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APPELLATE COURT 4TH DISTRICT

No. 4-23-0143

IN THE APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT

	)	Appeal from the Circuit
	)	Court of Seventeenth
	)	Judicial Circuit Boone
	)	County, Illinois
	)	Law Division
	)	
RMS INSURANCE SERVICES, INC.,	)	
an Illinois corporation d/b/a FLANDERS	)	
INSURANCE AGENCY, INC., and	)	
OWEN G. COSTANZA, an individual,	)	
	)	
Plaintiffs	)	
	)	
v.	)	Case No. 2021 L 30
	)	
DONALD G. SATTLER, an individual,	)	
MARION THORNBERRY, an individual,	)	
ELISABETH M. RODGERS, an individual,	)	
and CHERYL RUSSELL-SMITH, an	)	
individual,	)	
Defendants.	)	

CORRECTED **BRIEF OF PLAINTIFFS - APPELLANTS, RMS INSURANCE SERVICES, INC. & OWEN G. COSTANZA**

Oral Argument Requested

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NATURE OF THE CASE

This action was brought for defamation *per se*, tortious interference with prospective business advantage, tortious interference with contract, and civil conspiracy.

ISSUES PRESENTED FOR REVIEW

(1) Whether the trial Court erred in granting Defendants' motion to dismiss and summary judgment in favor of Defendants and against Plaintiffs.

JURISDICTION

Pursuant to Illinois Supreme Court Rule 303 this appeal is taken from a final judgment of the Circuit Court of Boone County entered on January 18, 2023. Appellants filed their Notice of Appeal on February 13, 2023.

STATUTES INVOLVED

735 ILCS 110/) Citizen Participation Act.

735 ILCS 5/2-615.

735 ILCS 5/2-619.

735 ILCS 5/2-1005.

I. STANDARD OF REVIEW.

A section 2-615 motion to dismiss (735 ILCS 5/2-615 (West 2002)) challenges the legal sufficiency of a complaint based on defects apparent on its face. *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 364, 290 Ill. Dec. 525, 821 N.E.2d 1099 (2004). Therefore, courts review *de novo* an order

granting or denying a section 2-615 motion. *Wakulich v. Mraz*, 203 Ill. 2d 223, 228, 271 Ill. Dec. 649, 785 N.E.2d 843 (2003).

> "Summary judgment is to be granted only if the pleadings, affidavits, depositions, admissions, and exhibits on file,when reviewed in the light most favorable to the nonmovant,show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Berlin v. Sarah Bush Lincoln Health Center*, 179 Ill. 2d 1, 6-7, 227 Ill. Dec. 769, 688 N.E.2d 106 (1997); 735 ILCS 5/2-1005 (c) (West 1994). Summary judgment is a drastic means of disposing of litigation and therefore it must be clear that the moving party is truly entitled to such remedy. *Id.*, at 7, citing *Jackson Jordan, Inc. v. Leydig, Voit & Mayer,* 158 Ill. 2d 240, 249, 198 Ill. Dec. 786, 633 N.E.2d 627 (1994).

Appellate review of an order granting summary judgment is *de novo.* On *de novo review* [the court is]

> "... free to consider any pleadings, depositions, admissions, and affidavits on file at the time of the hearing regardless of whether facts contained therein were presented to the trial court in response to the motion for summary judgment." *William J. Templeton Co. v. United States Fidelity & Guaranty Co.*, 317 Ill. App. 3d 764, 769, 250 Ill. Dec. 886, 739 N.E.2d 883). " A triable issue of fact exists where there is a dispute as to a material fact or where, although the facts are not in dispute, reasonable minds might differ in drawing inferences from those facts." *Petrovich v. Share Health Plan of Illinois, Inc.*, 188 Ill. 2d 17, 31, 241 Ill. Dec. 627, 719 N.E.2d 756 (1999).

STATEMENT OF FACTS

Plaintiffs, Owen G. Costanza ("Costanza") and RMS Insurance Services, Inc., d/b/a Flanders Insurance Agency ("Flanders") (individually "Plaintiff" and collectively "Plaintiffs") filed their original Complaint in this

matter on October 18, 2021. (C10-C49). The Complaint named Donald G. Sattler ("Sattler"), Marion L. Thornberry ("Thornberry"), Elisabeth M. Rodgers ("Rodgers"), and Cheryl Russell-Smith ("Russell-Smith") as the Defendants (individually "Defendant" and collectively "Defendants"). (C10) The Complaint contains 17 separate counts against the four individual Defendants for Tortious Interference with Prospective Business Advantage, Tortious Interference with Contract, Defamation, and Civil Conspiracy.

Prior to filing suit Plaintiff Costanza lost an election to Defendant Sattler for the position of Village President of Poplar Grove. (C12-C15). Defendant Sattler, as well as Defendants Thornberry and Rodgers distributed a campaign flyer before, during, and after the Village President election, critical to and disparaging of Plaintiff Costanza (the "Flyer," attached to the Complaint as an Exhibit. (C416). The Flyer implies that Costanza committed insurance fraud among other acts listed under the heading, "My Opponents (sic) Criminal Record Is:" (C416). The Flyer lists events that occurred in 1995, 1999, 2000, 2007, 2008, 2010, 2011, 2012, 2014, and 2015. Of the 13 acts listed under the heading "My Opponents (sic) Criminal Record is:," eight (8) are more than 10 years old at the time of the distribution of the Flyer by the Defendants and one is at least 10 years old. Ten of the events are civil, not criminal but are included under the "Criminal Record" headline. (C416).

Despite Sattler's winning of the election, Sattler, Thornberry and Rodgers continued to distribute the Flyer and make defamatory remarks about Costanza's character and fitness for office. (C15, C17, C20).

Defendants Sattler, Rodgers and Thornberry filed their appearances through counsel on December 17, 2021. (C104). Plaintiffs' suit alleges, *inter alia*, damages to Plaintiffs' business and business reputation due to the actions of Defendants. (C21,C22,C24, C26, C27). On January 12, 2022, Defendants filed a Section 2-619 (a)(9) 735 ILCS 110/1. et seq. Motion to Dismiss pursuant to the Illinois Citizen Participation Act. (C108-C186). This motion sought dismissal of Plaintiffs' Complaint on the grounds that it was a so-called "SLAPP" suit (Strategic Lawsuit Against Public Participation).

Also on January 12, 2022, Defendants filed three (3) separate Section 2-615 Motions to Dismiss. (C187-C380). The first 2-615 Motion was directed against Counts 1-3 of the Complaint. (C187- C251). The second 2-615 Motion (C252-C317) was directed against counts 5,6,7, and 9. (C252). The third Section 2-615 Motion (C318-C380) was directed against counts 11, 12, 13, 15, 16 and 17 of the Complaint. (C318).

The three Section 2-615 Motions contain much the same if not identical exhibits. These exhibits are also much the same, if not, the same exhibits in support of Defendants' SLAPP Motion to Dismiss. (C126-C186), (C197-C251) [54 pagers of exhibits], (C263-C317) [54 pages of exhibits], and

(C326-C380) [54 pages of exhibits]. The Defendants' SLAPP Motion did not contain an affidavit.

On March 4, 2022, Plaintiffs filed their response to the Defendants' SLAPP Motion to Dismiss. (C391-C 468). This response included Costanza's affidavit in opposition to the motion. (C405-C419). Defendants attached no affidavits to their SLAPP Motion. Defendants filed their affidavits with their reply. Defendants' affidavits all admit that the individual Defendants intend to hinder Costanza's career in local politics. (C508-C509), (C510-C511), (C512-C513).

On March 18, 2022, Defendants filed their Reply in Support of the SLAPP Motion. (C471-C513).

On March 25, 2022, the Trial Court, Ronald A. Barch presiding, heard the SLAPP Motion and took the matter under advisement. (C6). The record also reflects that Plaintiffs voluntarily dismissed Defendant Russell-Smith on this date, as well. (C6).

On April 4, 2022, the Trial Court, Ronald A. Barch presiding, set the SLAPP Motion for ruling on May 11, 2022. (C7). On April 14, 2022, the Trial Court, Ronald A. Barch presiding, entered the Russell-Smith dismissal order and abated and postponed the previously set briefing and hearing schedule on Defendants three (3) 2-615 Motions. (C517).

On May 11, 2022, the Trial Court, Ronald A. Barch presiding, issued its written Memorandum of Decision and Order on Defendants' SLAPP

Motion, denying Defendants' Motion and holding that there were genuine issues of material fact that required the case go to a jury. (C518-C529). The Court also stated the following regarding the claim that in 1999 Costanza was fired from Liberty Insurance for fraud and misrepresentation:

> "While the statements alone appear facially accurate, in the context of the flyer as a whole, along with other available information suggesting the statement in isolation is misleading and false, the statement is arguably defamatory as Costanza suffered no finding of fraud or misrepresentation. The court declines to find an innocent construction. The statement imputes that Costanza committed acts of fraud and misrepresentation and was terminated from his employment. The statement imputes that he lacks integrity necessary to hold office and prejudices him professionally by undermining his credibility in the eyes of his political and professional constituents. Substantial truth is an affirmative defenses (sic) rather than proof that the Plaintiffs' case is meritless." (C524).

The trial Court also came to similar conclusions regarding the allegations that: (1) In 2007 Costanza pleaded guilty to drunk driving (C525-C526); (2) In 2008 the State of Wisconsin denied Costanza's request for an insurance license due to a false application (C526); (3) In 2010 the State of Indiana fined Costanza for a false application and revoked his insurance license (C526-C527); and (4) In 2012, Costanza filed a fraudulent renewal application with the Illinois Department of Insurance (C527-C528).

The Trial Court, Ronald A. Barch presiding, held:

> "Here, the pleadings, exhibits and attachments give rise to a genuine question of fact as to whether the gist or sting of the allegedly false, misleading and statements and materials is substantially true."C529).

On June 21, 2022, pursuant to Stipulation filed with the Court, Plaintiffs filed their Motion to Amend their Complaint. (C535-C573).

On August 22, 2022, Defendants filed their Motion for Summary Judgment. (C578). No affidavits were attached. Also on August 22, 2022, Defendants filed a "renewed" Section 2-615 Motion to Dismiss Counts 1-3. (C591). Defendants did not renew or pursue the other two Section 2-615 motions previously filed.

In the time period between May 11, 2022 and January 18, 2023, (1) no discovery was conducted by Defendants, (2) Defendants filed no pleadings, only motions, and (3) the Trial Courts made their respective decisions on the identical set of facts, as the Motion for Summary Judgment and the renewed Section 2-615 Motion were based on the same facts that were present before the Trial Court, Ronald A. Barch presiding, on Defendants' SLAPP Motion.

On September 30, 2022, Plaintiffs filed their responses to Defendants' renewed Section 2-615 Motion to Dismiss (C605) and Motion for Summary Judgment, including Costanza's uncontroverted affidavit in opposition to the Summary Judgment Motion. (C619- C644).

On January 18, 2023, after a hearing on November 10, 2022, the Honorable Stephen E. Balogh presiding, entered an order granting both Defendants' Motion for Summary Judgment and renewed Section 2-615 Motion. Both the dismissal and the entry of summary judgment were with prejudice. (C647-C662). In the order granting Defendants' 735 ILCS 5/2-615

Motion to Dismiss Counts 1-3 and their Motion for Summary Judgment, the Trial Court, Honorable Stephen E. Balogh presiding, found the Defendants' statements to be privileged and substantially true as a matter of law and granted Defendants' Motion for Summary Judgment and their Section 2-615 Motion to Dismiss Counts 1-3 with prejudice. (C660-662).

On February 13, 2023, Plaintiffs filed their Notice of Appeal. (C663-666).

II. ARGUMENT.

A. Summary Judgment Was Entered in Error.

The Trial Court, Ronald A. Barch presiding, heard Defendants' arguments in their SLAPP Motion to Dismiss and rejected the balance of them in denying that previous motion. Defendants' Motion for Summary Judgment (the "Motion") presented virtually identical facts and arguments on Plaintiffs' defamation claims that were previously heard by the Court and rejected in Judge Barch's Memorandum of Decision and Order of May 11, 2022. Plaintiffs' tortious interference and civil conspiracy claims were not addressed in the Motion. Those counts are conceded by Defendants. The Motion for Summary Judgment is a thinly veiled Motion for Reconsideration of the Barch Court's denial of the SLAPP Motion to Dismiss rather than a Motion for Summary Judgment.

1. LEGAL STANDARD

> "Summary judgment is to be granted only if the pleadings, affidavits, depositions, admissions, and

exhibits on file, when reviewed in the light most favorable to the nonmovant, show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Berlin v. Sarah Bush Lincoln Health Center*, 179 Ill. 2d 1, 6-7, 227 Ill. Dec. 769, 688 N.E.2d 106 (1997); 735 ILCS 5/2-1005 (c) (West 2000). In conducting our review, "we are free to consider any pleadings, depositions, admissions, and affidavits on file at the time of the hearing regardless of whether facts contained therein were presented to the trial court in response to the motion for summary judgment." *William J. Templeton Co. v. United States Fidelity & Guaranty Co.*, 317 Ill. App. 3d 764, 769, 250 Ill. Dec. 886, 739, N.E. 2d 883, 920)." A triable issue of fact exists where there is a dispute as to a material fact or where, although the facts are not in dispute, reasonable minds might differ in drawing inferences from those facts." *Petrovich v. Share Health Plan of Illinois, Inc.*, 188 Ill. 2d 17, 31, 241 Ill. Dec. 627, 719 N.E.2d 756 (1999).

2. <u>THE STATUTE</u>

735 ILCS 5/2-1005 provides:

> Sec. 2-1005. Summary judgments. (a) For plaintiff. Any time after the opposite party has appeared or after the time within which he or she is required to appear has expired, a plaintiff may move with or without supporting affidavits for a summary judgment in his or her favor for all or any part of the relief sought.
>
> (b) For defendant. A defendant may, at any time, move with or without supporting affidavits for a summary judgment in his or her favor as to all or any part of the relief sought against him or her.
>
> (c) Procedure. The opposite party may prior to or at the time of the hearing on the motion file counteraffidavits. The judgment sought shall be rendered without delay if 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. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Summary determination of major issues. If the court determines that there is no genuine issue of material fact as to one or more of the major issues in the case, but that substantial controversy exists with respect to other major issues, or if a party moves for a summary determination of one or more, but less than all, of the major issues in the case, and the court finds that there is no genuine issue of material fact as to that issue or those issues, the court shall thereupon draw an order specifying the major issue or issues that appear without substantial controversy, and directing such further proceedings upon the remaining undetermined issues as are just. Upon the trial of the case, the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of affidavits. The form and contents of and procedure relating to affidavits under this Section shall be as provided by rule.

(f) Affidavits made in bad faith. If it appears to the satisfaction of the court at any time that any affidavit presented pursuant to this Section is presented in bad faith or solely for the purpose of delay, the court shall without delay order the party employing it to pay to the other party the amount of the reasonable expenses which the filing of the affidavit caused him or her to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(g) Amendment of pleading. Before or after the entry of a summary judgment, the court shall

> permit pleadings to be amended upon just and reasonable terms. (Source: P.A. 84-316.)

B. <u>The Purpose of Summary Judgment.</u>

The purpose of summary judgment is not to try an issue of fact, but to determine whether a triable question of fact exists. (See, *e.g., Hadley v. Witt Unit School District 66 (1984), 123 Ill. App. 3d 19, 23, 462 N.E.2d 877, 880-81.*) *Miller v. Smith,* 137 Ill. App. 3d 192, 196, 484 N.E.2d 492 (5th Dist. 1985).

In this matter, in determining whether a genuine issue of material fact existed, the Balogh court (i) considered inadmissible evidence (R13, lines 3 and 4) and (ii) items of secondary importance immaterial to the allegedly defamatory statements (R12, lines 7-9) in deciding and granting Defendants' Motion for Summary Judgment. Article VI of the Judicial Article of the Illinois Constitution of 1970, provides for a unified, three-tiered judiciary - Circuit Court, Appellate Court, and Supreme Court. There is no mention of administrative hearing boards, or regulatory agencies as part of the three-tiered system. It follows that these types of tribunals are subordinates to the jurisdiction of the Courts and therefore secondary in nature and importance. The specific findings mentioned by Defendants resulted in nothing more than one delay in processing a license application and some fines in other instances. Plaintiff Costanza continues to hold insurance licenses. Therefore, these items are immaterial to the determination of the defamatory nature of the Flyer. The Balogh Court exceeded the scope of purpose of summary judgment and therefore erred in granting Defendants' motion.

C. <u>A Finding of Genuine Issues of Fact Precluding Summary Judgment is a Matter of Record.</u>

In order to preclude entry of summary judgment the factual issue must be "material." (*Macmor Mortgage Corp. v. Exchange Nat'l Bank,* 30 Ill. App. 3d 734, 332 N.E.2d 740 (1st Dist 1975). *Boylan v. Martindale,* 103 Ill. App. 3d 335, 340, 431 N.E.2d 62 (2nd Dist. 1982).

The factual issues found by the Barch Trial Court to be in dispute are central to the determination of Plaintiffs' defamation claims, precluding entry of summary judgment. A triable issue of fact exists. On the same set of facts the Barch Court found genuine issues of fact requiring the case to go to the jury on the questions of substantial truth. (C518-C529). The Honorable Stephen E. Balogh found no genuine issues of material fact and entered summary judgment. The Balogh Court also granted Defendants renewed 2-615 Motion with prejudice. (C647-C662). A triable issue exists where there is a dispute as to a material fact or where, although the facts are not in dispute, reasonable minds might differ in drawing inferences from those facts." *Petrovich v. Share Health Plan of Illinois, Inc.*, 188 Ill. 2d 17, 31, 241 Ill. Dec. 627, 719 N.E.2d 756 (1999).

On May 11, 2022 the Trial Court, Honorable Ronald Barch presiding, held, *inter alia*:

> "In summary, the court finds that the Defendants have proven that some of the statements attributed to them are truthful, making tort claims based upon those statements separately and individually meritless as a matter of law. As to the balance of statements attributed to the Defendants, however, whether the

> statements are blatantly false, partially false or substantially true and whether the statements were intended and understood to be false, misleading, defamatory and injurious to Plaintiffs are questions of fact for the jury. It will be up to a jury to determine whether Plaintiffs suffered tortious injury from statements and materials that comingled arguably true statements that are facially untrue, arguably false or substantially true. Whether allegedly defamatory materials are substantially true is normally a jury question. *Kopolovic v. Shah*, 2012 IL App (2d) 110383 ¶ 43 (2012). Here, the pleadings, exhibits and attachments give rise to a genuine issue of fact as to whether the gist or sting of the allegedly false, misleading and statements and materials is substantially true. Because the Defendants have failed to demonstrate that all of Plaintiffs' claims are meritless, the Defendants have failed to carry their burden of proving that Plaintiffs' lawsuit is a SLAPP. Defendants' Section 2-619 motion to dismiss is therefore denied." (C529)

On January 18, 2023, the Trial Court, Honorable Stephen Balogh presiding, on identical facts as May 11, 2022, there having been no discovery whatsoever and no answer, affirmative defenses, or counterclaims filed, found *inter alia*:

> "Therefore, the court finds that the statements made by the defendants in regard to Costanza were and are privileged because they concern a matter of public interest and involve a public person. The statements are, as discussed above, factual in nature and substantially true." (C662).

When Plaintiffs' counsel raised the Barch Court's prior finding of genuine issues of material fact, Judge Balogh responded as follows:

> MR. DONOHUE: Well, there's been -- in the SLAPP motion, there's a finding of record that --
>
> THE COURT: So what? I'm not bound by that.

> MR. DONOHUE: Well, there are found that there's genuine issues here and this last motion --
>
> THE COURT: No. They found that your suit wasn't meritless. (R10, LL21-24; R11, LL1-3).

This statement by Judge Balogh is incorrect and contradictory to the express statement by the Barch Court.

> "Here, the pleadings, exhibits and attachments give rise to a genuine issue of fact as to whether the gist or sting of the allegedly false, misleading and statements and materials is substantially true." (C529).

The Balogh Court reinforced its position on the Barch Court ruling at the November 10, 2022 hearing:

> MR. MADONIA: Because what they say, Judge, is they say half truths and innuendoes that lead someone down to a path that's a dead end just as the judge said; they decline to find it. That it was -- it was this allegation and this assumption that his license was permanently denied. It wasn't. It issued as they said.
>
> THE COURT: You're adding so much to that statement.
>
> MR. MADONIA: I'm reading right from the opinion, Judge.
>
> THE COURT: His opinion is not binding on me. That opinion is meaningless. (R40, lines 6-16).

The present situation is exactly the type contemplated by Petrovich.

There can probably be no better example of a "reasonable mind" than that of a Circuit Court Judge. Here, two very experienced judges came to opposite conclusions based on the same facts. Not only were these two judges examining the same facts but they were sitting in the same courtroom in the same circuit on the same case. All that is required to find a triable issue and

preclude summary judgment is the possibility that reasonable minds might differ in drawing inferences. The mere possibility is enough to preclude summary judgment. Here the two reasonable minds actually drew different inferences from the same facts. This alone merits reversal under Petrovich.

D. Summary Judgment is Viewed as a "Drastic Remedy."

Summary judgment is recognized to be a drastic remedy, which is properly granted only where the movant's right to it is clear and free from doubt. *O'Banner v. McDonald's Corp.*, 273 Ill. App. 3d 588, 591 (1st Dist 1995). Golden Rule Ins. Co. v. Schwartz, 203 Ill. 2d 456, 467, 272 Ill. Dec. 176, 786 N.E.2d 1010 (2003).

> "It is a drastic means of disposing of litigation, and this court has a duty to construe the record strictly against the movant and liberally in favor of the nonmoving party." *Majca v. Beekil*, 183 Ill. 2d 407, 416, 233 Ill. Dec. 810, 701 N.E.2d 1084 (1998). Summary judgment should not be allowed unless the moving party's right to judgment is clear from doubt, because plaintiffs are not required to prove their cases at the summary judgment stage. *Jackson v. TLC Associates, Inc.*, 185 Ill. 2d 418, 424, 235 Ill. Dec. 905, 706 N.E.2d 460 (1998), Murray v. Chicago Youth Center, 224 Ill. 2d 213, 245-246, 309 Ill. Dec. 310, 864 N.E.2d 176 (2007).
>
> "Although summary judgment is an expeditious method of disposing of a lawsuit, it is a drastic remedy and should be allowed only when the right of the moving party is free and clear from doubt." *Petrovich v. Share Health Plan of Illinois, Inc.*, 188 Ill. 2d 17, 31, 241 Ill. Dec. 627, 719 N.E.2d 756 (1999).

Construing the record strictly against the Defendants results in finding genuine issues of material fact regarding the defamation claims, precluding entry of summary judgment. Plaintiffs are not required to prove their case at pleading or at summary judgment. *Murray, supra.* The Balogh Court, however, appears to have held Plaintiffs to this proof standard at the November 10, 2022 hearing.

> THE COURT: Show me -- tell me one single untrue statement. (R15, lines3 &4)

The grant of Summary Judgment should be reversed.

E. <u>Defendants Failed to Show Their Right to Summary Judgment is Not Clear Nor Free From Doubt.</u>

> The moving party must show that his right to summary judgment is free from doubt (*Elliott v. Chicago Title Insurance Co.*, 123 Ill. App. 3d 226, 231, 462 N.E.2d 640 (1984)) and inferences which may be reasonably drawn from the evidence are resolved in favor of the nonmovant. *Rubin v. City National Bank & Trust Co.,* 81 Ill. App. 3d 1020, 1022, 402 N.E.2d 281 (1980). Where the record reveals a genuine issue of material fact, the motion for summary judgment should be denied." *Frazier v. Smith & Wesson,* 140 Ill. App. 3d 963, 967, 489 N.E.2d 495 (1st Dist. 1986).

All inferences that could be drawn must be drawn in Plaintiffs' favor, resulting in the denial of Defendants' Motion. The record illustrates that two separate Circuit Court judges came to opposite rulings on the denial of Defendants' SLAPP Motion to Dismiss (Barch Court) and the granting of the Defendants' Motion for Summary Judgment and Motion to Dismiss Counts 1-3 (Barch Court). These two decisions were decided on the same

facts and pleadings. Thus, a triable issue exists precluding entry of Summary Judgment. This merits reversal and requires the case proceed to trial.

F. <u>Entry of Summary Judgment in favor of Defendants Should be Reversed.</u>

In looking at a motion for summary judgment the motion should be viewed in the light most favorable to the non-moving party.

> Summary judgment should be granted when "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 the moving "party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005 (c) (West 2002). However, summary judgment is a drastic measure and should only be granted when the moving party's right to judgment is clear and free from doubt. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.,* 154 Ill. 2d 90, 102 (1992). Thus, all evidence before a court considering a summary judgment motion must be considered in the light most favorable to the nonmoving party (*In Re Estate of Hoover*, 155 Ill. 2d 402, 410-11 (1993)), and summary judgment should be denied not only if there are disputed facts, but also if reasonable people could draw different inferences from the undisputed facts." *Wood v. National Liability & Fire Insurance Co.,* 324 Ill. App. 3d 583, 585 (2001)*,* *Bourgonje v. Machev*, 362 Ill. App. 3d 984, 994, 298 Ill. Dec 953, 841 N.E.2d 96, 105-106 (2005).

With no new facts before it the Balogh Court granted the Motion for Summary Judgment. Entry of summary judgment was inappropriate.

Three of the items listed on the Flyer were inadmissible and should not be considered in deciding a motion for summary judgment. Viewing all of the

evidence before the Court in the light most favorable to Plaintiffs required that the Balogh Court exclude all of the inadmissible evidence before it:

> 1995, pleads guilty to filing a false report in Boone County. (R18, Lines 2-3),
>
> In 1999 Costanza pled guilty to writing bad checks. (R20,Lines 8-9), and
>
> In 2007 Costanza pled guilty to drunk driving.

The Balogh Court in reaching its decision considered inadmissible evidence. This is reversible error. When Plaintiffs' counsel pointed out that those events were inadmissible, Judge Balogh's response was "So ?"

> MR. DONOHUE: On misdemeanors that were both over ten years old.
>
> THE COURT: So?
>
> MR. DONOHUE: They're not admissible.
>
> THE COURT: They're not admissible but they're not false. (R page 12, LL 23-24, R page 13, LL 1-4)

The mandate of Illinois Rule of Evidence 609 (b) is clear: No evidence of a conviction more than 10 years old is admissible:

> IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME
>
> (b) Time Limit. Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of conviction or of the release of the witness from confinement, whichever is the later date.
> Adopted September 27, 2010, eff. January 1, 2011; comment amended Jan. 6, 2015, eff. immediately.

Looking at all of the evidence before the Court in the light most favorable to the Plaintiffs, the Balogh Court erred in not excluding all of the evidence of convictions that were over 10 years old pursuant to Illinois Rule of Evidence 609(b). The order entering summary judgment should be reversed.

G. Under *Parker v. House O'Lite Corp.,* the Flyer is not Substantially True and the Balogh Court Erred in Construction and Application of the "Gist" or "Sting" Doctrine in Finding the Flyer Substantially True.

The Balogh Court erred in finding Substantial Truth.

> An allegedly defamatory statement is not actionable if it is substantially true, even though it is not technically accurate in every detail. *Cianci v. Pettibone Corp.*, 298 Ill. App. 3d 419, 424, 698 N.E.2d 674, 232 Ill. Dec. 583 (1998). A defendant bears the burden of establishing the "substantial truth" of her assertions, which she can demonstrate by showing that the "gist" or "sting" of the defamatory material is true. *Cianci* 298 Ill. App. 3d at 424. When determining the "gist" or "sting" of allegedly defamatory material, a trial court must "look at the highlight of the article, the pertinent angle of it, and not to items of secondary importance which are in offensive details, immaterial to the truth of the defamatory statement." *Gist v. Macon County Sheriff's Dept.,* 284 Ill. App. 3d 367, 370, 671 N.E.2d 1154, 219 Ill. Dec. 701 (1996). The defense of substantial truth normally is a jury question. But, first, courts must ask whether a reasonable jury could find substantial truth has not been established. If the answer is no, the question is one of law, subject to de novo review. *Cianci*, 298 Ill. App. 3d at 424. Parker v. House O'Lite Corporation, 324 Ill. App. 3d 1014, 1026, 258 Ill. Dec. 304, 756 N.E.2d 286 (2001).

The Barch court found genuine issues of fact regarding substantial truth requiring a jury to make the ultimate determination. (C529). A reasonable inference to be drawn from this is that the Barch Court asked whether a reasonable jury would find that substantial truth has been established. It follows that the Barch Court found the question to be a factual inquiry to be determined by the jury, consistent with *Parker, supra.* At hearing, the Balogh Court dismissed Plaintiffs' arguments that Defendants misinterpreted the "gist' or "sting" of their Flyer. When determining the "gist" or "sting" of allegedly defamatory material, a trial court must "look at the highlight of the article, the pertinent angle of it, and not to items of secondary importance which are inoffensive details, immaterial to the truth of the defamatory statement." *Parker, supra.* The highlight of the Flyer is the wording "Insurance Fraud," actually highlighted and set forth below the "My Opponents (sic) Criminal Record Is:" headline.

The pertinent angle is that the Defendants want the residents of Poplar Grove to frame Costanza as a criminal in their minds. The fact that several of the items are civil, rather than criminal are items of secondary importance not to be considered when determining the "gist" or "sting" of the article. Removing the inadmissible statements and the civil matters of secondary importance leaves a Flyer that implicates Costanza as a criminal. Based on the consideration of inadmissible evidence set forth above (R18, lines 2-3), (R20, lines 8-9), and (R20, lines 17-18) which the Balogh Court

expressly stated were inadmissible ("They're not admissible but they're not false." (R13, lines 3-4)) and items of secondary importance immaterial to the truth of the defamatory statement (R12, lines 7-9), the Balogh Court erred in grating summary judgment.

The following are items of secondary nature, inoffensive details and immaterial to the truth of the defamatory statements:

> THE COURT: 1999, terminated from Liberty -- and there's a mistake here. It should say Liberty Mutual Insurance for fraud misrepresentation.
> (R18, lines 7-9);
>
> THE COURT: In 2000 Costanza suffered a home foreclosure in Boone County, Illinois.
> (R20, lines 11-12);
>
> THE COURT: All right. In 2000 Costanza completed a bankruptcy filing.
> (R20, lines 14-15);
>
> THE COURT: In 2008 the State of Wisconsin denies Costanza's request for an insurance license due to a false application.
> (R20, lines 20-22);
>
> THE COURT: In 2010 the State of Indiana fined Costanza for a false application and revoked his insurance license.
> (R21, lines 7-9);
>
> THE COURT: Okay. And then there are three all concerning an Illinois Department of Insurance investigation.
> (R22, lines 6-8);
>
> THE COURT: And in 2015 -- this is the state -- this is the one that matters. In 2015 the Illinois Department of Insurance disciplined and fined Costanza $30,000 for multiple repeat violations. Is that true?
> (R22, lines 121-14); and

> "Well, it's also a civil problem. There's a civil action for fraud. The regulatory departments treat it administratively." (R12, lines 7-8).

The incidents above are all of secondary importance. They were terminations from employment and disciplinary or investigative proceedings that resulted in temporary delays in an application and some civil fines. They are inoffensive details because Plaintiff Costanza never lost his individual licenses. They are immaterial to the truth of the defamatory statement because Owen Costanza is not a criminal. Therefore, taken as a whole these items and the inadmissible evidence should not have been considered by the Balogh Court. Once they are properly excluded what remains are genuine issues of material fact to be determined by a jury at trial, not by the court at summary judgment on the basis of a record devoid of any discovery whatsoever. What is quite telling is that the Balogh Court came to the very same conclusions that the Defendants intended: Plaintiff Costanza is a criminal. The Balogh Court compounded its mistake by granting Defendants' Motion for Summary Judgment.

In arguing these points Plaintiffs' Counsel had the following exchanges with Judge Balogh:

> "THE COURT: Well, I read your brief and that's this idea that it could be construed as false when taken on the whole.
>
> MR. DONOHUE: Right. And it's construed as false after --
>
> THE COURT: How can it be construed as false?

MR. DONOHUE: Well, the entire flyer, if you will, has highlights on it in big bold on the corners that say "Insurance fraud" and the bottom says, you know, stop Mr. Costanza from defrauding our community.

THE COURT: Okay. "We cannot allow a repeat criminal like Mr. Costanza to defraud our village like he has defrauded his creditors, customers, past employers and the Wisconsin, Indiana and Illinois Department of Insurance. What else has he done to us." Is that what you're referring to?

MR. DONOHUE: Yeah. That's the gist of that flyer.
THE COURT: Well, and that's the -- kind of the closing statement.

MR. DONOHUE: It's also -- it's also highlighted in the corners "Insurance fraud." Insurance fraud is a felony.

THE COURT: Well, it's also a civil problem. There's a civil action for fraud. The regulatory departments treat it administratively.

MR. DONOHUE: And I don't think that the general public can make that decision based on that flyer.

THE COURT: So what?

MR. DONOHUE: Well, they're saying that "My opponent's criminal record is," and he's committed insurance fraud.

THE COURT: They never say that. I got the flyer right here in front of me.

MR. DONOHUE: "My opponent's criminal record is."

THE COURT: A repeat criminal like Mr. Costanza to defraud our village like he has -- well, he -- I mean, as a matter of truth, doesn't he have one plea of guilty and two convictions in the criminal context?

MR. DONOHUE: On misdemeanors that were both over ten years old.

THE COURT: So?

MR. DONOHUE: They're not admissible.

THE COURT: They're not admissible but they're not false.

MR. DONOHUE: And they're not -- they're painting him as a career criminal. One of those is a DUI.

THE COURT: So what?

MR. DONOHUE: That tens of thousands of people in this state --

THE COURT: But they're true. How does that make them defamatory?

MR. DONOHUE: But the other ones were found not to be true.

THE COURT: Okay. Well, does it make a difference --

MR. DONOHUE: The majority --

THE COURT: Does it make a difference in the context that he was running for village president and that this all concerned a matter of public interest?

MR. DONOHUE: No, it doesn't because that was adjudicated on their SLAPP motion.

THE COURT: What?

MR. DONOHUE: That was adjudicated on the SLAPP motion.

THE COURT: I don't even understand what you're talking about.

MR. DONOHUE: Okay. Well, they filed a motion to dismiss under 2-619 --

THE COURT: All right. Correct me if I'm wrong, but neither party has raised this as far as I can tell. I know Judge

Barch didn't raise it. But in the context of the law of defamation, right, if it concerns either a party of a matter of public interest or a public person, then there is a heightened standard.

MR. DONOHUE: And we did argue that and it's in the transcripts from the hearing.

THE COURT: The matter of privilege?

MR. DONOHUE: The matter -- privilege never came up and the matter of -- the defendants never argued that they had a privilege.

THE COURT: No, they haven't, but you still have to -- you know --

MR. DONOHUE: We got to Mr. Costanza being a public figure. We covered --
(R11, LL9-24; R12, LL1-24; R13, LL1-24; R14, LL1-19).

In the above exchange it is clear that the Balogh Court mistakenly considered inadmissible evidence. It is also clear that the Balogh Court mistakenly did not view all of the evidence in the light most favorable to the Plaintiffs. Both points are error requiring reversal of the entry of summary judgment. Respectfully, the items on which the Balogh Court focused were immaterial to the "gist" of the Flyer.

Article VI of the Judicial Article of the Illinois Constitution of 1970, provides for a unified, three-tiered judiciary - Circuit Court, Appellate Court, and Supreme Court. There is no mention of regulatory bodies or administrative hearing boards in this Section of our Constitution.

Stripped of the inadmissible evidence and the items of secondary Importance the *per se* defamatory import of the Flyer is evident. What is left is:

From top to bottom:

- "**<u>My Opponents (sic) Criminal Record Is:</u>**"
- INSURANCE FRAUD.
- We cannot allow a repeat criminal like Mr. Costanza to Defraud our village like he has defrauded his creditors, customers...
- What else has he done to us?
- INSURANCE FRAUD.
- Restore Integrity to Poplar Grove.
- Paid for by friends of Sattler for [REDACTED].

During argument the Balogh Court asked Plaintiffs' counsel:

> MR. DONOHUE: Well, our position is that this motion for summary judgment is just repeating their reply to the SLAPP motion.
>
> THE COURT: So what?
>
> MR. DONOHUE: Well, there's been -- in the SLAPP motion, there's a finding of record that --
>
> THE COURT: So what? I'm not bound by that.
>
> MR. DONOHUE: Well, there are found that there's genuine issues here and this last motion --
>
> THE COURT: No. They found that your suit wasn't meritless.
>
> MR. DONOHUE: And they found that there was questions on the defamation that needed to go to the jury.
>
> THE COURT: And what were those questions?
>
> MR. DONOHUE: The specific -- that we set out in our

> response.
>
> THE COURT: Well, I read your brief and that's this idea that it could be construed as false when taken on the whole.
>
> MR. DONOHUE: Right. And it's construed as false after --
>
> THE COURT: How can it be construed as false?
> (R 10, LL17-24), (R11, LL1-14).

Application of the *Parker* analysis answers the Balogh Court's questions and leaves a Flyer that falsely states and implies that Plaintiff is (1) a repeat criminal, (2) who will defraud the Village of Poplar Grove as he has defrauded others, and that (3) he lacks integrity and therefore the ability to hold public office. These statements are false and defamatory *per se*.

Rather than applying *Parker,* the Balogh Court on the basis of Plaintiffs' Amended Complaint, speculated as to the defamatory nature of the Flyer and used this speculation and inadmissible evidence to enter summary judgment in favor of Defendants. Engaging in this type of conjecture and speculation on inadmissible evidence and immaterial secondary information in a case where the Defendants have not filed a responsive pleading is prohibited.

> "Accordingly, reviewing the record *de novo*, we find insufficient evidence that would create a genuine issue of material fact concerning whether Griffin knew or should have known that Price would operate the vehicle in a negligent manner on the day in question. To hold for plaintiff based on this insufficient evidence presented at the motion for summary judgment would require us to engage in mere conjecture and speculation, and this we will not do. *See Sorce, 309*

> *Ill. App. 3d at 328, 722 N.E.2d at 237." McGrath v. Price*, 342 Ill. App. 3d 19, 30, 276 Ill. Dec. 42, 793 N.E.2d 801 (1st Dist. 2003).

While McGrath involved a motor vehicle accident and a Plaintiff's motion for summary judgment on negligence, the Court clearly held that mere conjecture and speculation based on insufficient evidence is prohibited. Accordingly, the Balogh Court's analysis based on mere conjecture, speculation, and insufficient evidence must also be prohibited.

It is clear, however, that, unlike the Balogh Court, the Barch Court engaged in the proper *Parker* analysis when reaching its decision.

Under oath, all three Defendants unequivocally affirm that their intent included attempts to hinder Mr. Costanza's career in local politics. Defendants judicially admitted their combined intent to interfere with Mr. Costanza's career in local politics. (C509), (C511), and (C513).

Consistent with such sworn intent, the Barch Court found that Defendants' imputed: (1) a lack of integrity necessary to hold office; (2) commission of crimes; and (3) undermined Mr. Costanza's credibility with his political and professional constituents, and (4) prejudiced him and his company with their false accusations to the extent that a genuine factual issue for the jury is a matter of record. It is clear that the real point of Defendants' actions was to injure Mr. Costanza's reputation and interfere with his career in local politics and business. The "real point" of the Flyer is

to convey the false message that Owen G. Costanza was committing insurance fraud through his business in Poplar Grove. This is false.

> "The gravamen of an action for defamation is not the injury to plaintiff's feelings, but damage to his reputation in the eyes of other persons. (33A Ill.L. & Prac. Slander & Libel ch. 2, sec. 11, at 23 (1970), citing *Cowper v. Vannier (1959), 20 Ill. App.2d 499, 156 N.E.2d 761; Voris v. Street & Smith Publications (1947), 330 Ill. App. 409, 71 N.E.2d 338*. 'A statement is defamatory if it impeaches a person's integrity, virtue, human decency, respect for others, or reputation and thereby lowers that person in the estimation of the community or deters third parties from dealing with that person.' *(Newell v. Field Enterprises, Inc. (1980), 91 Ill. App. 3d 735, 741, 415 N.E.2d 434, 440, 47 Ill. Dec. 429." (Berkos v. National Broadcasting Co. (1987), 161 Ill. App. 3d 476, 485, 515 N.E.2d 668, 672-73, 113 Ill. Dec. 683.) Lemons v. Chronicle Publishing Company*, 253 Ill. App. 3d 888, 891,192 Ill. Dec. 634, 625 N.E.2d 789 (1993).

H. <u>Defendants Have Not Met Their Burden of Production of Evidence. There Is No Evidence As To Each Element of Each Claim</u>.

Defendants have made no arguments regarding either Plaintiffs' (i) tortious interference with contract counts, (ii) tortious interference with prospective business advantage counts, or (iii) the civil conspiracy count. Under *McGrath*, Defendants have failed to meet their burden and summary judgment should be denied. To grant Defendants' Motion based on this lack of evidence would require the Court to engage in speculation and mere conjecture, which is not to be used in deciding a motion for summary judgment.

> "Accordingly, reviewing the record *de novo*, we find insufficient evidence that would create a genuine issue of material fact concerning whether Griffin

> knew or should have known that Price would operate the vehicle in a negligent manner on the day in question. To hold for plaintiff based on this insufficient evidence presented at the motion for summary judgment would require us to engage in mere conjecture and speculation, and this we will not do. See *Sorce, 309 Ill. App. 3d at 328, 242 Ill. Dec. 738, 722 N.E.2d at 237. McGrath v. Price*, 342 Ill. App. 3d 19, 30, 276 Ill. Dec. 42, 793 N.E.2d 801 (1st Dist. 2003).

Without resorting to mere conjecture and speculation, the Balogh Court had no basis from which to grant Defendants' Motion. The purpose of the Motion is to determine whether or not a genuine issue of material fact exists. That question is unequivocally answered in the affirmative by simply reviewing the record and reading the Barch Court's May 11, 2022 Memorandum of Decision and Order. All inferences to be drawn in the Motion must be construed against the Defendants and resolved in favor of the Plaintiffs. Defendants cannot show as a matter of law that they are entitled to summary judgment.

The entry of Summary Judgment was inappropriate and should be reversed.

III. <u>The Trial Court Erred in Grating Defendants' Motion to Dismiss.</u>

Each of the claims contained in the Amended Complaint states a claim upon which relief may be granted. These facts comply with Illinois' fact-pleading requirements. Accordingly, Defendants' 735 ILCS 5/2-615 Motion to Dismiss Counts I, II, & III of Plaintiffs' Complaint should be denied in its entirety with prejudice.

A. LEGAL STANDARD

> "A section 2-615 motion to dismiss (735 ILCS 5/2-615 (West 2002)) challenges the legal sufficiency of a complaint based on defects apparent on its face. *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 364, 290 Ill. Dec. 525, 821 N.E.2d 1099 (2004). Therefore, we review *de novo* an order granting or denying a section 2-615 motion. W*akulich v. Mraz*, 203 Ill. 2d 223, 228, 271 Ill. Dec. 649, 785 N.E.2d 843 (2003). In reviewing the sufficiency of a complaint, we accept as true all well-pleaded facts and all reasonable inferences that may be drawn from those facts. *Ferguson v. City of Chicago*, 213 Ill. 2d 94, 96-97, 289 Ill. Dec. 679, 820 N.E.2d 455 (2004). We also construe the allegations in the complaint in the light most favorable to the plaintiff. *King v. First Capital Financial Services Corp.*, 215 Ill. 2d 1, 11-12, 293 Ill. Dec. 657, 828 N.E.2d 1155 (2005). Thus, a cause of action should not be dismissed pursuant to section 2-615 unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to recovery. *Canel v. Topinka*, 212 Ill. 2d 311, 318, 288 Ill. Dec. 623, 818 N.E.2d 311 (2004). We have repeatedly stated, however, that Illinois is a fact-pleading jurisdiction. See, *e.g.*, *Weiss v. Waterhouse Securities, Inc.*, 208 Ill. 2d 439, 451, 281 Ill. Dec. 571, 804 N.E.2d 536 (2004). While the plaintiff is not required to set forth evidence in the complaint (*Chandler v. Illinois Central R.R. Co.,* 207 Ill. 2d 331, 348, 278 Ill. Dec. 340, 798 N.E.2d 724 (2003)), the plaintiff must allege facts sufficient to bring a claim within a legally recognized cause of action (*Vernon v. Schuster*, 179 Ill. 2d 338, 344, 228 Ill. Dec. 195, 688 N.E.2d 1172 (1997)), not simply conclusions (*Anderson v. Vanden Dorpel*, 172 Ill. 2d 399, 408, 217 Ill. Dec. 720, 667 N.E.2d 1296 (1996))." *Marshall v. Burger King Corp.*, 282 Ill. 2d 422, 429, 305 Ill. Dec. 897, 856 N.E.2d 1048,1053 (Ill. June 22, 2006).

B. Plaintiffs Plead Facts Sufficient to Establish a Claim for Tortious Interference with Prospective Business Advantage.

1. <u>Pleadings To Be Construed Liberally.</u>

Section 2-603(c) of the Code further provides:

> Sec. 2-603. Form of pleadings.
>
> (c) Pleadings shall be liberally construed with a view to doing substantial justice between the parties.
>
> 735 ILCS 5/2-603(c) (from Ch. 110, par. 2-603). (Source: P.A. 82-280).

Section 735 ILCS 5/2-612 has been interpreted to find a one sentence description of a cause of action to be a sufficient pleading:

> "…[S]ection 2-612 of the Code, which provides that "[n]o pleading is bad in substance which contains such information so as reasonably informs the opposite party of the nature of the claim or defense which he or she is called upon to meet." 735 ILCS 5/2-612 (West 1998). The defendant's traverse, even though just one sentence, was sufficient to put the plaintiff on notice that the defendant was challenging its authority to condemn the Rodenburg Marsh property." *Forest Pres. Dist. v. Miller*, 339 Ill. App. 3d 244, 252, 273 Ill. Dec. 742, 789 N.E.2d 916, 923 (Ill. App. Ct. 3d Dist. May 15, 2003).

The burden is substantial for defendants seeking dismissal pursuant to Section 2-615.

> "A section 2-615 motion to dismiss challenges the legal sufficiency of a complaint based on defects apparent on its face. *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429, 305 Ill. Dec. 897, 856 N.E.2d 1048 (2006). A cause of action should not be dismissed pursuant to a section 2-615 motion unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to relief. *Canel v. Topinka*, 212 Ill. 2d 311, 318, 288 Ill. Dec. 623, 818 N.E. 2d 311 (2004)." *Pooh-Bah Enters. v. County of Cook*, 232 Ill. 2d 463, 473, 328 Ill. Dec. 892, 905 N.E.2d 781, 788 (Ill. March 19, 2009).

C. Limited Scope of Section 2-615 Motion.

> "A Section 2-615 motion to dismiss attacks the legal sufficiency of the complaint. *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 484, 203 Ill. Dec. 463, 639 N.E.2d 1282 (1994). Such a motion does not raise affirmative factual defenses, but alleges only defects appearing on the face of the complaint. *Illinois Graphics*, 159 Ill. 2d at 484, 203 Ill. Dec. 463, 639 N.E.2d 1282; *Kolegas v. Heftel Broadcasting Corp.*, 154 Ill. 2d 1, 8, 180 Ill. Dec. 307, 607 N.E.2d 201 (1992). Thus, the question presented by a section 2-615 motion is whether the allegations of the complaint, when viewed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief can be granted. *Vernon v. Schuster,* 179 Ill. 2d 338, 344, 228 Ill. Dec. 195, 688 N.E.2d 1172 (1997); *Bryson v. News America Publications, Inc.*, 174 Ill. 2d 77, 86-87, 220 Ill. Dec. 195, 672 N.E.2d 1207 (1996)." Borowiec v. Gateway 2000, Inc., 209 Ill. 2d 376, 382, 283 Ill. Dec. 669, 808 N.E.2d 957 (2004).

"[N]or may section 2-615 motions be supported by reference to any facts or exhibits that are not alleged in or attached to the complaint under attack." *Scott Wetzel Servs. v. Regard*, 271 Ill. App. 3d 478, 480-81, 208 Ill. Dec. 98, 648 N.E.2d 1020 (1st Dist. 1995). Each one of the Defendants' section 2-615 motions has in excess of 50 pages of exhibits which by their very nature are factual matters outside the scope of a Section 2-615 motion. They should not have been considered by the Balogh Court. Doing so was reversible error.

D. Questions of Fact Cannot Be Decided.

A claim need only show a possibility of recovery, not an absolute right to recovery, to survive a section 2-615 motion. *Platson v. NSM America, Inc.*, 322 Ill. App. 3d 138, 143, 255 Ill. Dec. 208, 748 N.E.2d 1278 (2d Dist. 2001).

All of Plaintiffs' claims were properly and sufficiently pleaded. Therefore, under *Platson* all the allegations survive the motion to dismiss and it was granted in error and should be reversed.

E. Failure To Adhere To Fact Pleading Requirements.

> "To pass muster a complaint must state a cause of action in two ways. First, it must be legally sufficient; it must set forth a legally recognized claim as its avenue of recovery. When it fails to do this, there is no recourse at law for the injury alleged, and the complaint must be dismissed. [Citations.] Second and unlike Federal practice, the complaint must be factually sufficient; it must plead facts which bring the claim within the legally recognized cause of action alleged. If it does not, the complaint must be dismissed." *People ex rel. Fahner v. Carriage Way West, Inc.* (1981), 88 Ill. 2d 300, 308." *Mlade v. Finley*, 112 Ill. App. 3d 914, 918, 445 N.E.2d 1240 (1st Dist. 1983).

Every count in the Plaintiffs First Amended Complaint set forth a legally recognized cause of action in the State of Illinois. It was error for the Balogh Court to Grant the Defendants' Motion to Dismiss.

IV. CONCLUSION.

The genuine issues of fact in this case are spread throughout the record in the Memorandum of Decision and Order dated May 11, 2022. This requires that the matter proceed to trial. It is axiomatic that a trial court is a baseline for a reasonable man standard. Defendants' right is not clear nor free from doubt. For the reasons stated, the Balogh Court grant of Summary Judgment should be reversed and the matter proceed to trial, or in the

alternative that judgment enter against all Defendants and in favor of Plaintiffs and that the case proceed to trial on damages only.

WHEREFORE, Plaintiffs, OWEN G. OSTANZA and RMS INSURANCE SERVICES, INC., d/b/a Flanders Insurance Agency, respectfully pray this Honorable Court deny Defendants' Motion for Summary Judgment in its entirety, require the Defendants to file their Answer within twenty-eight days, and for such other and further relief as this Honorable Court deems just and equitable.

Respectfully submitted,

OWEN G. COSTANZA

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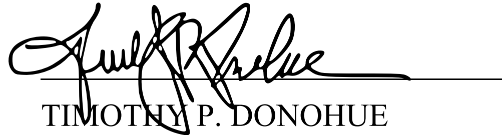
CERTIFICATE OF SERVICE

I, TIMOTHY P. DONOHUE, the attorney certify under penalties of perjury as provided by law pursuant to 735 ILCS 5/1-109 that I served that a digital copy of Appellants' brief was sent to Appellees' Counsel Trent M. Ferguson at trentferglaw@yahoo.com and Cheryl Russell Smith @cherylrussell.law@gmail.com via an approved electronic filing service provider and/or by electronic mail on May , 2023 .



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No. 4-23-0143

IN THE APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT

	)	Appeal from the Circuit
	)	Court of Seventeenth
	)	Judicial Circuit Boone
	)	County, Illinois
	)	Law Division
	)	
RMS INSURANCE SERVICES, INC.,	)	
an Illinois corporation d/b/a FLANDERS	)	
INSURANCE AGENCY, INC., and	)	
OWEN G. COSTANZA, an individual,	)	
	)	
Plaintiffs	)	
	)	
v.	)	Case No. 2021 L 30
	)	
DONALD G. SATTLER, an individual,	)	
MARION THORNBERRY, an individual,	)	
ELISABETH M. RODGERS, an individual,	)	
and CHERYL RUSSELL-SMITH, an	)	
individual,	)	
Defendants.	)	

ILLINOIS SUPREME COURT RULE 341 APPELLANT CERTIFICATION

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 35 pages or lesss than 9,000 words.

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ORAL ARGUMENT REQUESTED