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FIRST DIVISION  
Date Filed: June 29, 2009

No. 1-08-0517

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT

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NECK AND BACK, LTD, an Illinois Corporation,	)	Appeal from the
	)	Circuit Court of
	)	Cook County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 1-08-0517
	)	
KEEFE AND ASSOCIATES LLC,	)	
an Illinois Limited Liability Company,	)	Honorable
	)	Jeffrey Lawrence,
	)	Judge Presiding.
Defendant-Appellee.	)	

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O R D E R

The plaintiff, Neck & Back, Ltd., filed a complaint for defamation per se against the defendant, Keefe & Associates LLC. The defendant filed a motion to dismiss pursuant to sections 2-615 and 2-619 of the Code of Civil Procedure (735 ILCS 5/2-615, 5/2-619 (West 2006) (the Code)). The circuit court dismissed the complaint. The plaintiff appeals.

According to the allegations in the complaint, the plaintiff is in the business of providing physical therapy and chiropractic services. The defendant is a law firm. On August 21, 2006, the defendant published an article which contained the following statement:

"The medical facility that had the extraordinary bill that was cut was MedChoice Medical Center, who we have been told is the 'Neck and Back Clinic' of the Rockford area."

The plaintiff maintained that the above defamatory statement used Neck and Back as a pejorative term to refer to clinics that excessively bill or over bill for patient services. It further maintained that the statement was false and intended to harm the plaintiff's reputation in the community. According to the plaintiff, it had been contacted by several individuals who read the article as portraying the plaintiff in a negative light and as a pejorative use of the plaintiff's good name. The statement was defamatory per se because it contained words imputing that the plaintiff was engaged in illegal and unlawful billing practices and lacked ability and integrity in performing its profession.

In its motion to dismiss, the defendant maintained that under the "innocent construction rule" the statement was not actionable. The defendant also maintained that the statement was protected under the first amendment to the United States Constitution. U.S. Const., amend. I.

The circuit court granted the motion to dismiss. The plaintiff filed a timely notice of appeal.

#### ANALYSIS

##### I. Procedural Concerns

##### A. Violation of Supreme Court Rules

With one exception, in the statement of facts and the argument portions of its brief, the plaintiff cites to the pages

of the appendix rather than to the record on appeal.<sup>1</sup> Therefore, the plaintiff's brief fails to comply with the requirements of Supreme Court Rule 341(h)(6) and (7). Official Reports Advance Sheet No. 15 (July 16, 2008), R. 341(h)(6)(7), eff. July 1, 2008. See Engle v. Foley & Lardner, LLP, Nos. 1-08-2761 & 1-08-2762 (consolidated), slip op. at 24 (May 8, 2009) (citation to the appendix of the brief rather than to the record is a direct violation of Rule 341(h)).

"Failure to provide proper citations to the record is a violation of [Rule 341(h)], the consequence of which is waiver of the facts or argument lacking such citation. Engle, slip op. at 24. However, as the record is not extensive and the violation does not interfere with our review, we will not impose sanctions for the violation. See In re Detention of Powell, 217 Ill. 2d 123, 132, 839 N.E.2d 1008 (2005). Nonetheless, we remind appellate counsel that strict adherence to our supreme court rules is necessary if they wish "to avoid any consequences which may prove irreversible to their case." Engle, slip op. at 25.

B. Basis for Dismissal

The circuit court did not indicate which section of the Code it applied in dismissing the complaint. Our courts have considered the innocent construction rule in the context of both

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<sup>1</sup>While a party may cite to the pages of an abstract rather than to the record on appeal, this court did not order the filing of an abstract in this case. See 210 Ill. 2d R. 342(b).

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section 2-615 and 2-619 motions to dismiss. See Tuite v. Corbitt, 224 Ill. 2d 490, 866 N.E.2d 114 (2006) (innocent construction rule considered in a section 2-615 motion to dismiss); Cartwright v. Garrison, 113 Ill. App. 3d 536, 540, 447 N.E.2d 446 (1983) (innocent construction rule properly considered in a motion to dismiss based on affirmative matter).

In Bryson v. News America Publications, Inc., 174 Ill. 2d 77, 672 N.E.2d 1207 (1996), our supreme court held that a motion seeking dismissal under the innocent construction rule could not be properly considered a section 2-615 motion where the defendants had relied on affirmative matters outside the pleadings. The court determined that it should be considered under section 2-619. Bryson, 174 Ill. 2d at 92. Likewise, in the present case, the defendants relied on an exhibit containing outside material in arguing the motion to dismiss. Therefore, we will consider the motion as having been granted pursuant to section 2-619.

## II. Standard of Review

We apply the de novo standard of review to the dismissal of a complaint pursuant to section 2-619 of the Code. Westmeyer v. Flynn, 382 Ill. App. 3d 952, 954-55, 889 N.E.2d 671 (2008). "'An appeal from such a dismissal is similar to one following the grant of summary judgment.'" Westmeyer, 382 Ill. App. 3d at 955, quoting Nosbaum v. Martini, 312 Ill. App. 3d 108, 114, 726 N.E.2d 84 (2000). The reviewing court considers whether the existence

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of a genuine issue of material fact should have precluded dismissal or, if no issue of fact exists, whether dismissal is proper as a matter of law. Westmeyer, 382 Ill. App. 3d at 955.

We take all well-pleaded allegations in support of the claim as true and draw all reasonable inferences in the plaintiff's favor. Westmeyer, 382 Ill. App. 3d at 955. "'Under section 2-619 a motion to dismiss should be granted if, after construing the pleadings and supporting documents in the light most favorable to the nonmoving party, the trial court finds that no set of facts can be proved upon which relief could be granted.'" Westmeyer, 382 Ill. App. 3d at 955, quoting Owens v. McDermott, Will & Emery, 316 Ill. App. 3d 340, 344, 736 N.E.2d 145 (2000).

### III. Discussion

"A defamatory statement is a statement that harms a person's reputation to the extent it lowers the person in the eyes of the community or deters the community from associating with her or him." Solaia Technology, LLC v. Specialty Publishing Co., 221 Ill. 2d 558, 579, 852 N.E.2d 825 (2006). Where, as here, the plaintiff has alleged defamation per se, he is not required to prove damages. Such statements "are thought to be so obviously and materially harmful to the plaintiff that injury to [his] reputation may be presumed." Bryson, 174 Ill. 2d at 87. Illinois recognizes five categories of statements that are defamatory per se. See Bryson, 174 Ill. 2d at 88-89.

The plaintiff alleged that the defamatory statement fell into the following two of those categories: those imputing the commission of a criminal offense and those imputing an inability to perform or want of integrity in the discharge of duties of office or employment. Bryson, 174 Ill. 2d at 88. "Even if a statement falls into one of the recognized categories of words that are actionable per se, it will not be found actionable per se if it is reasonably capable of an innocent construction." Bryson, 174 Ill. 2d at 90.

Under the innocent construction rule, the court considers the statement in context and gives the words of the statement and any implications arising from them, their natural and obvious meaning. Solaia Technology, LLC, 221 Ill. 2d at 580. "'[I]f, as so construed, the statement may reasonably be innocently interpreted or reasonably be interpreted as referring to someone other than the plaintiff it cannot be actionable per se.'" Solaia Technology, LLC, 221 Ill. 2d at 580, quoting Chapski v. Copley Press, 92 Ill. 2d 344, 352, 442 N.E.2d 195 (1982). "'[A] statement "reasonably" capable of a nondefamatory interpretation, given its verbal or literary context, should be so interpreted. There is no balancing of reasonable constructions \*\*\*.'" Solaia Technology, LLC, 221 Ill. 2d at 580, quoting Mittelman v. Witous, 135 Ill. 2d 220, 232, 552 N.E.2d 973 (1982). The court must interpret the words of the statement "'as they appear[] to have been used and according to the idea they were intended to convey

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to the reasonable reader.'" Solaia Technology, LLC, 221 Ill. 2d at 580, quoting Bryson, 174 Ill. 2d at 93, citing 33A Ill. L. & Prac. Slander & Libel §12, at 25 (1970). The determination of whether a statement is reasonably susceptible to an innocent interpretation is a question of law for the court to decide. Bryson, 174 Ill. 2d at 90.

The question in this case is whether the phrase "Neck and Back Clinic" can reasonably be interpreted to refer to some entity other than the plaintiff. The plaintiff maintains that, in referring to MedChoice Medical Center as "the Neck and Back Clinic of the Rockford area," the article identified only one specific entity, namely, the plaintiff.

In Bryson, the complained of article referred to the plaintiff's last name. The court noted that the last name "Bryson" was not so common as to require a finding as a matter of law that no reasonable person would believe the article was about the plaintiff. Bryson, 174 Ill. 2d at 97.

As was the case in Bryson, the defendant did use "Neck and Back Clinic," words which appear in the plaintiff's name. According to the defendant's exhibit in support of its motion to dismiss, a search of that phrase and "Rockford" revealed about 498 references for "'neck and back' rockford il." However, as the plaintiff notes, the exhibit did not use the plaintiff's full name, and it did not demonstrate its use as a business name.

In Erickson v. Aetna Life & Casualty Co., 127 Ill. App. 3d

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753, 759, 469 N.E.2d 679 (1984), a claim report, alleged to be defamatory per se referred to "Dr. Norris Erickson." The reviewing court "believ[ed] that there [was] no question as to whether the statement was directed to plaintiff - it referred to plaintiff and no one else." Erickson, 127 Ill. App. 3d at 759.

The defendant maintains that since the complained of statement referred to the "Neck and Back Clinic" not the "Neck & Back, Ltd.," no reasonable person would confuse such general terms, especially since the plaintiff referred to itself inconsistently throughout these proceedings. However, the defendant does not dispute the plaintiff's assertion that its legal name is "Neck & Back Clinic, Ltd. See Erickson, 127 Ill. App. 3d 573 (while the plaintiff used the middle initial "A," the absence of the "A" from the alleged defamatory statement did not prevent the reviewing court from concluding that the defamatory statement referred to the plaintiff).

While separately the terms "neck" and "back," might be considered general terms, in combination with the word "clinic" they refer specifically to the plaintiff. Moreover, the defendant's use of quotation marks and the capital letters are strong indications that the defendant was not making a general reference to entities that treated neck and back-related medical problems but was specifically referring to the plaintiff.

Taken in its context, we cannot say as a matter of law that the words "the Neck and Back Clinic" in the statement could

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reasonably be interpreted as referring to someone other than the plaintiff.

The defendant maintains that, even if this court finds that the statement in this case is not susceptible to the innocent construction rule, the statement is protected under the First Amendment. "[A] defamatory statement is constitutionally protected only if it cannot be reasonably interpreted as stating actual fact." Solaia Technology, LLC, 221 Ill. 2d at 581. In analyzing whether a defamatory statement is constitutionally protected, the court considers: (1) whether the statement has a precise and readily understood meaning; (2) whether the statement is verifiable; and (3) whether the statement's literary or social context signals that it has factual content. Solaia Technology, LLC, 221 Ill. 2d at 581. A statement that is both factual and false is actionable. Solaia Technology, LLC, 221 Ill. 2d at 582.

While the term "extraordinary" might be deemed hyperbole, in the context of the statement here, it clearly refers to an excessive charge for services. The statement is certainly verifiable in that the amount of the bill, that it was submitted by MedChoice Medical Center and that the bill was ultimately reduced are verifiable facts. Finally, viewed in context, the statement provided information, not opinion, as to MedChoice Medical Center's billing practices. As the defendant's statement can be reasonably interpreted as stating an actual fact, it is not entitled to constitutional protection.

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We conclude that the circuit court erred in granting the defendant's motion to dismiss.

The judgment of the circuit court is reversed, and the cause is remanded for further proceedings.

Reversed and remanded.

HALL, J., with R.E. GORDON, P.J., and GARCIA, J.,  
concurring.