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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. DONALD G. SATTLER, an individual, MARION THORNBERRY, an individual, ELISABETH M. RODGERS, an individual, and CHERYL RUSSELL-SMITH, an individual, Defendants.	Case No. 2021 L 30

RESPONSE BRIEF OF DEFENDANTS-APPELLEES, DONALD G. SATTLER, MARION THORNBERRY and ELISABETH M. RODGERS

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TABLE OF CONTENTS

POINTS AND AUTHORITIES

STATEMENT OF FACTS

In April of 2021, Plaintiff Owen Costanza ("Costanza") lost an election to Defendant Donald Sattler ("Sattler") for the position of President of the Village of Poplar Grove. (C 14). During the election Sattler distributed a political Flyer ("Flyer") containing certain specific allegations regarding Costanza. (C 14, 416). Plaintiffs allege the remaining Defendants also distributed the Flyer (C 17-18, 20). The specific allegations in the Flyer were as follows:

In 1995, Costanza pled guilty to filing a false police report ("Allegation #1");

In 1999, Costanza was terminated by Liberty Insurance for fraud and misrepresentation ("Allegation #2");

In 1999, Costanza pled guilty to writing bad checks ("Allegation #3);

In 2000, Costanza suffered a home foreclosure in Boone County, Illinois ("Allegation #4")

In 2000, Costanza completed a bankruptcy filing ("Allegation #5");

In 2007, Cosanza pled guilty to drunk driving ("Allegation #6");

In 2008, the State of Wisconsin denied Constanza's request for an insurance license due to a false application ("Allegation #7");

In 2010, the State of Indiana fined Costanza for a false application and revoked his insurance license ("Allegation #8");

In 2011, Costanza was terminated from RMS for misappropriating company funds ("Allegation #9");

In 2012, Costanza filed a fraudulent license renewal application with the Illinois Department of Insurance ("Allegation #10");

In 2014, the Illinois Department of Insurance Investigated Numerous Complaints by Insurance Customers, Past Terminations, Criminal History, Unlawful Fund Withdrawals and Fines and Discipline from Wisconsin and Indiana. ("Allegation #11);

In 2014, Illinois Revokes Insurance Business License for Major Violations ("Allegation #12);

In 2015, the Illinois Department of Insurance Disciplines and Fines Costanza $30,000.00 for Multiple Repeat Violations. ("Allegation #13") (E 66, C 648).

While Costanza lost the election for President of the Village Poplar Grove, he had a prior history of being involved in local politics, including successfully running against Defendant Marion Thornberry ("Thornberry") for the position of Treasurer of the Boone County Republican's Club (C 16, 116) and being elected Chairman of the Republican Central Committee (C 116). Subsequent to losing the election for Poplar Grove Village President, Costanza remained active in local politics regularly posting on Facebook as "Owen Costanza – Poplar Grove Village President", attending Village Hall meetings, co-hosting a Meet and Greet welcoming Darin Lahood to the new 16th Congressional District, running for Precinct Committee Person for Poplar Grove District 2 (C 522), and successfully running for Village of Poplar Grove Trustee. (C 116-117).

After losing the election for President of the Village of Poplar Grove, Costanza and RMS Insurance Services, Inc., d/b/a Flanders Insurance Agency ("Flanders")(collectively "Plaintiffs") filed their Complaint against the Defendants (C 10-49). In response, Defendants filed three Motions to Dismiss pursuant to 735 ILCS 5/2-615 (C 187-380), a Motion to Dismiss pursuant to the Illinois Citizen Participation Act ("SLAPP Motion")(C 108-186), and subsequently a Motion for Summary Judgment Pursuant to 735 ILCS 5/2-1005. (C 578). The exhibits to the Motion for Summary Judgment are included separately in the record in the Exhibit List. (E 2-65).

The SLAPP Motion was heard prior to a hearing on Defendants' other Motions due to the Act's requirements that a hearing and decision on the motion must occur within 90 days after notice of the motion is given to the respondent (735 ILCS 110/20). On March 25, 2022, The Honorable Judge Ronald A. Barch heard the SLAPP Motion and on May 11, 2022, rendered the court's written Memorandum of Decision and Order (C 518-529). In the Memorandum of Decision and Order on the Defendants' SLAPP Motion, Judge Barch found that for 7 of the Flyer's 13 Allegations (Allegations # 3,4,5,9,11,12,13) dismissal would be proper since the allegations were true and Plaintiffs' claims on those issues meritless (C 518-529). Judge Barch found the remaining 6 allegations (Allegations # 1,2,6,7,8,10) to be factually accurate but not necessarily meritless. (C 518-529). The Court in the same paragraphs went on to state "Substantial truth is an affirmative defense rather than proof that Plaintiffs' suit is meritless." (C 524, 526, 527,528).

On January 18, 2023, after a hearing on November 10, 2022, the Honorable Judge Stephen Balogh, entered an order granting both Defendants' Motion to Dismiss Counts I, II, and III of Plaintiffs' Amended Complaint for failure to state a claim and Defendants' Motion for

Summary Judgment, finding all of the specific allegations in the Flyer to be either true or objectively verifiably true. (C 647-662). The dismissal and the entry of summary judgment were with prejudice (C 647-662).

ARGUMENT

I. The Trial Court Properly Granted Summary Judgment

A. Judge Barch's Memorandum of Decision and Order did not adjudicate whether some of the allegations were substantially true but only whether Plaintiffs' Complaint was meritless.

Plaintiffs' brief alleges their tortuous interference and civil conspiracy claims were not addressed in their "SLAPP" Motion (Strategic Lawsuit Against Public Participation, 735 ILCS 110/1, et seq.) and as such "are conceded by Defendants." (Appellants brief page 8). This argument is a non sequitur and Defendants have not conceded any of Plaintiffs' claims or allegations. The SLAPP Motion was heard prior to a hearing on Defendants' other Motions due to the Act's requirements that a hearing and decision on the motion must occur within 90 days after notice of the motion is given to the respondent (735 ILCS 110/20).

The SLAPP Motion was a Motion to Dismiss brought under section 2-619(a)(9) of the Code of Civil Procedure. When determining whether a SLAPP lawsuit should be dismissed, courts are required to engage in a three-step analysis: (1) whether the movant's acts were in furtherance of his right to petition, speak, associate, or otherwise participate in government to obtain favorable government action; (2) whether the nonmovant's claims are solely based on, related to, or are in response to the movant's acts in furtherance of his constitutional rights; and (3) whether the nonmovant failed to prove that the movant's acts were not genuinely aimed at solely procuring favorable government action. *Garrido v. Arena*, 2013 IL App (1st) 120466. ¶

15; *Prakash v. Parulekar*, 2020 IL App (1st) 191819, ¶ 33. The trial court found 6 of the 13 allegations in the Flyer to fail under prong 2 of the analysis since those allegations were found to be facially accurate but not necessarily meritless. (C 518-529).

The Court finding some of the allegations to not be meritless is different from the issue of whether the allegations were substantially true. Both substantial truth and privilege do not render a claim "meritless" under the meaning of the SLAPP Act. *Garrido v. Arena*, 2013 IL App 1120466, ¶ 25-27. This has been settled in the case of *Garrido v. Arena*, 2013 IL App (1st) 120466, ¶ 27 as pointed out in Plaintiffs' Response to Defendants' SLAPP Motion. (C 400). ("Thus, even if defendants can prove that the allegedly defamatory statements at issue in the case are substantially true or are constitutionally privileged, they still cannot carry their burden of showing that plaintiff's claim is meritless," Plaintiffs' brief, citing *Garrido*). The trial court in this matter also specifically pointed out same in it's written Memorandum ("Substantial truth is an affirmative defense rather than proof that Plaintiffs' suit is meritless"). (C 524, 526, 527,528).

Defendants do maintain the SLAPP Motion should have been granted as all of the allegations are absolutely true. The allegations, for example, that "In 1995, Costanza pled guilty to filing a false police report," (C 524) and "In 2007, Costanza pled guilty to drunk driving" (C 525-526) are fully accurate and such guilty pleas are considered part of a criminal record.

B. The Trial Court did not consider any inadmissible evidence.

Plaintiffs allege the trial court heard and considered inadmissible evidence under Illinois Supreme Court Rule of Evidence 609. Appellants' brief, pages 11 and 17 – 19.

Illinois Supreme Court Rule 609 deals with the impeachment of a witness by introducing evidence that the witness has been convicted of a crime involving dishonesty, false statement, or moral turpitude. Ill. Sup. Ct. R. 609.

Here the evidence of the crimes was used to show the statements in the Flyer regarding the crimes committed by Costanza, namely, writing a bad check, filing a false police report, and drunk driving, were true, and therefore not actionable under Plaintiffs' theories set forth in their complaint.

Since the evidence was not introduced for impeachment purposes, it is admissible.

C. Defendants are entitled to summary judgment as there as no genuine issues of material fact

A motion for summary judgment is properly granted where the pleadings, depositions, admissions, and affidavits establish that no genuine issue of material fact exists and that the movant is entitled to summary judgment as a matter of law. 735 ILCS 5/2-1005 (West 2018); *J. Maki Constr. Co. v. Chi. Reg'l Council of Carpenters*, 379 Ill. App. 3d 189, 190 (2nd Dist., 2008).

The party opposing summary judgment does not have to prove his or her case, but must present some factual basis arguably entitling him or her to judgment. *Parker v. House O'Lite Corp.*, 324 Ill. App. 3d 1014, 1019 (1st Dist., 2001).

Freedom of expression upon public questions is secured by the First Amendment has long been settled. The constitutional safeguard of the 1st Amendment, "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U. S. 476, 484 (1957).

1. <u>The allegations were privileged and therefore not actionable as defamation.</u>

Where the plaintiff is found to be a public figure he must prove, by clear and convincing evidence, that the defendant acted with "actual malice" in making the defamatory expression. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)

"Actual malice" does not incorporate mere suspicions or what someone should have known. Instead, it requires the person making the alleged defamatory statement actually knew that the information was false or acted with such disregard for the truth as to rise to the level of recklessness. *Martin v. State Journal-Register*, 244 Ill. App. 3d 955, 963-964 (4th Dist., 1993).

Given Constanza's involvement in local politics, both trial court Judges found Costanza to be a public figure and the allegations involving a matter of public concern (C 521, 655, 662). Costanza himself admits he was becoming more successful in local politics (C 544) and admits it was the intent of the Defendants to interfere with his "career in politics." (R 35, lines 1-6).

The Court in questioning the Plaintiffs' attorney regarding malicious defamation asked "I think in this context, the social context is its' in the midst of an election and it pretty much was intended to demonstrate factual content. Right?" The Plaintiffs' attorney answered "Again, yes." (R 39, lines 19-23).

Thus a qualified privilege exists for the communication at issue.

The burden of proving actual malice is not satisfied by the bare allegation that a defendant acted maliciously and with knowledge of the falsity of the statement; the plaintiff must allege facts from which actual malice may be inferred." *Davis v. John Crane, Inc.*, 261 Ill. App. 3d 419, 431, (1st Dist., 1994).

Furthermore, since the allegations are at least substantially true, there can be no malicious defamation.

2. <u>The allegations in the Flyer are true, or substantially true, and therefore not defamatory.</u>

An allegedly defamatory statement is not actionable if it is substantially true, even though it is not technically accurate in every detail. *Lemons v. Chronicle Publishing Co.*, 253 Ill. App. 3d 888, 890 (4th Dist., 1993). (Plaintiff was caught shoplifting by store employees and then pulled a knife, newspaper article's statements that employees were security guards, the plaintiff was convicted of four rather than three offenses, and one employee was stabbed as opposed to cutting himself while trying to disarm the plaintiff were of little relevance). *Wilson v. United Press Assoc.*, 343 Ill. App. 238 (1st Dist., 1951) (the "gist" or "sting" of a report of a supreme court decision was that the plaintiff, after having been convicted, was granted a new trial, and the newspaper's report that the plaintiff had begun to serve his sentence was immaterial). *Hardman v. Arlan*, 2019 Il App. (1st) 173196. (A statement that plaintiff was convicted of domestic violence when he instead plead guilty to simple battery which was later expunged). *Koniak v. Heritage Newspapers, Inc.*, 198 Mich. App. 577 (1993). (A statement that a father sexually assaulted his stepdaughter 30-50 times, when the stepdaughter testified he had done so only 8 times). *Stevens v. Independent Newspapers, Inc.*, 15 Media L. Rep. 1097 (Del. Super. Ct. 1998). (A statement that a man was sentenced to death for six murders, when in fact he was only sentenced to death for one). *Nichols v. Moore*, 396 F. Supp. 2d 783 (E.D. Mich. 2005). (A statement that Terry Nichols was arrested after the Oklahoma City Bombing, when actually he had only been held as a material witness).

A defendant bears the burden of establishing the substantial truth of his assertions, which he can demonstrate by showing that the "gist" or "sting" of the defamatory material is true. *Lemons*, 253 Ill. App. 3d at 890.

In determining whether a statement may be reasonably interpreted as factually true also involves examination in the light of the following criteria: (1) do the statements have a precise and readily understood meaning, (2) are the statements objectively verifiable, and (3) whether the statements' social context signals that it has factual content. *Imperial Apparel, Ltd. v. Cosmo's Designer Direct, Inc.*, 227 Ill.2d 381, 398 (Ill. 2008).

When determining the "gist" or "sting" of the allegedly defamatory material, a 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. *Glorioso v. Sun-Times Media Holdings, LLC*, 2023 IL App (1st) 211526, ¶68.

While determining substantial truth is normally a question for the jury, the question is one of law where no reasonable jury could find that substantial truth had not been established. *Moore v. People for the Ethical Treatment of Animals, Inc.*, 402 Ill. App. 3d 62 (1st Dist., 2010).

In their pleadings Plaintiffs fail to adduce the falsity of any of the allegations in the Flyer.

Costanza, instead, only provided blanket statements of the allegations in the Flyer as being false, even signing an affidavit attesting the allegations were false. (E 14)

During the hearing on Defendants' Motion for Summary Judgment and upon examination from the Court, Costanza, through counsel, had to admit that the specific allegations are at least substantially true. (C 656).

The argument and evidence provided during hearing and in the pleadings for each of the allegations in the Flyer was as follows:

Allegation # 1: In 1995, Costanza pleads guilty to filing a false police report in Boone County.

In paragraph 15 of his affidavit Costanza affirms that he did plead guilty to a Class B misdemeanor relating to this charge. (E 14).

Also attached to Defendants' Motion for Summary Judgment are three pages from the 17th Judicial Circuit Court on Boone County's website showing Costanza's guilty plea in Case Number 1995-CM-170 in exchange for court supervision and the court withholding of judgement. (E 23-25).

Costanza, through counsel, admitted same was true during the hearing on Defendants' Motion for Summary Judgment. (R 17, lines 2-6).

Allegation #2: In 1999, Costanza was terminated from Liberty Insurance for Fraud Misrepresentation.

Attached to Defendants' Motion for Summary Judgment as Exhibit E are three pages from the State of Wisconsin, Office of the Commissioner of Insurance, Agent Licensing Section, filed by Liberty Insurance Corporation, setting forth that Costanza was terminated from Liberty Insurance Corporation and that the reason Costanza was terminated from their employment was for "fraud" and "misrepresentation." The document further provides a

statement from Liberty Insurance Company that they believe Costanza filed a fraudulent claim on a vehicle he owned and that they insured. (E 26-28).

In his affidavit attached to Defendants' Motion for Summary Judgment as "Exhibit C", Costanza does not refute that he was terminated for fraud and misrepresentation, only that there was never a finding of fraud entered. (E 14-15).

In an Agreed Entry with the State of Indiana attached to Defendants' Motion for Summary Judgment as "Exhibit H", Costanza admits he obtained his Indiana insurance producer license by failing to disclose he was terminated for cause from an insurance agency. (E 41-45).

Allegation #3: In 1999, Costanza pled guilty to writing bad checks.

Court records indicate that in Boone County Case Number 1999-CM-657, Costanza did in fact enter a guilty plea on January 27, 2000. The Court later entered a "conditional discharge order and additional conditions order" disposition for the case. Attached to Defendants' SLAPP Motion as Exhibit I are three pages from the 17th Judicial Circuit Court of Boone County's website showing Costanza's guilty plea in Case Number 1999-CM-657. (C 138-139).

Costanza, through counsel, admitted same was true during the hearing on Defendants' Motion for Summary Judgment. (R 20, lines 8-13).

Allegation # 4: 2000 Home Foreclosure in Boone County.

Court records indicate that in Boone County Case Number 1999-CH-145, Costanza's home was in fact foreclosed on, with the Court confirming the sale and ordering possession on July 19, 2000. Attached to Defendants' SLAPP Motion as Exhibit J are two pages

from the 17th Judicial Circuit Court of Boone County's website confirming the foreclosure of Mr. Owen's home. (C 140-141).

Costanza, through counsel, admitted same was true during the hearing on Defendants' Motion for Summary Judgment. (R 20, lines 11-13).

Allegation # 5: 2000 Completes Chapter 7 Bankruptcy Filed in 1996 as Chapter 13.

Court records indicate that in the Northern District of Illinois (Western Division), bankruptcy petition # 96-51903, Costanza did file for Chapter 13 bankruptcy in 1996, converted it to a Chapter 7, which was later finalized by the Court on January 3, 2000. Attached to Defendants' SLAPP Motion as Exhibit K are 7 pages from the U.S. Bankruptcy Court's website. (C 142-148).

Costanza, through counsel, admitted same was true during the hearing on Defendants' Motion for Summary judgment. (R 20, lines 14-16).

Allegation # 6: in 2007, Costanza pleads guilty for drunk driving in Winnebago County.

Winnebago County court records indicate Costanza did enter a guilty plea of DUI on February 27, 2007, in the 17th Judicial Circuit Court, Winnebago County Case Number 2007-DT-70. The Court later entered a "court supervision" disposition of the case. Attached to Defendants' Motion for Summary Judgment as "Exhibit F" are three pages from the 17th Judicial Court's online website showing same. (E 29-31).

Costanza admits in his affidavit attached to Defendants' Motion for Summary Judgment as Exhibit C, that he did plead guilty to the class C misdemeanor charge of driving under the influence of alcohol. (E 15).

Costanza, through counsel, admitted same was true during the hearing on Defendants' Motion for Summary Judgment. (R 20, lines 17-19).

Allegation # 7: in 2008, the State of Wisconsin Department of Insurance denied insurance license for false application.

Costanza, in his affidavit attached to Defendants' Motion for Summary Judgment as Exhibit C, did admit his application for a license in Wisconsin was denied in 2008. (E 15-16).

Attached to Defendants' Motion for Summary Judgment as Exhibit G is a copy of select pages from the State of Wisconsin, Office of the Commissioner of Insurance Report from 2008 stating Costanza "Has had his license denied for 31 days. This action was based on allegations of failing to disclose previous criminal convictions on an insurance license application and failing to disclose a company termination for allegations of misconduct." (E 32-40).

Attached to Defendants' Motion for Summary Judgment as Exhibit I is a letter and a press release from the State of Wisconsin stating they denied Costanza's license application. (E 46-48).

Attached to Defendants' Motion for Summary Judgment as Exhibit K is a copy of an Order of Dismissal and a Stipulation and Consent Order from the Illinois Department of Insurance with the signed and notarized signature of Costanza on February 18, 2015, and also

signed by the Acting Director, James A. Stephens on February 20, 2015 (hereinafter "Illinois Stipulation and Consent Order"). (E 51-58).

In the Illinois Stipulation and Consent Order, it states that Costanza and the Director of Insurance agree, amongst other things that:

"J. In 2008, the State of Wisconsin denied the Business Entity (RMS Insurance Group, Inc) and Licensee's (Costanza's) application for failing to disclose previous criminal convictions on and insurance application and failing to disclose a company termination for allegations of misconduct."

Attached to Defendants' Motion for Summary Judgment as Exhibit J is a letter from Owen Costanza to the State of Montana Licensing Department in which he states the State of Wisconsin "denied" his application. (E 49-50).

Allegation # 8: in 2010 Indiana Department of Insurance fines Costanza $1,500.00 for a false application and revokes his insurance license.

Attached to Defendants' Motion for Summary Judgment as Exhibit H is an Agreed Entry and Final Order and Approval from the State of Indiana, Commissioner of Insurance, fining Costanza the sum of $1,500.00 in connection with the filing of an application for insurance license which contained three false statements. Specifically, the State of Indiana found, and Costanza agreed in a written Agreed Entry, that he:

A. falsely responded "No" when asked on the application "[h]ave you ever been convicted of a crime, had a judgment withheld or deferred, or are currently charged with committing a crime?"

B. falsely responded "No" when asked on the application "[h]ave you ever been named as a party in an administrative proceeding regarding any professional or occupational license?"

C. falsely responded "No" when asked on the application "[h]ave you ...ever had an insurance agency contract of any other business relationship with an insurance company terminated for any alleged conduct." (E 41-45)

In the same Agreed Entry, both the State of Indiana and Costanza agree that by falsely answering the application, he was subject to revocation of his Indiana non-resident insurance license. (E 41-45).

Thus, it is true that Costanza answered falsely on the application by failing to disclose prior criminal convictions and was fined $1,500.00 for doing same.

Costanza's Illinois insurance producer business entity license for RMS Service Group, Inc., was revoked in the State of Illinois in 2014. See Exhibit K attached hereto. (E 51-58).

Here the "sting" or "gist" or essence of the statement was that Costanza was found to have made three significant false statements on his application to the Indiana Department of Insurance. The distinction of whether Costanza's license was denied, not issued, revoked or subject to revocation is immaterial to the truth that he was found to have made said false statements on said application.

Allegation # 9: 2011 Terminated from RMS Service Group for Misappropriating Company Funds.

According to an RMS Service Group letter obtained through a FOIA request of a state agency, dated January 27, 2011, Costanza was in fact terminated for the reason(s) listed in the letter, pertaining to financial transactions. Attached to Defendants' SLAPP Motion as Exhibit O is a letter dated January 27, 2011, from RMS Service Group to the Plaintiff, Owen Costanza, terminating Costanza's employment for the reasons stated therein. (C 167-168)

Allegation # 10: In 2012 Costanza answers fraudulently on the Illinois Department of Insurance renewal application.

Attached to Defendants' Motion for Summary Judgment as Exhibit K is a copy of an Order of Dismissal and a Stipulation and Consent Order from the Illinois Department of Insurance with the signed and notarized signature of Costanza on February 18, 2015, and also signed by the Acting Director, James A. Stephens on February 20, 2015. (E 51-58).

In the Illinois Stipulation and Consent Order, it states that Costanza and the Director of Insurance agree, amongst other things that:

"J. In 2008, the State of Wisconsin denied the Business Entity (RMS Insurance Group, Inc.) and Licensee's (Costanza's) application for failing to disclose previous criminal convictions on an insurance application and failing to disclose a company termination for allegations of misconduct."

"In 2010, the State of Indiana filed an Agreed Entry with a $1,500.00 civil penalty against Licensee (Constanza) for failing to disclose prior criminal convictions, having a judgment withheld or deferred, pending criminal investigation, or being named as a party in administrative proceedings regarding a professional or occupational license or registration on their application."

On his 2010 and 2012 Illinois Insurance renewal applications, Costanza answered "no" each time to the question #2 when asked about his involvement in an administrative proceeding regarding a professional or occupational license or registration and "no" to question #1 when asked if he had been convicted of a crime or had a judgment withheld or deferred (E 55).

Attached to Defendants' Motion for Summary Judgment is group exhibit M which are Costanza's 2010 and 2012 insurance application with the State of Illinois.

Also attached to Defendants' Motion for Summary Judgment Exhibit L, is a letter from the Illinois Department of Insurance dated July 19, 2022, confirming Costanza answered "no" in his 2010 and 2012 Illinois renewal applications when asked if he had even been named or involved with an administrative proceeding regarding any professional license or registration. (E 60-61).

Allegation # 11: 2014 DOI Investigates Numerous Complaints by Insurance Customers, Past Terminations, Criminal History, Unlawful Fund Withdrawals, and Fines & Discipline from Wisconsin and Indiana (IL-14-HR-0482 & IN-934-AG10-8031-135)".

According to an Illinois Department of Insurance Stipulation and Consent Order, dated February 18, 2015, the Illinois DOI did in fact conduct this investigation. Attached to Defendants' SLAPP Motion as Exhibit K is an Order of Dismissal and a Stipulation and Consent Order from the State of Illinois, Department of Insurance. (E 51-58).

Allegation # 12: 2014 Illinois DOI Revokes Insurance Business License for Major Agency Violations."

According to an Illinois Department of Insurance Stipulation and Consent Order, dated February 18, 2015, Costanza as representative of RMS Service Group, Inc. agreed to the revocation of the license of RMS Service Group, Inc. d/b/a Alliance Insurance Agency. Attached to Defendants' SLAPP Motion as Exhibit K is an Order of Dismissal and a Stipulation and FConsent Order from the State of Illinois, Department of Insurance setting forth said consent. (E 51-58).

Allegation # 13: 2015 Illinois DOI Disciplines and Fines Him $30,000.00 for Multiple Repeat Violations.

Attached to Defendants' SLAPP Motion as Exhibit K is an Order of Dismissal and a Stipulation and Consent Order from the State of Illinois, Department of Insurance setting forth a civil penalty of $30,000.00 against RMS Service Group, Inc.. (E 51-58).

Plaintiffs, through counsel, admitted same was true during the hearing on Defendants' Motion for Summary Judgment. (R 22, lines 11-17).

Plaintiffs, through counsel, admitted all of the allegations are "verifiably true in a matter of law." (R 38, line 13).

Because all of the specific statements are true the Plaintiffs' action for defamation must fail.

Upon examination from the Court, and Costanza finally having to admit that the individual statements are at least substantially true, the Plaintiffs shift their argument to allege that none of the 13 specific allegations were part of the "gist" of the Flyer. Instead, Plaintiffs argue the focus should be only the wording "Insurance Fraud" and "Criminal Record." (C 656) (Defendants' Appellant Brief, page 20).

The uncontroverted evidence provided with Defendants' Motion for Summary Judgment, including admissions of Costanza, proves that Costanza has a "criminal record" and is a "repeat criminal." Costanza admits same in his affidavit and through counsel. (R 17, lines 2-6; R 20, lines 8-13; R 20, lines 17-19), (E 14 – 15) (Admissions to filing a false police report, pleading guilty to writing bad checks, and pleading guilty to drunk driving).

The Illinois Criminal code defines "Conviction" as a judgment of conviction or sentence entered upon a plea of guilty or upon a verdict or finding of guilty of an offense, rendered by a legally constituted jury or by a court of competent jurisdiction authorized to try the case without a jury (720 ILCS 5/2-5)(from Ch. 38, par. 2.-5).

Based on the exhibits attached hereto, Costanza does in fact have a criminal record, having committed multiple crimes, including but not limited to, pleading guilty to drunk driving, writing a bad check, filing a false police report. He also admitted unlawful withdrawals of funds from his and his business' Premium Fund Trust Account (E 54).

That the State of Wisconsin denied Costanza's license for 31 days for failing to disclose his criminal convictions. (E 40).

The State of Indiana, in its Agreed Entry, found that Costanza had a criminal record and failed to disclose same on his application to sell insurance (E 41-45). Costanza signed the document and agreed to the fine therein of $1,500.00 (E 41 - 45).

Costanza also signed the Stipulation and Consent Order from Illinois agreeing that he failed to disclose his criminal convictions to Wisconsin, Indiana, and Illinois and agreed to the fine of $30,000.00 for this and other misfeasance and nonfeasance. (E 51-58)

Costanza, in his letter to the State of Montana Licensing Department admitted he had misdemeanor convictions. (E 49-50).

The statement in the Flyer of Costanza has a criminal record is consistent with the statements of the State of Indiana, the State of Wisconsin, the State of Illinois, and those of Costanza himself.

That Costanza should not be able to deny he has a criminal record when he himself admitted to same in multiple public documents and agreed to pay civil fines relating to his failure to disclose his record. (E 41-45, E 49-50, E 51-58).

Even so, the gist or sting is not that Costanza has a criminal record but rather that he is not worthy of the voters' trust, their votes, or being in any other position of influence within local politics. Specifically, the sting of the Flyer is Constanza repeatedly provided multiple States with false information, repeatedly mishandled clients' funds, was administratively fined $30,000.00, had a license application delayed and a business license revoked, has had personal financial problems leading to a foreclosure and a bankruptcy, was terminated from employment for insurance fraud. The least worrisome of all is that he has a criminal record.

The specific allegations set forth in the Flyer are naturally a concern to citizens where Costanza is trying to exert influence and enter into a fiduciary relationship with them as an elected official.

The headings themselves are subject to subjective interpretation and were also in the context of a public person and involving a matter of public concern. As such, in addition to being true, are privileged speech.

There are no inferences which may be reasonably drawn in favor of the Plaintiffs.

No reasonable jury could find that the Flyer was not true, or in the alternative, substantially true and therefore, the trial courts granting of the Motion for Summary Judgment should be upheld.

II. The trial court properly dismissed Counts I, II, and III of Plaintiffs' Amended Complaint.

As previously set forth herein, the statements of the Defendants were true, and therefore privileged and protected by the 1st Amendment of the United States Constitution. This fact alone is enough to dismiss all of Plaintiffs' Amended Complaint.

On appeal the Plaintiffs for the first time raises the issue of Exhibits being attached to Defendants' 735 ILCS 5/2-615 Motion to Dismiss Counts I, II, and III of the Complaint for Interference with a Prospective Economic Advantage ("Motion to Dismiss"). It is well settled that issues not raised in the trial court are deemed waived and may not be raised for the first time on appeal. *Cambridge Eng'g, Inc. v. Mercury Partners 90 BI, Inc.*, 378 Ill. App. 3d 437, 453 (1st Dist., 2007).

Nevertheless, the Motion was still properly granted.

The question presented by a motion to dismiss under section 2-615 is whether sufficient facts are contained in the pleadings which, if proved, would entitle the plaintiff to relief. *Anderson v. Vanden Dorpel*, 172 Ill.2d 399 (Ill. 1996).

In Count I, II, and III, of their first-amended complaint, Plaintiffs are seeking recovery under a theory of intentional interference with prospective economic advantage.

To state a cause of action for intentional interference with prospective economic advantage, a plaintiff must allege (1) a reasonable expectancy of entering into a valid business relationship, (2) the defendant's knowledge of the expectancy, (3) an intentional and unjustified interference by the defendant that induced or caused a breach or termination of the expectancy, and (4) damage to the plaintiff resulting from the defendant's interference. *Anderson v. Vanden Dorpel*, 172 Ill. 2d 399, 406 (Ill. 1996).

Plaintiffs' factual allegations regarding their reasonable expectation of a business relationship in their first amended complaint consist of the following:

Count I – Tortious Interference with Prospective Business Advantage Against Defendant Sattler

Par. 51 – "Plaintiffs held reasonable expectancies of entering into valid business relationships with potential third party insurance clients and customers throughout the community at large, including, without limitation, the Belvidere School District."

Par. 54 – "As a result of Sattler's actions and false statements, in addition to the Belvidere School District, several other prospective commercial contacts of Plaintiffs' stopped returning Plaintiffs' telephone calls and/or refused to speak with Plaintiffs."

Count II - Tortious Interference with Prospective Business Advantage Against Defendant Thornberry

Par. 57 - Plaintiffs held reasonable expectancies of entering into valid business relationships with potential third party insurance clients and customers throughout the community at large, including, without limitation, the Belvidere School District."

Par. 61 - "As a result of Thornberry's false statements and actions, several prospective

commercial contacts of Plaintiffs', including, without limitation, the Belvidere School District, stopped returning Plaintiffs' telephone calls and/or refused to speak with Plaintiffs.

Count III - Tortious Interference with Prospective Business Advantage Against Defendant Rodgers.

Par. 64 - Plaintiffs held reasonable expectancies of entering into valid business relationships with potential third party insurance clients and customers throughout the community at large, including, without limitation, the Belvidere School District."

Par. 68 - As a result of Rodger's false statements and actions, several prospective commercial contacts of Plaintiffs', including, without limitation, the Belvidere School District, stopped returning Plaintiffs' telephone calls and/or refused to speak with Plaintiffs

The facts, or lack thereof, set forth in the Amended Complaint fall short of what is necessary to state a claim for intentional interference with prospective economic advantage.

In opposing a motion for dismissal, a plaintiff cannot rely simply on mere conclusions of law or fact unsupported by specific factual allegations. *Id.* at 408 citing *Doe v. Calumet City*, 161 Ill.2d 374 (Ill. 1994); *Quake Construction, Inc. v. American Airlines, Inc.*, 141 Ill. 2d 821, 829 (Ill. 1990).

Illinois is, moreover, a fact-pleading jurisdiction, and a plaintiff must allege facts sufficient to being his or her claim within the scope of the cause of the action being asserted. *Anderson* at 408.

The Plaintiffs' declaration that they have several prospective commercial contacts including the Belvidere School District, rests on nothing more than their own subjective belief. There are no facts alleged that support that conclusion.

Even in circumstances more favorable to an employee than those in this matter, Illinois courts have refused to find the sufficiently strong expectancy required to support a cause of action for intentional interference with prospective economic advantage. Plaintiffs cannot claim a reasonable expectancy on a mere hope for employment based on an interview or discussions with potential clients.

In *Werblood v. Columbia College*, 180 Ill. App. 3d 967 (1st Dist., 1989), the court determined that the plaintiff's expectation of a renewal of her current college employment contract was not sufficient to support a cause of action for intentional interference, even though officials had assured her that her employment was secure.

Similarly, in *Williams v. Weaver*, 145 Ill. App. 3d 562 (1st Dist., 1986) the court held that a person held under a renewable contract did not enjoy a sufficient expectancy of continued employment.

Furthermore, the Illinois Supreme Court held that progression past the initial interview, as well as such assurances from the potential employer, do not demonstrate a reasonable expectancy of a contractual relationship or a legally protectable expectancy where plaintiff alleging she was the "leading candidate" for the position, that she had been assured that her interviews had gone well and that she was being 'seriously considered' for the job, and that those who had interviewed her were going to recommend that she be hired. *Anderson* at 408.

Here we only have the allegation that the Plaintiffs prospective business clients did not return Plaintiffs' phone calls and nothing more.

To hold that Plaintiffs' complaint states a cause of action for intentional interference with prospective economic advantage would considerably broaden the scope of the tort.

Under the Plaintiffs' theory, the potential class of litigants could include all persons who state something negative about them to anyone in the area that knows the Plaintiffs sell insurance and then fails or refuses to return a phone call from the Plaintiff.

Similarly, Plaintiffs fail to provide any factual basis as to how the Defendants allegedly "knew of Flanders well as Plaintiffs' business expectancies in the community at large, upon information and belief, including, without limitation, with the Belvidere School District."

If Plaintiffs' contacts consisted of phone calls as they appear to allege, there is no factual explanation or reasonable inference on how the Defendants knew of such phone calls and these prospective business expectancies.

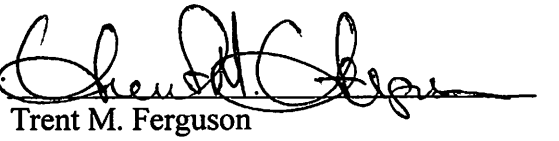
Plaintiffs also fail to allege the Defendants' alleged statements were ever made to any of the alleged prospective business persons or entities or that such persons or entities ever heard or knew of the alleged statements.

As shown by the Record, the trial court rendered its decision based solely on the Complaint's failure to allege a prospective economic advantage. (R 35 – 37, line 19).

WHEREFORE, Defendants, DONALD G. SATTLER, MARION THORNBERRY, and ELISABETH M. RODGERS, respectfully request this Honorable Court affirm the Trial Courts granting of Defendants' Motion for Summary Judgment and Defendants' Motion to Dismiss.

Respectfully submitted,

DONALD G. SATTLER, MARION THORNBERRY, and ELISABETH M. RODGERS

By: 
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