NOTICE
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2019 IL App (5th) 180013-U

NO. 5-18-0013

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

JOHN W. MADDEN,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee and Cross-Appellant,	)	Williamson County.
	)	
v.	)	No. 15-L-283
	)	
MENARD, INC.,	)	Honorable
	)	Brad K. Bleyer,
Defendant-Appellant and Cross-Appellee.	)	Judge, presiding.

JUSTICE CATES delivered the judgment of the court.
Justices Welch and Chapman concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in entering judgment in favor of John Madden for slander per se on count IV of Madden's second amended complaint.

¶ 2 Menard, Inc. (Menards), appeals from the trial court's judgment entered in favor of John Madden in the amount of $20,000 on count IV of Madden's second amended complaint. We affirm.

¶ 3 BACKGROUND

¶ 4 Menards is a privately held corporation which operates home improvement stores. On September 6, 2015, Madden accompanied his friends, John Wall (Wall) and Christine Wall, to a Menards store in Marion, Illinois, to purchase supplies Wall needed for a home improvement project. Shortly after 1 p.m., Wall and Madden approached a check-out lane with four 8-foot wall

dividers, four tubes of liquid nails, and several 4 x 8 sheets of paneling. The cashier, Brianna Gaddis, scanned the wall dividers and the liquid nails, and then totaled the order. Wall slid his Menards' credit card through the credit card reader, signed the electric credit card pad, and a receipt printed. At trial, Madden admitted into evidence a receipt showing that Wall had paid for the wall dividers and liquid nails.

¶ 5 In a separate second transaction, Wall attempted to purchase the sheets of paneling using a different credit card. Wall's card was declined, and the transaction was suspended. Kaitlin Williams, the head cashier, brought the suspended transaction up on a different register for Wall to pay. While the second transaction was being attempted, Madden removed the already purchased wall dividers and liquid nails from the check-out lane and took them outside to his vehicle. Madden returned to the store, where Wall was still attempting to complete the second purchase. Wall's card was repeatedly declined and, ultimately, the second transaction was never completed. Madden subsequently left the store with John and Christine Wall without the sheets of paneling. After exiting the store, Gaddis informed Williams that she believed Madden had left the store with unpaid merchandise. Williams followed Madden to the parking lot and wrote down Madden's license plate number.

¶ 6 The following week, Brian Millette, the electrical department manager, was informed of the incident and instructed to investigate. Millette obtained written accounts of the incident from Williams and Gaddis, both of whom indicated that they believed Madden had left the store with unpurchased merchandise. Millette testified that Williams advised him that all the transactions involving Wall were voided and there were no completed transactions for the incidents. Millette testified he reviewed the surveillance video of the incidents and believed the video corresponded to Williams' written account.

¶ 7 Millette stated that the surveillance video showed multiple attempted transactions wherein Wall's credit card was declined. During these attempts, Madden picked up some merchandise from the check-out lane and left the store with it. Millette testified that a "receipt" prints out both when a transaction is successfully completed, and when a transaction is voided. Millette stated that when he saw the receipt print out on the surveillance video, he believed it was a voided transaction based on Williams' statement that no transaction had been successfully completed. Millette testified he could not tell from the video alone whether the transaction was successfully completed, or had been voided. In order to confirm whether a transaction was successful or voided, one would have to check the computer purchase data. Millette was unable to personally review the computer purchase data for the transactions, so he asked Williams, who had access to the computer system, to provide him the data. Millette testified that Williams showed him evidence of several voided transactions. Millette stated that Williams only showed him voided transaction data, so he believed all the transactions had been unsuccessful. Millette informed the general manager that he believed Madden had left the store with unpaid merchandise.

¶ 8 Millette contacted the police, and Officer Scott Morse responded to the call. Millette testified he showed Officer Morse the statements of Williams and Gaddis, and the surveillance video of the transactions. Based on the information Menards provided to him, Officer Morse completed an affidavit of probable cause asserting Madden had committed retail theft by removing merchandise from Menards' store without paying for it. On October 19, 2015, the Williamson County State's Attorney filed an information in cause number 15-CM-675, charging Madden with retail theft, a Class A misdemeanor, from Menards for leaving the store with merchandise without purchasing it.

¶ 9 John Mehlbrech, the general manager of the store, testified that on November 2, 2015, Madden came into the store with a receipt showing that the items alleged to have been stolen by Madden had been paid for by Wall. Using the time stamped on the receipt, Mehlbrech was able to review the video and confirm that Madden had not stolen any merchandise. Based on this information, Mehlbrech called the State's Attorney's office to request that the charges against Madden be dropped. An employee at the State's Attorney's office instructed Mehlbrech to send him the request and information on company letterhead. That day, Mehlbrech drafted and faxed a letter to the State's Attorney's office requesting that the charges for retail theft against Madden be dismissed. On November 4, 2015, the State's Attorney filed a motion to nol-pros in cause number 15-CM-675. On November 6, 2015, a judge signed an order granting the State's motion.

¶ 10 On November 16, 2015, Madden filed a one-count complaint against Menards alleging defamation based on Menards' employees falsely accusing him of retail theft. On December 21, 2015, Menards filed a combined motion to dismiss the complaint pursuant to sections 2-615 and 2-619 of the Code of Civil Procedure (735 ILCS 5/2-615, 2-619 (West 2014)). In its section 2-619 motion, Menards asserted that Madden's defamation claim was barred by the doctrine of absolute privilege because his claim was based upon statements made to a police officer for the purpose of instituting criminal proceedings. On March 7, 2016, the trial court dismissed Madden's complaint pursuant to section 2-619 based on a finding that Madden's defamation claim was barred by absolute privilege.

¶ 11 On March 8, 2016, Madden filed his first amended complaint bringing two new counts. Counts II and III both alleged that Menards was negligent in training its employees and in investigating the alleged theft. Count III included an additional allegation that Menards acted with conscious disregard and utter indifference by failing to take affirmative action to assist Madden in

expunging his criminal record related to the incident. The amended complaint contained the following allegations:

> "7. John Madden did not commit the crime of retail theft as alleged in the criminal 'Information.'
>
> 8. John Madden did not commit the acts described by Marion Police Officer Scott Morse in his Affidavit of Probable Cause."

¶ 12 On July 29, 2016, Menards filed its answer to Madden's first amended complaint. With regard to the allegations in paragraphs 7 and 8, Menards asserted it was "without information sufficient as to sustain a belief as to the allegations" contained in each paragraph and "therefore denies the same."

¶ 13 On May 4, 2017, Menards filed a motion for summary judgment on counts II and III of the amended complaint. On May 17, 2017, Madden filed a response to Menards' motion for summary judgment, and a cross-motion for summary judgment. On August 1, 2017, the trial court entered summary judgment in favor of Menards on count III of the first amended complaint, and denied Menards' motion as to count II and Madden's cross-motion.

¶ 14 On September 27, 2017, Madden filed a second amended complaint. As part of this amendment, Madden added an additional count. In count IV, Madden alleged that Menards' answer to the first amended complaint, wherein Menards "denied" the allegations set forth in paragraphs 7 and 8, harmed Madden's reputation. Madden alleged that Menards' denials constituted public statements asserting Madden was guilty of retail theft despite Menards knowing that such assertions were not true, and prayed for damages "consistent with *per se* slander."

¶ 15 On November 15, 2017, the trial court entered a docket entry granting Madden relief under count IV of his second amended complaint, finding Madden had pled and proven a valid cause of

action for "slander *per se* and/or intentional infliction of emotional distress." The court awarded Madden $20,000 for "actual and presumed damages." The court denied Madden relief under count II, finding it to be a claim for negligent infliction of emotional distress and finding that Madden had failed to prove the necessary damages. The court ordered Madden's attorney to submit a written judgment. On December 12, 2017, the trial court entered a written judgment stating only that the court found "in favor of [Madden] and against [Menards]" and "that [Madden] sustained damages in the amount of $20,000." This appeal follows.

¶ 16 DISCUSSION

¶ 17 On appeal, Menards argues the trial court erred in finding Madden had proven a claim for slander *per se* or intentional infliction of emotional distress. Menards also maintains the trial court erred in failing to find that Madden's claim was barred by the statute of limitations and absolute privilege. Madden filed a cross-appeal arguing that the trial court erred in finding that count II of his second amended complaint was a claim for negligent infliction of emotion distress and denying him judgment on this basis. In his brief, Madden stated that, in the event this court affirms the trial court's judgment on count IV, he would withdraw his cross-appeal.

¶ 18 This court will begin by addressing Menards' argument the trial court erred in finding that Madden proved his claim of slander *per se*. To sustain a claim for defamation, a plaintiff must demonstrate that the defendant made a defamatory statement about the plaintiff, the defendant made an unprivileged publication of that statement to a third party, and the publication caused damages. *Green v. Rogers*, 234 Ill. 2d 478, 491 (2009). "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 or deters the community from associating with her or him." *Green*, 234 Ill. 2d at 491. A statement is defamatory *per se* if the statement is so obviously and materially harmful on its face that injury to

the plaintiff's reputation may be presumed. The plaintiff need not plead or prove actual damage to his reputation in order to recover for statements which are defamatory *per se*. *Moore v. People for the Ethical Treatment of Animals, Inc.*, 402 Ill. App. 3d 62, 68 (2010). Whether a statement constitutes slander *per se* is a question of law. *Suhadolnik v. City of Springfield*, 184 Ill. App. 3d 155, 186 (1989); *Leyshon v. Diehl Controls North America, Inc.*, 407 Ill. App. 3d 1, 5 (2010).

¶ 19 There are five categories of statements that are considered actionable *per se*: (1) those imputing that the person has committed a crime, (2) those imputing that a person is infected with a loathsome communicable disease, (3) those imputing that a person is unable to perform or lacks integrity in performing his employment duties, (4) those imputing that a person lacks ability or otherwise prejudices a party in his profession, and (5) those imputing that a person has engaged in adultery or fornication. *Green*, 234 Ill. 2d at 491-92. To constitute defamation per se based on imputing the commission of a crime, the words used must fairly impute the commission of a crime. *Moore*, 402 Ill. App. 3d at 69.

¶ 20 Menards argues that its statements denying the allegations set forth in Madden's first amended complaint because it was "without information sufficient to sustain a belief as the allegations" were not tantamount to accusing Madden of committing a crime. Menards contends it had not seen either the criminal information or the police officer's affidavit of probable cause when it filed its answer and, therefore, its answer and denials were appropriate.

¶ 21 The evidence at trial, however, was that Menards knew at the time of filing its answer that Madden had not committed retail theft by leaving the store with unpaid merchandise, as it had accused him of doing. In his complaint, Madden set forth the facts surrounding the officer's affidavit and the criminal information. Madden alleged that on or around October 19, 2015, he was made the subject of a criminal information alleging he committed the crime of retail theft at the

Menards store located in Marion in September 2015. Madden alleged that the information was filed as a result of the affidavit of probable cause signed by Officer Morse and that Morse relied upon the information provided to him by Menards. Based on the record and the pleadings, Menards' statements in response to Madden's allegations fairly impute that Madden committed a retail theft at its Marion store in September 2015.

¶ 22 We also reject Menards' argument that Madden's claim fails because the statements are capable of an innocent construction. The innocent construction rule provides that statements are not actionable *per se*, if the alleged defamatory statement does not by itself denote criminal conduct and the statement, in common usage, has a more flexible and broader meaning. *Moore*, 402 Ill. App. 3d at 70. The court must consider the statements in context, with the words and the implications therefrom given their natural and obvious meaning. *Moore*, 402 Ill. App. 3d at 70. Whether the statement is entitled to an innocent construction, is a question of law, which is reviewed *de novo*. *Moore*, 402 Ill. App. 3d at 70.

¶ 23 Construing Menards' denial that Madden did not commit the retail theft as set forth in the information and the affidavit of probable cause in its natural and obvious sense, we find Menards' statements cannot be given an innocent construction. The allegations in Madden's complaint are clear: Menards accused Madden of committing retail theft but Menards' determination that Madden had done so was incorrect. In its answer, Menards essentially denied that its determination that Madden had committed retail theft was incorrect. Viewed in context, the clear inference of Menards' statement is that Madden may have stolen from one of its stores.

¶ 24 Based on the foregoing, the trial court did not err in finding that Madden had pled and proven a cause of action for slander *per se* and in awarding Madden $20,000 in damages. In light of this court's finding that the trial court did not err in entering judgment in Madden's favor on his

claim for slander *per se*, this court need not address Menards' claim on appeal that the trial court erred in finding that Madden had also pled and proven a claim for intentional infliction of emotional distress.

¶ 25 Next, Menards asserts that Madden's claim is barred by two affirmative defenses, the statute of limitation and absolute litigation privilege. Menards contends the trial court erred by failing "to determine" that Madden's slander claim was barred by the one-year statute of limitations. Menards also argues the trial court erred by failing "to recognize" the absolute privilege associated with written statements made by parties in judicial proceedings.

¶ 26 The statute of limitations and absolute litigation privilege are affirmative defenses, and the burden of pleading and proving the defenses is on the defendant. *Trzop v. Hudson*, 2015 IL App (1st) 150419, ¶ 68 (burden of pleading and proving affirmative defenses is on the party asserting it); *Goldman v. Walco Tool & Engineering Co.*, 243 Ill. App. 3d 981, 989 (1993) (statute of limitations is an affirmative defense); *Razavi v. Walkuski*, 2016 IL App (1st) 151435, ¶ 12 (privilege is an affirmative defense). A defendant can raise an "affirmative matter," either in a section 2-619 motion within the time for pleading, or in their answer as an affirmative defense, or in both a motion and the answer. 735 ILCS 5/2-619(a), (a)(9), (d) (West 2016); *Trzop*, 2015 IL App (1st) 150419, ¶ 68. Facts constituting any affirmative defense, which if not expressly stated in the pleading that would be likely to take the opposite party by surprise, must be plainly set forth in the answer or reply. 735 ILCS 5/2-613(d) (West 2016); *Enterprise Recovery Systems, Inc. v. Salmeron*, 401 Ill. App. 3d 65, 75-76 (2010). If the defendant fails to timely plead an affirmative defense, he is deemed to have waived the defense. *Athans v. Williams*, 327 Ill. App. 3d 700, 705 (2002). The defense is waived even if the evidence suggests the existence of the defense. *Athans*, 327 Ill. App. 3d at 705.

¶ 27 The statute of limitations for a claim of defamation, including slander *per se*, is one year. 735 ILCS 5/13-201 (West 2016); *Moore*, 402 Ill. App. 3d at 73. Menards filed its answer to Madden's first amended complaint on July 29, 2016. Madden did not file his second amended complaint raising the claim regarding Menards' statements within that pleading until September 27, 2017, well after the one-year limitations period had run. During oral argument before this court, Menards' acknowledged that it waived the statute of limitations defense by failing to raise it in the trial court.

¶ 28 Menards continues to maintain, however, that it preserved the defense of absolute privilege by raising the defense in its 2-619 motion to dismiss filed in response to Madden's original complaint. Menards' position is without merit.

¶ 29 Absolute litigation privilege provides that attorneys and parties to a litigation are absolutely privileged to publish defamatory statements in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as part of, a judicial proceeding in which he participates if it has some relation to the proceeding. *Johnson v. Johnson & Bell, Ltd.*, 2014 IL App (1st) 122677, ¶ 15; *Doe v. Williams McCarthy, LLP*, 2017 IL App (2d) 160860, ¶ 19. The purpose of the privilege is to allow attorneys freedom in their efforts to secure justice for their clients and the privilege facilitates the free flow of information between attorneys, clients, and the court system. *Williams McCarthy, LLP*, 2017 IL App (2d) 160860, ¶ 19. Illinois law recognizes that this privilege extends to statements made to law enforcement officers for the purpose of instituting legal proceedings. *Layne v. Builders Plumbing Supply Co.*, 210 Ill. App. 3d 966, 970-72 (1991); *Razavi*, 2016 IL App (1st) 151435, ¶ 12. Absolute privilege is afforded to persons who report crimes because it furthers public service and the administration of justice. *Razavi*, 2016 IL App (1st) 151435, ¶ 13.

¶ 30 In its section 2-619 motion filed in response to Madden's original complaint, Menards raised the affirmative defense of absolute privilege of statements made *to police officers* for the purpose of instituting criminal proceedings. The trial court granted Menards' motion on this basis and dismissed Madden's original one-count complaint for defamation. Menards argues that once the defense was raised and ruled upon, it was unnecessary for it to raise the defense again as to count IV of the second amended complaint. On appeal, however, Menards seeks to bar count IV of Madden's second amended complaint because the slanderous statements were made by parties in a judicial proceeding. To avoid taking the opposite party by surprise, the party asserting an affirmative defense must set forth the facts constituting the defense in the 2-619 motion or in the answer or reply. 735 ILCS 5/2-613(d) (West 2016); *Salmeron*, 401 Ill. App. 3d at 75-76. At no point in the trial court did Menards advise the court or Madden that it believed its statements made during the course of litigation, as opposed to statements it made to a police officer preceding litigation, would or should be covered by the privilege. Although it is clear that the statements made by Menards in its answer to Madden's first amended complaint are absolutely privileged, Menards waived this defense by failing to raise it in the trial court.

¶ 31 Based on the foregoing, the trial court's order entering judgment in favor of Madden on count IV of his second amended complaint is affirmed. Because the trial court's judgment as to count IV is affirmed, this court need not address the issues raised in Madden's cross-appeal.

¶ 32 Affirmed.