumors or reports that plaintiff had done so.

¶ 11 Cross-motions for summary judgment were filed, and the trial court granted summary judgment in favor of the defendants, finding that (1) the statement "[p]lease see the attached copy of the temporary restraining order placed on [plaintiff,]" was true, and (2) the language "[i]f [plaintiff] can do this to her step-son, what would she do to your loved one[,]" was a question

and not a statement of fact. The court concluded that plaintiff did not present a sustainable claim for defamation and found defendants entitled to judgment as a matter of law.

¶ 12 Plaintiff appeals.

¶ 13 ANALYSIS

¶ 14 Initially we note that only the plaintiff/appellant has submitted a brief to the court. However, we review this case pursuant to the standards set forth in *First Capital Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128 (1976) (where 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).

¶ 15 On appeal, plaintiff contends that the defendants made a false statement about her which was neither privileged nor, as the trial court apparently found, capable of an innocent construction. She alleges that the language, "[i]f [plaintiff] can do this to her step-son, what would she do to your loved one?" constitutes the false and defamatory statement, and that this statement, taken in its context, is defamatory *per se*. Plaintiff also argues that this court should abandon the innocent construction rule. She asks us to find that the trial court erred in granting summary judgment in favor of the defendants.

¶ 16 Summary judgment is appropriate when the pleadings, depositions, and affidavits on file, construed in the light most favorable to the nonmoving party, establish there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Radtke v. Schal-Bovis, Inc.*, 328 Ill. App. 3d 51 (2002). If those findings cannot properly be made, the right of the moving party is not clear and free from doubt and summary judgment should not be entered. 735 ILCS 5/2-1005 (West 2010); see also *Land v. Board of Education*, 202 Ill. 2d 414, 432

(2002) (although summary judgment aids in the expeditious disposition of a lawsuit, it is a drastic measure, and thus, a trial court should grant summary judgment only if the moving party's right to judgment is clear and free from doubt). We review a trial court's grant of summary judgment *de novo*. *Radtke*, 328 Ill. App. 3d 51.

¶ 17 Defamation- Evaluation of Actual Language

¶ 18 A defamatory statement is one that harms a person's reputation such that it lowers the person in the eyes of the community or deters the community from associating with the person. *Green v. Rogers*, 234 Ill. 2d 478 (2009). To prevail in a defamation action, the plaintiff must present facts showing that the defendant made a false statement about the plaintiff, that the defendant's statement was not privileged, that the statement was published to a third party, and that its publication caused damages to the plaintiff. *Green*, 234 Ill. 2d 478. Publication occurs when the defamatory statements are communicated to someone other than the plaintiff. *Vickers v. Abbott Laboratories*, 308 Ill. App. 3d 393 (1999).

¶ 19 The five categories of defamation that are considered actionable *per se* include words that: (1) impute the commission of a criminal offense; (2) impute infection with a loathsome communicable disease; (3) impute an inability to perform or want of integrity in the discharge of duties of office or employment; (4) impute engagement in adultery or fornication; or (5) prejudice a party, or impute lack of ability, in his or her trade, profession or business. *Solaia Technology, LL.C v. Specialty Publishing Co.*, 221 Ill. 2d 558, 579-80 (2006). If a defamatory statement is actionable *per se*, the plaintiff need not plead and prove actual damage to her reputation in order to recover. *Parker v. House O'Lite Corp*., 324 Ill. App. 3d 1014 (2001). If a statement falls into one of the *per se* categories, it will not be actionable if it is capable of an

innocent construction. *Tuite v. Corbitt*, 224 Ill. 2d 490 (2006).

¶ 20 In this case, when viewing the facts in the light most favorable to plaintiff (the non-movant), it is clear that the defendants published the statement when they sent the letter. Furthermore, the defendants have established no facts indicating that their statement was privileged. See *Kuwik v. Starmark Start Marketing and Admin., Inc*., 156 Ill. 2d 16 (1993) (explaining qualified privilege); see also *Zych v. Tucker*, 363 Ill. App. 3d 831 (2006) (explaining absolute and qualified privileges). Although the defendants initially contended that they had an obligation to report suspected abuse involving their fellow employees, they acknowledged in depositions that they had no obligation or duty to report abuse unrelated to a Mosaic resident to Mosaic parents and guardians. Also, because plaintiff has alleged that the defendants' statement constituted defamation *per se*, she need not prove actual damages. Thus, the issue we must determine is whether, on these facts, the plaintiff has stated a viable claim that the defendants made a false statement, *per se*, about her.

¶ 21 A statement reasonably capable of a non-defamatory interpretation, given its verbal or literary context, should be so interpreted. *Green*, 234 Ill. 2d 478. However, a court need not strain to find an unnatural but innocent meaning for a statement where the defamatory meaning is far more reasonable. *Bryson v. News America Publications, Inc*., 174 Ill. 2d 77 (1996). "'It is well established that statements made in the form of insinuation, allusion, irony, or question, may be considered as defamatory as positive and direct assertions of fact.'" *Solaia Technology, LLC v Specialty Publishing Co.,* 221 Ill. 2d 558, 581 (2006), quoting *Berkos v National Broadcasting Co.*, 161 Ill. App. 3d 476, 487 (1999).

¶ 22 In this case, the trial court granted the defendants' motion for summary judgment based

on its finding that the language at issue was in the form of a question, so it was neither a statement nor accusatory, and thus, it did not constitute defamation. We disagree.

¶ 23 The contested statement does not, as asserted by the defendants and found by the trial court, ask the reader to merely consider the truth or falsity of the *allegations made against plaintiff on behalf of her stepson*; it does not say, or even imply, that if these facts we have given you are true, then you should ask yourself if she is capable of abusing your child or ward as she did her own. Rather, this statement *assumes* the truth of the abuse and asks the reader to assume it as well and then to consider, if plaintiff can do this to her own child, what would she do to yours. The plain language of this statement, standing alone, makes the false statement that plaintiff had been found to have abused her stepson and can be expected to harm your child. This conclusion is strengthened when considered with the preceding sentences which assert, first and truthfully, that a temporary restraining order [was] placed on Mrs. Courson, and, then, falsely, that the protective order issued as a result of an investigation for abusing her stepson. Furthermore, based on well-established Illinois case law, the fact that this statement was phrased as a question does not make it any less false, nor does it preclude a court from finding it defamatory. *Solaia Technology*, 221 Ill. 2d at 581. Consequently, the trial court improperly granted summary judgment based on this finding.

¶ 24 Innocent Construction Rule Analysis

¶ 25 Plaintiff also contends that Illinois should abandon the innocent construction rule. Under that rule, a court must consider the alleged defamatory statement in context and give the words of the statement, and any implications arising from them, their natural and obvious meaning. If as so construed, the statement is reasonably susceptible to an innocent interpretation, it is not

actionable as defamation *per se*. *Green*, 234 Ill. 2d 478. The rule originated as *dicta* in *John v. Tribune Co.*, 24 Ill. 2d 437 (1962), and has been adopted as a rule of law and modified and refined by the Illinois Supreme Court in numerous decisions, including most recently in *Green*, 234 Ill. 2d 478. Based on this precedent and the supreme court's apparent commitment to the doctrine, we decline plaintiff's invitation to abandon this well-settled rule.

¶ 26 When we analyze the facts using the innocent construction rule, our conclusion that plaintiff has stated a viable claim for defamation *per se*, remains the same. Even if a defamatory statement falls under one of the recognized categories of *per se* defamation, a court will not find the statement actionable if it is reasonably capable of an innocent construction. *Green*, 234 Ill. 2d 478. The rule of innocent construction is applicable only to claims of *per se* defamation. *Bryson v. News America Publications, Inc.*, 174 Ill. 2d 77 (1996). Here, the first, third, and fifth categories of *per se* defamation are implicated, and consideration under the innocent construction rule is warranted.

¶ 27 Although the rule has often been used as a sword to dismiss plaintiffs' claims, it also operates to protect claims where a reasonable construction of the challenged words and phrases supports a finding that there is, indeed, defamatory meaning. The rule as originally described in *John v. Tribune Co.*, 24 Ill. 2d 437, 442 (1962), held that

> "the article is to be read as a whole and the words given their natural and obvious meaning, and requires that *words* allegedly libelous *that are capable of being read innocently must be so read* and declared nonactionable as a matter of law." (Emphasis added.)

¶ 28 The supreme court modified this iteration, however, in *Chapski v. Copley Press*, 92 Ill. 2d

344, 350-52 (1982). The *Chapski* court clarified that the rule does not apply merely because the allegedly defamatory words are "capable of" an innocent construction; rather it held that:

> "[A] written or oral statement is to be considered in context, with the words and the implications therefrom given their natural and obvious meaning: if, 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."* (Emphasis added.)

¶ 29 In its decision in *Bryson*, 174 Ill. 2d 77, the supreme court further clarified the rule, saying:

> "In applying the innocent construction rule, courts must give the allegedly defamatory words their natural and obvious meaning. (Citations). *Courts must therefore interpret the allegedly defamatory words as they appeared to have been used and according to the idea they were intended to convey to the reasonable reader.* (Citations) When a defamatory meaning was clearly intended and conveyed, this court will not strain to interpret allegedly defamatory words in their mildest and most inoffensive sense in order to hold them nonlibellous under the innocent construction rule." (Emphasis added.)
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> "The innocent construction rule, however, does not require

> courts to strain to find an unnatural but possibly innocent meaning for words where the defamatory meaning is far more reasonable. (Citation) Nor does it require this court to espouse a naivete unwarranted under the circumstances." *Bryson*, 174 Ill. 2d at 939-94.

¶ 30 In *Green*, 234 Ill. 2d 478, a recent consideration of the rule, the supreme court emphasized the critical importance of "context" in the innocent construction analysis. After setting out the modified rule, the court added:

> "Stated differently, 'a statement "reasonably" capable of a non-defamatory interpretation, given its verbal or literary context, should be so interpreted. There is no balancing of reasonable constructions ***,' (citation). At the same time, *when the defendant clearly intended and unmistakably conveyed a defamatory meaning, a court should not strain to see an inoffensive gloss on the statement*. (Citation.)" (Emphasis added.) *Green*, 234 Ill. 2d at 500.

¶ 31 Applying the innocent construction rule to the facts we have before us and interpreting the allegedly defamatory words "as they appeared to have been used and according to the idea they were intended to convey to the reasonable reader," *(Green*, 234 Ill. 2d at 500), we conclude that these defendants clearly intended and unmistakably conveyed a defamatory meaning. There is no other reasonable explanation as to why the defendants, knowing the protective order was being dismissed, created this letter and circulated it, anonymously, to the people in whose hands

it would do the most damage to the plaintiff. Moreover, plaintiff's employment was terminated with the loss of salary benefits, and professional reputation. In short, the facts, viewed in context and in the light most favorable to the plaintiff, do not establish that the offending language, as drafted and circulated by the defendant, is capable of an innocent constructions. Therefore, we find that, on the facts before us, the offending language is not reasonably capable of an innocent construction and the trial court erred in granting summary judgment for the defendants.

¶ 32 Conspiracy Claim

¶ 33 Based on our conclusion, plaintiff has also stated a viable claim of civil conspiracy. Civil conspiracy exists when two or more persons join together for the purpose of accomplishing by their concerted action either an unlawful purpose or a lawful purpose by an unlawful means. *Adcock v. Brakegate, Ltd.*, 164 Ill. 2d 54 (1994). Here, because we have determined that plaintiff presented a viable claim of defamation, she may also properly proceed on her claim for civil conspiracy based on defamation.

¶ 34 CONCLUSION

¶ 35 For the foregoing reasons, the judgment of the circuit court of McDonough County finding the challenged language non-defamatory as a matter of law and granting summary judgment to the defendants is reversed, and the cause is remanded for proceedings consistent with this order.

¶ 36 Reversed, remanded.

¶ 37 JUSTICE CARTER, dissenting:

¶ 38 I respectfully dissent from the majority's holding that the plaintiff presented a viable

defamation claim. I would affirm the circuit court's grant of summary judgment in favor of the defendants.

¶ 39 Unlike the majority, I do not believe that the defendants' letter contained a false statement. It is undisputed that an emergency order of protection was issued against the plaintiff based on allegations that she abused her stepson. Therefore, the defendants' statement that the order had been issued and the reasons for its issuance cannot be said to be false. Thus, the plaintiff's argument rests largely on the statement, "If Mrs. Courson can do this to her step-son, what would she do to your loved one?" However, this sentence neither affirmatively states that the plaintiff was guilty of abusing her stepson or that she would abuse anyone else. It simply asks the reader to consider that if the allegations are true, could the plaintiff harm someone else. Because I believe that the defendants' letter does not contain a false statement, I would find that there was no defamation. Accordingly, I would hold that the circuit court's grant of summary judgment in favor of the defendants was appropriate.

¶ 40 I do agree with the majority that abandoning the well-settled innocent-construction rule would be improper. See, *e.g.*, *Du Page County Airport Authority v. Dept. of Revenue*, 358 Ill. App. 3d 476, 486 (2005) (appellate court recognizing that "[i]t is fundamental to our judicial system that once our supreme court declares the law on any point, its decision is binding on all Illinois courts, and we cannot refuse to follow it, because we have no authority to overrule or modify supreme court decisions").

¶ 41 Lastly, because I do not believe that the defendants' letter amounted to defamation, I would also hold that the plaintiff could not succeed on her claim of civil conspiracy. Without defamation, it cannot be said that the defendants' actions were unlawful.

¶ 42 For the foregoing reasons, I respectfully dissent.