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2018 IL App (5th) 170322-U

NO. 5-17-0322

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

CURTIS SMITH,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Madison County.
	)	
v.	)	No. 13-L-1662
	)	
DEBORAH PONTIOUS,	)	Honorable
	)	A.A. Matoesian,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE MOORE delivered the judgment of the court.
Presiding Justice Barberis and Justice Cates concurred in the judgment.

ORDER

¶ 1 *Held*: Upon answering, individually, the various subparts of the certified question on appeal as we have necessarily limited them in order to advance the ultimate termination of this litigation, we vacate the circuit court's order granting a partial summary judgment for the plaintiff on his claim for defamation *per se* where there was no evidence of record that the alleged defamatory statements were false and material questions of fact existed as to the defendant's assertion of qualified privilege.

¶ 2 The defendant, Deborah Pontious, appeals, pursuant to Illinois Supreme Court Rule 308 (eff. Jan. 1, 2016), the August 12, 2016, order of the circuit court of Madison County that granted the motion for summary judgment filed by the plaintiff, Curtis Smith, as to the defendant's liability to the plaintiff for defamation. Subsequent to its

August 12, 2016, order, the circuit court certified the following question for interlocutory appeal:

> "Whether a non-public figure plaintiff can establish liability for defamation without presenting any evidence that (a) the alleged defamatory statement is false, (b) defendant knew or should have known the statement was false, and (c) publication of the statement caused actual harm to the plaintiff."

For the following reasons, we limit the various subparts of the certified question, such that it is to be restated as follows:

> "Whether a non-public figure plaintiff can establish liability for defamation without presenting any evidence as to the following: (a) the alleged defamatory statement is false; (b) defendant knew or should have known the statement was false despite a claim by the plaintiff of qualified privilege; and (c) publication of the statement caused actual harm to the plaintiff despite the plaintiff's claim that all of the statements in question were defamatory *per se* when the plaintiff has not made a claim below that the statements at issue involved a matter of public concern." See *Crawford County Oil, LLC v. Weger*, 2014 IL App (5th) 130382, ¶11 (if a certified question requires limitation to advance the ultimate termination of the litigation, such limitation is proper (citing *De Bouse v. Bayer AG*, 235 Ill. 2d 544, 557 (2009))).

With the certified question so limited, we answer subpart (a) in the negative, decline to answer subpart (b) because a threshold legal determination has not yet been made by the circuit court, and answer subpart (c) in the affirmative. Further, we vacate the order

granting the plaintiff a partial summary judgment and remand for further proceedings not inconsistent with this order.

¶ 3 FACTS

¶ 4 On October 3, 2013, the plaintiff filed a complaint against the defendant in the circuit court of Madison County, making the following allegations. The plaintiff is a professor at Southern Illinois University in Edwardsville (SIUE). The plaintiff and the defendant were in a dating relationship from approximately January 2012 until August 2012. On or about October 15, 2012, the defendant sent an e-mail to the plaintiff's sister-in-law, and on or about October 23, 2012, the defendant sent an e-mail to the department head of the plaintiff's employer. According to the complaint, both of these written communications, which were attached to the complaint as exhibit A and exhibit B respectively, contained "*per se* defamation" in that they (1) falsely imputed to the plaintiff the commission of a criminal offense, (2) falsely imputed to the plaintiff an inability or want of integrity in performing the duties of his profession, and (3) used false words prejudicing the plaintiff in his profession. The complaint alleges that these false statements of fact damaged and impugned the integrity of the plaintiff as a professional and caused him actual pecuniary loss. No allegation is made in the complaint that the statements in question involve a matter of public concern.

¶ 5 Count I of the complaint alleges a cause of action for defamation *per se* and avers that, due to the character of the false statements at issue, damage to the plaintiff's reputation is presumed and special damages need not be pled. Count I further alleges that the e-mails amounted to an unprivileged publication to a third party and the publication

was made with a malicious intent to destroy the plaintiff's reputation and affect his ability to earn a living in his chosen profession, justifying an award of punitive damages. Count II of the complaint, which is not at issue in this appeal, alleges a cause of action for intentional infliction of emotional distress.

¶ 6 Exhibit A to the complaint appears to be an e-mail sent from ****@****.com[1] to ****@****.net, with a greeting to "Ann" and a salutation from "Debbie." The e-mail contains the following statements about an individual the writer refers to as "Curt":

> "He hacks email accounts by sending $100 to zhack@gmail and they access the desired account;"
>
> He is party to "internet hook ups that he is addicted to";
>
> "He lies about everything";
>
> "He is still posting all over those adult websites";
>
> "He made a porno tape of Ruth and posted to those adult websites";
>
> "He cheated again this weekend";
>
> "He is perceived as a creepy old sex pervert."

¶ 7 Exhibit B to the complaint appears to be an e-mail sent from ****@**** to ****@****, with a greeting to "Dr. Morice" and no salutation. The e-mail contains the following statements about an individual the author refers to as "Dr. Curt Smith":

> "[H]e has threatened to destroy [the e-mail writer] like his former wife";
>
> "I have information about his conduct that reflects very poorly on SIUE";

[1]We have chosen to redact the identifying portions of all private individuals' e-mail addresses in the interests of privacy.

He "spends his days at home on adult websites, trying to hook up with women whenever possible";

He "uses his university photo on many of these websites";

"He is presently on a bunch of swinger websites, under a new name but using his very recognizable picture";

"He is presently communicating with women overseas, specifically Ghana, using his position at the university as a way to lure them over";

The writer has "documented proof but feel[s] that [Curt] would inflict terrible harm to [the writer] and [the writer's] family";

"Look what happened to ***, [Curt's] last wife. He involved her in the swinging lifestyle and somehow disseminated that tape. [The writer] ha[s] no proof that he did so, but he was with her that weekend at a [s]wing [d]ance event in West County where the tape was made. The fact that [the writer] ha[s] been threatened in print that [the writer] will be destroyed like [his ex-wife] by [Curt] leads [the writer] to believe that he has some involvement in her demise";

He "misrepresents to many people that he was a fighter pilot in Viet Nam. He says that he was shot down and received a purple heart. He was never in the military, although he shows dog tags that he had made to support his fantasy. He was ROTC and his second wife was formerly married to a man who was killed in Viet Nam and that is probably where he got his story. Unfortunately, [he] will look you in the eye and lie so well that you will think that he is telling the truth. Well, he believes his lies so they are the truth to him";

> “[The writer] believe[s] that he should not be able to use his position at the university to lure and manipulate women (mentoring, for example), everyone is afraid of what he will do if they come forward. Also, he is a poor representative of the university”;
>
> “[H]e carries a loaded handgun under the front seat of his car onto university property. Actually, he always carries one in his vehicle, loaded, which is not legal.”

¶ 8 On December 29, 2014, the defendant, *pro se*, filed an amended answer to the plaintiff’s complaint, in which she, *inter alia*, denied the allegations in the complaint that she sent the e-mails referenced in the complaint and/or that these e-mails contained content that was defamatory *per se*. In addition, the amended answer includes numerous affirmative defenses, including an assertion that the statements at issue were made in good faith and were subject to privilege.

¶ 9 On May 16, 2016, the plaintiff filed a motion for partial summary judgment pursuant to section 2-1005 of the Code of Civil Procedure (735 ILCS 5/2-1005 (West 2014)). According to the motion, during the defendant’s deposition, she admitted to sending an e-mail to the plaintiff’s employer in which she accused him of carrying a gun onto the SIUE campus, which would be a criminal act if true. In addition, the motion averred that during the deposition, the defendant admitted to sending an e-mail to the plaintiff’s employer in which she accused him of using his position as a professor to seduce women and other abuses of his position with the university, which the motion argued would be words that impute an inability to perform or want of integrity in the

discharge of the duties of his office or employment. Finally, the motion argued that the defendant has not provided any evidence to support her allegation that these statements are true, and because the statements are defamation *per se*, the plaintiff is entitled to a summary judgment as to the issue of liability. The motion requested that a partial summary judgment be entered against the defendant on the issue of liability and that a hearing be set on the issue of damages. Although the motion for a partial summary judgment references excerpts of the defendant's deposition, which are said to be attached to the motion, the deposition excerpts are not part of the supporting record on appeal.

¶ 10 On August 5, 2016, the defendant filed a response to the plaintiff's motion for a partial summary judgment, requesting a dismissal of the motion. The response averred that the plaintiff was under investigation by the FBI, predating the filing of this lawsuit. The investigation was still open and ongoing, identifies the defendant as a victim of an alleged "hacking" and destruction of her e-mail accounts, as well as threatening behavior "and specific illegal actions of the plaintiff towards the defendant and others." In addition, the response avers that the interrogatories and requests to admit filed by the plaintiff in the current action are part of the federal investigatory file, the facts of the current lawsuit are the subject of an open federal investigation, and "should not be determined in the [p]laintiff's favor at this point."

¶ 11 Exhibit E to the response is an affidavit of the defendant which states that she, and other witnesses, can verify the truth of the statements at issue. In addition, the response states that "[t]he [d]efendant has made a report to the Madison County Sheriff's Department case #15-10035 concerning perjury on the part of the [p]laintiff in this case,

making a decision at this time based on his questionable testimony improper." The response set forth an argument that a partial summary judgment is not proper because the statements were true, or in the alternative, were protected by a qualified privilege, and there is no evidence that he suffered any monetary or emotional damages caused by the statements.

¶ 12 Numerous partially redacted reports documenting telephonic interviews between FBI agents and the defendant between May 23, 2013, and August 13, 2014, are attached to the response. In these interviews, the defendant identifies herself as the user of e-mail account ****@**** and states that the plaintiff broke into the account in approximately the fall of 2012. These reports also record statements by the defendant to the FBI that are similar to the statements at issue in the case at bar. Specifically, the following statements are recorded in the FBI interview reports:

> "[The plaintiff] tells people he was shot down in a plane in Vietnam. [The plaintiff] has never served in the military or in Vietnam. [The plaintiff] has numerous guns";
>
> "[The plaintiff] does not have a concealed carry permit. [The plaintiff] carries a concealed weapon onto the [SIUE] campus where he is a professor."

¶ 13 An e-mail from a victim specialist with the FBI, dated March 29, 2014, and addressed to the defendant, was also attached to the response. The e-mail identifies the defendant as a possible victim of an ongoing FBI investigation named "Operation Firehacker." The e-mail explains that the FBI is investigating an international scheme involving internet vendor websites that advertise e-mail hacking services. These websites

contain advertisements stating that the website organizers can gain access to any e-mail account in exchange for a fee. The e-mail states that, during the investigation, the defendant's e-mail account was identified as one of several thousand potential victim e-mails that was likely submitted to one of the websites. The stated purpose of the e-mail is to notify the defendant that individual(s) may have attempted or been successful in accessing the defendant's e-mail account. The letter emphasizes that the FBI does not have additional information about who may have submitted the e-mail account to the website for hacking. The e-mail goes on to inform the defendant about steps she can take to protect her e-mail address and computer.

¶ 14 The affidavit of the defendant is also attached to the response. Therein, the defendant states, under oath, that she would competently testify to the following facts: (1) she witnessed the plaintiff driving around with a handgun on numerous occasions between 2009 and 2012, including on the campus of SIUE, (2) she saw profiles of the plaintiff on adult websites when she googled his name, (3) these profiles contained his e-mail address and pictures of him, (4) his university photo was used in at least one of the profiles, (5) in approximately November 2012, the plaintiff threatened to destroy the defendant and her family like he did his ex-wife, (6) the defendant took this to mean that the plaintiff was the one who uploaded a pornographic video of his ex-wife to a pornographic website, (7) although the plaintiff claims that he only received an unsatisfactory performance evaluation at SIUE after the alleged defamation, the defendant saw a letter from SIUE in the summer of 2012 that discussed the plaintiff's unsatisfactory performance evaluation, (8) the plaintiff showed the defendant his

communication with a woman that he friended on Facebook from Ghana, (9) the woman from Ghana was very young and wearing a bikini but he was insistent that she was going to come to the United States to be a student at SIUE so he could help her, (10) there was lots of "weird" communication on the cell phone and computer with young ladies from various places, (11) the defendant witnessed the plaintiff discussing his tour of Vietnam with other persons, (12) the plaintiff had "dog tags" with his name printed on them that looked realistic, (13) the defendant found out from a family member that the plaintiff frequently told this story and it was not true, as he could not serve in the military due to a hearing issue, and (14) the defendant was told that the scar the plaintiff claimed was a bullet wound was from having a mole removed.

¶ 15 On August 12, 2016, the circuit court entered an order stating that this case was called on the plaintiff's motion for a partial summary judgment and that the plaintiff appeared by counsel and the defendant appeared *pro se*. The order continues by stating that argument was heard and the motion for partial summary judgment is granted. The order contains no findings of fact or conclusions of law, and a transcript of the hearing is not part of the record on appeal.

¶ 16 Although the copy contained within the supporting record on appeal does not contain a file stamp, it appears that, on or about December 15, 2016, the defendant, through counsel, filed a motion to reconsider and vacate the circuit court's order. According to the motion to reconsider, partial summary judgment as to liability was improper because there are genuine issues of material fact as to at least three elements of defamation: (1) falsity, (2) fault on the part of the defendant, and (3) actual harm to the

plaintiff. In addition, the motion to reconsider argued that newly discovered evidence, consisting of the plaintiff's federal conviction for computer fraud and his ex-wife's verified complaint charging him with raping her, videotaping the rape, and publishing it on the internet, supports the veracity of the defendant's statements and goes directly to the element of falsity and damages. Documents verifying this newly discovered evidence were attached to the motion to reconsider as exhibits.

¶ 17 On June 2, 2017, the circuit court entered an order denying the motion to reconsider. On June 16, 2017, the defendant filed a motion to certify the following question for interlocutory appeal, pursuant to Illinois Supreme Court Rule 308 (eff. Jan. 1, 2016):

> "Whether a non-public figure plaintiff can establish liability for defamation without presenting any evidence that (a) the alleged defamatory statatement is false, (b) defendant knew or should have known the statement was false, and (c) publication of the statement caused actual harm to the plaintiff."

¶ 18 On July 21, 2017, the circuit court granted the defendant's motion to certify the foregoing question for interlocutory appeal. On August 18, 2017, the defendant filed an application to this court for leave to appeal, which this court granted on October 11, 2017.

¶ 19 ANALYSIS

¶ 20 1. Standard of Review

¶ 21 This case comes before us as an interlocutory appeal of a certified question pursuant to Illinois Supreme Court Rule 308 (eff. Jan. 1, 2016), and as such, our standard

of review is *de novo*. *Weger*, 2014 IL App (5th) 130382, ¶11 (citing *In re M.M.D.*, 213 Ill. 2d 105, 113 (2004)). In *Weger*, this court made the following additional observations regarding our standard of review with respect to certified questions:

> "Although the scope of our review is generally limited to the questions that are certified by the circuit court, if the questions so certified require limitation in order to materially advance the ultimate termination of the litigation, such limitation is proper. See *De Bouse v. Bayer AG*, 235 Ill. 2d 544, 557 (2009). In addition, in the interests of judicial economy and the need to reach an equitable result, we may consider the propriety of the circuit court order that gave rise to these proceedings. *Id.* at 558 (citing *Vision Point of Sale, Inc. v Haas*, 226 Ill. 2d 334, 354 (2007))." *Id.*

¶ 22 2. Elements of Defamation

¶ 23 In order to address the certified question on appeal, we find it necessary to conduct a fairly in-depth review of the elements of a defamation claim. Illinois is clear regarding the elements of a claim for defamation. "To state a defamation claim, a plaintiff must present facts showing that the defendant made a false statement about the plaintiff, that the defendant made an unprivileged publication of that statement to a third party, and that this publication caused damages." *Green v. Rogers*, 234 Ill. 2d 478, 491 (2009) (citing *Krasinski v. United Parcel Service, Inc.*, 124 Ill. 2d 483, 490 (1988)). Thus, there are essentially three elements to a defamation claim: (1) falsity, (2) unprivileged publication, and (3) damages. However, as will be explained below, the standards for proving, as well as the burden of proof as to the second and third elements, may change based on the

nature of the defamation claim and defenses that have been raised thereto. Accordingly, we turn to a discussion as to these two elements.

¶ 24 a. *Unprivileged Publication: Qualified or Conditional Privilege*

¶ 25 The second element of a defamation claim requires *unprivileged* publication to a third party. *Id.* Our supreme court discussed at length the qualified, or conditional, privilege as it exists in Illinois defamation law in *Kuwik v. Starmark Star Marketing & Administration, Inc.*, 156 Ill. 2d 16, 24 (1993). There, the court stated:

> " ' "A privileged communication is one which, except for the occasion on which or the circumstances under which it is made, might be defamatory and actionable ***." ' [Citation.] This privilege is based on the policy of protecting honest communications of misinformation in certain favored circumstances in order to facilitate the availability of correct information. [Citation.]
>
> The qualified privilege serves to enhance a defamation plaintiff's burden of proof. Where no qualified privilege exists, the plaintiff need only show that the defendant acted with negligence in making the defamatory statements to prevail. [Citation.] "

¶ 26 In *Kuwik*, our supreme court adopted the approach taken by the Restatement (Second) of Torts in determining whether a conditional or qualified privilege exists. *Id.* at 27. Under this approach, the court looks only to the occasion itself for the communication and determines as a matter of law and general policy whether the occasion created some recognized duty or interest for the defendant to make the communication. *Id.* (citing Restatement (Second) of Torts § 593 through 599 (1977)). The type of occasions held to

create a qualified privilege include: (1) situations in which some interest of the person who publishes the defamatory matter is involved, (2) situations in which some interest of the person to whom the matter is published or of some other third person is involved; and (3) situations in which a recognized interest of the public is concerned. *Id.* at 29. In addition, the Restatement (Second) of Torts provides specific examples of occasions when conditional privileges exist. *Id.*

¶ 27 If the defendant has demonstrated to the court that an occasion in which defamatory matter was published was privileged, the burden shifts to the plaintiff to prove, as a matter of fact, that the defendant directly intended to injure another or recklessly disregarded the defamed party's rights and the consequences that may result to him. *Id.* at 30. "Thus, an abuse of a qualified privilege may consist of any reckless act which shows a disregard for the defamed party's rights, including the failure to properly investigate the truth of the matter, limit the scope of the material, or send the material to only the proper parties." *Id.*

¶ 28 b. *Damages: Defamation Per Se and Matters of Public Concern*

¶ 29 The third element of a defamation claim requires proof of damages. *Green*, 234 Ill. 2d at 491. However, an exception exists for statements that are defamatory *per se* because the harm is apparent on the face of the statement. *Id*. (citing *Owen v. Carr*, 113 Ill. 2d 273, 277 (1986)).

> "In Illinois, there are five categories of statements that are considered defamatory *per se*: (1) words that impute a person has committed a crime; (2) words that impute a person is infected with a loathsome communicable disease; (3) words

that impute a person is unable to perform or lacks integrity in performing her or his employment duties; (4) words that impute a person lacks ability or otherwise prejudices that person in his or her profession; and (5) words that impute a person has engaged in adultery or fornication." *Id.* at 491-92 (citing *Van Horne v. Muller*, 185 Ill. 2d 299, 307 (1998)).

¶ 30 The foregoing limited categories of defamatory statements are deemed actionable *per se* because they are so obviously and materially harmful to the plaintiff that injury to the plaintiff's reputation may be presumed. *Van Horne*, 185 Ill. 2d at 307. "A plaintiff need not plead or prove actual damages to his or her reputation to recover for a statement that is actionable *per se*." *Id.* (citing *Bryson v. News America Publications, Inc.*, 174 Ill. 2d 77, 87 (1996)). The defendant cites to U.S. Supreme Court precedent to assert that damages may not constitutionally be presumed absent a showing of actual malice or reckless disregard for the truth (*Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)). However, as our supreme court recognized in *Bryson*, this rule has been limited to cases where the statements in question involve matters of public concern. 174 Ill. 2d at 109 (citing *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985)).

¶ 31 3. Limitation of the Certified Question

¶ 32 Turning to the certified question on appeal, we conclude, based on the foregoing discussion, that in order to materially advance the termination of this litigation, a limitation on subparts (b) and (c) of the certified question is proper. See *De Bouse v. Bayer AG*, 235 Ill. 2d 544, 557 (2009). Because the defendant in this case has advanced a defense of qualified privilege in her *pro se* answer as well as her response to the motion

for summary judgment, we limit our answer to subpart (b) of the certified question to cases in which qualified privilege is at issue. In addition, because the complaint alleges, and we agree, that all of the allegedly defamatory statements at issue fit into the categories for defamation *per se*, we limit our answer to subpart (c) of the certified question to cases in which the cause of action is for defamation *per se*. In addition, because the complaint does not allege that the statements at issue involve a matter of public concern, we limit our answer to subpart (c) of the certified question to those cases where such an allegation has not been made. In sum, we restate the certified question on appeal as follows:

> "Whether a non-public figure plaintiff can establish liability for defamation without presenting any evidence as to the following: (a) the alleged defamatory statement is false; (b) defendant knew or should have known the statement was false despite a claim by the plaintiff of qualified privilege; and (c) publication of the statement caused actual harm to the plaintiff despite the plaintiff's claim that all of the statements in question were defamatory *per se* when the plaintiff has not made a claim below that the statements at issue involved a matter of public concern."

With the certified question so limited, we turn to our answer to each subpart of the certified question.[2]

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[2]The plaintiff would like for this court to answer the certified question conjunctively; that is, to determine whether any subpart can be answered in the affirmative, and if so, to answer the entire certified question in the affiramative. We find that this approach will not advance the ultimate termination of this litigation and choose to answer each subpart of the certified question individually.

¶ 33 a. *Subpart (a): Falsity*

¶ 34 Subpart (a) of the certified question asks us to determine whether a non-public figure plaintiff can establish liability for defamation without presenting any evidence that the alleged defamatory statement is false. As set forth above, falsity is the first element of a claim for defamation, and in no circumstances can liability for defamation be established without evidence of falsity. See *Green*, 234 Ill. 2d at 491 (citing *Krasinski*, 124 Ill. 2d at 490). Accordingly, the answer to subpart (a) of the certified question is a resounding no.[3]

¶ 35 b. *Subpart (b): Culpability or State of Mind*

¶ 36 Subpart (b) of the certified question, as we have limited it, asks us to determine whether a non-public figure plaintiff can establish liability for defamation, in a case where the defendant has raised qualified privilege as a defense, without presenting any evidence that the defendant knew or should have known the statement was false. As set forth in great detail above, in a case where a qualified privilege is asserted by the defendant, the court must first determine, as a matter of law, if the privilege exists based on the circumstances surrounding the occasion in which the defendant published the statements at issue. *Kuwik*, 156 Ill. 2d at 24. This determination defines the plaintiff's burden of proof as to the defendant's state of mind in publishing a defamatory statement. *Id.* If the court determines, as a matter of law, that the qualified privilege does not exist, then only negligence on the part of the defendant is required. *Id.* However, if the court

[3]We note that the plaintiff makes no argument and cites no authority for the proposition that the plaintiff need not prove falsity. See Ill. S. Ct. R. 341 (eff. May 25, 2018) (points not argued in brief are forfeited).

determines that the qualified privilege does exist, then the plaintiff must prove, as a matter of fact, that the defendant directly intended to injure another or recklessly disregarded the plaintiff's rights and the consequences that may result to him. *Id.* at 30. Accordingly, the plaintiff's burden of proof, at a minimum, is that the defendant knew or should have known that the statement was false, but a higher culpability will be required to be proven if the circuit court determines that a qualified privilege exists. Thus, the level of culpability on the part of the defendant that the plaintiff must prove depends on the circuit court's determination as to whether a qualified privilege exists. Accordingly, we decline to answer subpart (b) of the certified question because there is no indication that the circuit court has made the threshold legal determination regarding qualified privilege.

¶ 37 c. *Subpart (c): Damages*

¶ 38 We turn, then, to subpart (c) of the certified question as we have limited it, which asks us to determine whether a non-public figure plaintiff can establish liability for defamation without presenting any evidence that publication of the statement caused actual harm to the plaintiff, despite the plaintiff's claim that all of the statements in question were defamatory *per se* and the plaintiff has not made a claim below that the statements at issue involved a matter of public concern. As set forth above, in a case such as this, where the alleged defamatory statements fit into one of the categories of defamation *per se*, damages are presumed. *Van Horne*, 185 Ill. 2d at 307. As such, the plaintiff need not plead nor prove damages. *Id.* (citing *Bryson*, 174 Ill. 2d at 87). In addition, where, as here, there is no claim that the statements at issue involve a matter of

public concern, actual malice is not required in order for damages to be presumed. See *Bryson*, 174 Ill. 2d at 109 (citing *Dun & Bradstreet, Inc.*, 472 U.S. at 761). Accordingly, our answer to subpart (c) of the certified question, as we have limited it, is yes.

¶ 39 4. *Underlying Partial Summary Judgment Order*

¶ 40 Having answered all subparts of the certified question as we have limited them, we turn, in the interests of judicial economy and the need to reach an equitable result, to the propriety of the order that gave rise to these proceedings. See *Weger*, 2014 IL App (5th) 130382, ¶ 11 (citing *Vision Point of Sale, Inc.*, 226 Ill. 2d at 354). The order giving rise to these proceedings granted a partial summary judgment to the plaintiff on the issue of the defendant's liability for defamation. "Summary judgment is appropriate only where 'the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' " *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008) (citing 735 ILCS 5/2-1005(c) (West 2002)). "A triable issue precluding summary judgment exists where the material facts are disputed or where, the material facts being undisputed, reasonable persons might draw different inferences from the undisputed facts." *Id.*

¶ 41 Here, as our answer to the various subparts of the certified question as we have limited it demonstrates, the record is replete with disputed facts that are material to the plaintiff's claim for defamation *per se*. Most basically, there is conflicting evidence, set forth above, as to the truth or falsity of the statements at issue. In addition, there is nothing in the record to suggest that the circuit court resolved the issue of qualified

privilege one way or another. Regardless, assuming, *arguendo*, the falsity of the statements at issue, there are genuine issues of material fact as to whether the defendant knew or should have known the statements are false or, in the case of a qualified privilege, whether the defendant acted in reckless disregard for the truth of the statements. For all of these reasons, a partial summary judgment in favor of the plaintiff on the issue of the defendant's liability for defamation was improper and must be vacated.

¶ 42 CONCLUSION

¶ 43 For the foregoing reasons, we limit the various parts of the certified question so that it is restated as follows:

> "Whether a non-public figure plaintiff can establish liability for defamation without presenting any evidence as to the following: (a) the alleged defamatory statement is false; (b) defendant knew or should have known the statement was false despite a claim by the plaintiff of qualified privilege; and (c) publication of the statement caused actual harm to the plaintiff despite the plaintiff's claim that all of the statements in question were defamatory *per se* when the plaintiff has not made a claim below that the statements at issue involved a matter of public concern."

¶ 44 With the certified question so limited, we answer subpart (a) in the negative, decline to answer subpart (b) because there is no indication that the circuit court has made the threshold legal determination regarding qualified privilege, and answer subpart

(c) in the affirmative. Further, we vacate the order granting the plaintiff a partial summary judgment and remand for further proceedings not inconsistent with this order.

¶ 45 Certified question answered in part; order vacated.