2014 IL App (3d) 140197-U

Order filed December 18, 2014

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2014

R. SHERWIN PARUNGAO, M.D.,	)	Appeal from the Circuit Court
	)	of the 9th Judicial Circuit,
Plaintiff-Appellant,	)	Knox County, Illinois.
	)	
v.	)	Appeal No. 3-14-0197
	)	Circuit No. 13-L-40
DANIEL K. PIPER, M.D.,	)	
	)	
Defendant-Appellee.	)	Honorable Scott Shipplett,
	)	Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Presiding Justice Lytton and Justice McDade concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly granted defendant's motion to dismiss because the statements contained in defendant's written letter were not defamatory *per se*. Even if the statements could be deemed defamatory, the statements are not actionable under the innocent construction rule. The releases of liability, executed by plaintiff, also barred plaintiff's cause of action against defendant for defamation *per se*.

¶ 2 Defendant Daniel K. Piper, M.D., the chief of staff at a hospital where plaintiff R. Sherwin Parungao, M.D., worked as a general surgeon, received requests for verification of plaintiff's staff privileges and credentials from two hospital administrators. The separate

requests for information from each hospital included individual releases executed by plaintiff, which permitted defendant to disclose plaintiff's confidential employment and credentialing information to those two potential employers. After defendant provided the requested employment and credentialing information to each hospital, plaintiff initiated a complaint against defendant alleging the information defendant provided to the prospective employers was defamatory *per se*. Defendant moved to dismiss the lawsuit based on sections 2-606, 2-615, 2-619, and 2-619.1 of the Illinois Code of Civil Procedure (Code). 735 ILCS 5/2-606, 2-615, 2-619, 2-619.1 (West 2012). The trial granted defendant's motion to dismiss. We affirm.

¶ 3 BACKGROUND

¶ 4 At all times relevant to this appeal, plaintiff was a board certified general surgeon licensed to practice medicine in Illinois who was authorized to exercise clinical privileges to practice medicine at Galesburg Cottage Hospital (GCH) beginning in August of 2006 until his voluntary resignation from GCH on July 7, 2013. In addition, at all times relevant to this appeal, defendant held the position of chief of staff at GCH.

¶ 5 On May 15, 2013, plaintiff stopped performing surgeries at GCH even though his medical staff privileges to practice medicine at GCH remained fully intact. During this same time frame, plaintiff began to seek employment at other medical facilities, specifically, St. Mary's Hospital (St. Mary's) in Centralia, Illinois, and Weatherby Healthcare (Weatherby) in Fort Lauderdale, Florida.

¶ 6 Defendant, the chief of staff at GCH, received specific requests for verification of plaintiff's staff privileges and credentials at GCH submitted by administrators of St. Mary's and Weatherby's. Accompanying St. Mary's request for verification was a "Release of Liability" form, executed by plaintiff on May 20, 2013. Weatherby's request included a "Release and

Authorization Information" form, executed by plaintiff[1] on May 23, 2013. Both releases specified that the requesting hospitals, St. Mary's and Weatherby, inquiring about plaintiff's past employment, as well as third persons who disclosed or provided information from GCH to the requesting hospitals, were released from any liability related to disclosure of information regarding plaintiff's credentials and professional abilities.

¶ 7 St. Mary's release specifically provided in part:

> "I hereby release from any liability any and all individuals and organizations who provide information concerning my licensure, appointment/reappointment, corrective actions, hearing and appellate reviews, specific training, experience, health status including physical or mental capabilities to exercise clinical privileges, clinical competence, peer review, quality improvement activities, ethics, character, ability to work cooperatively with others, civil or criminal proceedings, and/or any other matter that might directly or indirectly affect patient care or the orderly operation of any health care facility."

¶ 8 Weatherby's release specifically provided in part:

> "I authorize Weatherby to disclose and receive from current, prior, or potential employers *** information relating to my qualifications, ability, and character to practice medicine, including information from the following sources: *** organizations, hospitals, employers, personal references, physicians, attorneys, companies or agencies who may furnish my criminal background history, companies that perform drug screens, medical malpractice carriers or organizations, business and professional associates. ***

[1] The Weatherby release was "DocuSigned" by plaintiff, with a corresponding ID number.

I hereby forever waive and release Weatherby *** and third parties which provide or receive information regarding my credentials, *** from any claims, causes of action, damages and expenses, including reasonable attorney's fees arising from or relating to the provision, collection, verification, and dissemination of information about me."

¶ 9 Subsequently, defendant responded to the inquiries from St. Mary's and Weatherby by sending the following identical letter, on May 28, 2013, to each administrator of the two hospitals pursuant to their requests:

"Re: R. Sherwin Parungao, M.D.
Privileged and Confidential

Dear [Administrator's Name],

This letter is in response to your recent inquiry for verification of staff privileges for the above named practitioner. Please be advised that it is our policy to provide this information only for the physician's most current reappointment period, since any other issues were addressed at the prior reappointment. The following information will serve as verification of your request:

Name:	R. Sherwin Parungao, M.D.
Original Appointment Date:	12/28/2006
Staff Status:	Active
Last Reappointment Date:	01/01/2013
Inactive Date:	N/A
Specialty Area(s) of Practice:	General Surgery
Disciplinary Actions: [1]	None
Other Actions:[2]	As a result of clinical concerns raised to the Surgical Care Committee, a review was opened by a peer review committee and no final recommendation has been made. There are no restrictions on his clinical privileges.

Sincerely,
[Signature]
Daniel K. Piper, M.D.
Chief of Staff

[1] It is our policy to provide information as to formal peer review actions or peer review investigations that resulted in action, ranging from a probationary or proctoring requirement to termination of privileges. This response does not include administrative suspensions related to medical records, liability insurance coverage, and other such matters. It is our policy to only provide information regarding formal disciplinary action within the most current appointment period. We do not provide information regarding gossip, innuendo, nonfactual information or investigations in which the practitioner was cleared of any wrongdoing. Questions regarding performance, judgment, technical skills and competence require subjective analysis and opinion outside the scope of a privilege status request. Thus, we cannot provide verification of or confirm the presence or absence of any such subjective information.

[2] This category includes any resignation while under investigation, termination of the physician's relationship with the Hospital [GCH] via contract for reasons related to competence or professional conduct, active participation in an impaired practitioner program due to a directive of the MEC, peer review committee or impaired practitioner committee (where disclosure is permitted by law), and formal reprimands."

¶ 10 Plaintiff's verified complaint, filed on October 21, 2013, alleged defendant committed defamation *per se* when he sent the letters to the administrators for St. Mary's and Weatherby describing information labeled as "Other Actions." Plaintiff claimed in his complaint that the information disclosed as "Other Actions" could be construed to imply that plaintiff participated in an impaired practitioner program while employed by GCH. Plaintiff's complaint alleged this implied statement was false and defamatory *per se*.

¶ 11 On December 13, 2013, defendant filed a motion to dismiss the complaint pursuant to sections 2-606, 2-615, 2-619, and 2-619.1 of the Code. 735 ILCS 5/2-606, 2-615, 2-619, 2-619.1 (West 2012). In his motion to dismiss, defendant contended plaintiff's defamation *per se* claim was barred by several affirmative matters which supported dismissal under section 2-619(a)(9) of the Code. 735 ILCS 5/2–619(a)(9) (West 2012). Defendant contended the alleged defamatory statements were not actionable because: they fell under the innocent construction rule; defendant had a qualified privilege to convey the information to the administrators from the two medical facilities; and defendant was statutorily immune from liability section 10.2 of the Illinois Hospital Licensing Act (210 ILCS 85/10.2 (West 2012)) and section 60/5 of the Medical Practice

Act of 1987 (225 ILCS 60/5 (West 2012)). Defendant also argued plaintiff's signed release of liability forms barred plaintiff from pursuing the defamation *per se* cause of action.

¶ 12 Defendant's motion to dismiss also requested the trial court to dismiss plaintiff's complaint pursuant to section 2-615 of the Code (735 ILCS 5/2–615 (West 2012)), alleging the pleadings were insufficient and conclusory and failed to state a cause of action. Further, plaintiff's complaint failed to attach necessary documents, as required by section 2-606 of the Code (735 ILCS 5/2-606 (West 2012)), specifically, a copy of the two identical letters allegedly containing the defamatory statements.

¶ 13 The court held the hearing on defendant's motion to dismiss on January 23, 2014, and issued a decision letter to both parties on January 27, 2014. In that decision, the court found, when looking at the letters in their entirety, that the letters stated there were no restrictions on plaintiff's clinical privileges and no disciplinary action had been taken against plaintiff. Therefore, based on the "explicit, unequivocal language of the letter outside of the footnote," the letter was subject to innocent construction and, based on this ground alone, the motion to dismiss could be granted.

¶ 14 The court further found defendant was protected by a qualified privilege. The court noted this finding alone would also support granting defendant's motion to dismiss. Additionally, the court addressed defendant's contention that defendant was shielded by a statutory immunity under the Hospital Licensing Act (210 ILCS 85/10.2 (West 2012)) and Medical Studies Act [*sic*] (actually section 60/5 of the Medical Practice Act of 1987 (225 ILCS 60/5 (West 2012)). The court adopted defendant's argument and determined defendant was also statutorily immune from liability under the statutes.

¶ 15 Finally, the court noted that plaintiff executed release of liability forms for both St. Mary's and Weatherby, which were attached to the motion to dismiss, and not only explicitly released the requesting hospitals from liability, but also released third parties who provided information to these hospitals in response to their requests for information. The court found Illinois law enforced these types of exculpatory clauses (releases) and no public policy existed to exclude protection under the releases of liability signed by plaintiff. The court also found defendant, as chief of staff, made statements to the prospective employers that fell within the scope of the release forms and defendant was, therefore, protected from any liability.

¶ 16 For all the foregoing reasons, pursuant to section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2012)), the court granted defendant's motion to dismiss on several grounds. Plaintiff filed a timely notice of appeal.

¶ 17 ANALYSIS

¶ 18 Plaintiff raises several issues on appeal. First, plaintiff argues the trial court erred by dismissing plaintiff's complaint for defamation *per se* under the innocent construction rule. Second, plaintiff contends the trial court erred by finding defendant's statements were protected by a qualified privilege. Third, plaintiff requests this court to conclude the trial court erroneously decided that the Medical Practice Act and the Hospital Licensing Act provided a statutory immunity for defendant's written responses to plaintiff's prospective employers' requests for information. Finally, plaintiff disputes the court's finding in favor of defendant's position that the releases executed by plaintiff allowed defendant to discuss plaintiff's work-related review by a peer review committee.

¶ 19 Initially, defendant claims plaintiff argued before the trial court that the implication in defendant's letter that plaintiff participated in an impaired practitioner program was the false and

defamatory statement at issue and plaintiff has forfeited any other argument regarding defendant's general reference to a peer review process regarding plaintiff on appeal. Further, defendant contends the trial court did not err in its rulings on all other issues.

¶ 20 In the case at bar, the trial court dismissed plaintiff's complaint pursuant to section 2-619(a)(9) of the Code. 735 ILCS 5/2-619(a)(9) (West 2012). Section 2-619(a)(9) permits involuntary dismissal of a claim where the claim is barred by other affirmative matters defeating or avoiding the legal effect of the claim, such as a claim of privilege or immunity. *Id*. Under this section, the statute provides for involuntary dismissal based upon certain defects or defenses to the allegations in the complaint and, if the grounds for dismissal are not apparent on the face of the pleading, the motion shall be supported by affidavit. *Id*. We review the trial court's granting of a motion to dismiss pursuant to section 2-619 of the Code *de novo*. *Coghlan v. Beck*, 2013 IL App (1st) 120891, ¶ 24; *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 31.

¶ 21 I. Forfeiture of the Peer Review Argument

¶ 22 Plaintiff's complaint alleged defendant's defamatory statements contained in the two identical letters indirectly advised prospective employers that plaintiff participated in an impaired practitioner program while working at GCH. We note, on appeal, plaintiff now advances a broader argument before this court that suggests defendant's letters were defamatory *per se* because the letters disclosed plaintiff was subject to a peer review process at GCH and implied that process was ongoing.

¶ 23 At the onset, we address defendant's concerns that plaintiff is now presenting a new theory, which this court should treat as forfeited. It is well established that "the theory upon which a case is tried in the lower court cannot be changed on review." *Daniels v. Anderson*, 162

Ill. 2d 47, 58 (1994). However, after careful review of the allegations contained in the complaint and plaintiff's response to defendant's section 2-619 motion to dismiss, we conclude the trial court had the opportunity to consider whether the letters contained any defamatory statements about any type of peer review and/or participation in an impaired physician program. Consequently, we conclude forfeiture does not apply.

¶ 24 II. Defamation *Per Se*

¶ 25 Next, we turn to the issue of whether the letters contained information that was defamatory *per se*, as alleged in the complaint. To state a cause of action for defamation *per se*, plaintiff must present facts showing: (1) defendant made a false statement about plaintiff, (2) defendant made an unprivileged publication of that statement to a third party, and (3) this publication caused damages. *Green v. Rogers*, 234 Ill. 2d 478, 491 (2009); *Coghlan*, 2013 IL App (1st) 120891, ¶ 38. For a statement to qualify as defamatory *per se*, the statement must be false and its harm must be obvious and apparent on its face. *Green*, 234 Ill. 2d at 491.[2] This court reviews the preliminary construction of an allegedly *per se* defamatory statement *de novo*. *Id*. at 492.

¶ 26 The case law identifies five categories of statements that are considered defamatory *per se*. *Id*. at 491-92. Only two of these categories are relevant to the outcome in the case at bar, specifically: (1) words that impute that a person is unable to perform or lacks integrity in performing his employment duties; and (2) words that impute a person lacks ability or otherwise prejudices that person in his profession. *Id.*

[2] If a statement needs to be supplemented or needs extrinsic evidence for its interpretation, the statement standing alone is not defamatory *per se*. *Barry Harlem Corp. v. Kraff*, 273 Ill. App. 3d 388, 393 (1995).

¶ 27 For the convenience of the reader, the controversial language included in the category of "Other Actions" and the corresponding footnote is set forth below.

> "As a result of clinical concerns raised to the Surgical Care Committee, a review was opened by a peer review committee and no final recommendation has been made. There are no restrictions on his clinical privileges.[2]"

The exact language of footnote 2 defining "Other Actions" is as follows:

> "This category includes any resignation while under investigation, termination of the physician's relationship with the Hospital [GCH] via contract for reasons related to competence or professional conduct, active participation in an impaired practitioner program due to a directive of the MEC, peer review committee or impaired practitioner committee (where disclosure is permitted by law), and formal reprimands."

¶ 28 First we consider whether the written statements set forth above would reasonably cause a person, reading the language contained within the four corners of this letter, to surmise plaintiff's current employer caused him to take part in an impaired practitioner program. In fact, the body of defendant's letter clearly negated any purported inference that plaintiff might be a potentially impaired practitioner since the letter clearly stated plaintiff had full privileges, was in good standing, and did not have any restrictions with respect to his clinical privileges.

¶ 29 We recognize footnote 2 contains a general definition of types of "Other Actions" which includes actions involving peer review as well as a separate action to require participation in an impaired practitioner program. However, there is no suggestion, implied or explicit, causing the reader of each letter to conclude plaintiff was suspected of being an impaired practitioner since he was currently allowed to exercise full medical privileges while on staff at GCH.

¶ 30 Next, we consider the slightly broader contention plaintiff advances on appeal regarding whether defendant's letters dated May 28, 2013, contained a false statement suggesting that a second peer review process was under way. This interpretation of the letter is not supported by the express language selected by defendant. Specifically, the reader could only adopt this construction of the letters if the reader relied on extrinsic evidence, beyond the four corners of the letter, that the peer review initiated by the Surgical Care Committee had actually terminated prior to the date of defendant's letters. Each letter clearly states after peer review began, plaintiff was not subjected to any disciplinary actions or negative restrictions on his clinical privileges regardless of whether peer review was ongoing or had been terminated.

¶ 31 Consequently, we conclude the four corners of the two identical letters authored by defendant did not contain *per se* defamatory statements as defined by the case law.

¶ 32 III. Innocent Construction Rule

¶ 33 Assuming, *arguendo*, that defendant's statements in his letters could be construed as defamatory *per se*, plaintiff argues the trial court improperly applied the innocent construction rule as one of several grounds to allow defendant's motion to dismiss. Even if the statements could be read to be defamatory, the innocent construction rule provides that a purported *per se* defamatory statement is not actionable if the language may be reasonably subject to an innocent construction. *Mittelman v. Witous,* 135 Ill. 2d 220, 232 (1989); *John v. Tribune Co.*, 24 Ill. 2d 437, 442 (1962). The preliminary determination as to whether a statement may reasonably be innocently construed is a question of law. *Mittelman,* 135 Ill. 2d at 232.

¶ 34 Although we have concluded that the four corners of the letters did not contain statements that were defamatory *per se*, we will briefly address the application of this principle to the statements at issue. Using this approach, if the statement is reasonably capable of a non-

defamatory interpretation, in context with the full written letter, the statement at issue should be interpreted as non-defamatory, without a balancing of reasonable constructions. *Green,* 234 Ill. 2d at 500; *Mittelman,* 135 Ill. 2d at 232. While a court "should not strain to see an inoffensive gloss" if a defendant clearly intended and conveyed a defamatory meaning, if the statement is reasonably capable of a non-defamatory interpretation, it should be interpreted as such. *Coghlan,* 2013 IL App (1st) 120891, ¶ 41 (quoting *Green,* 234 Ill. 2d at 500).

¶ 35 When we consider the language of the letters as a whole, we conclude the express language does not imply that plaintiff was required to participate in an impaired practitioner program. The language included in the letter is reasonably capable of a non-defamatory interpretation that plaintiff was in good standing, with full privileges, and not subjected to any disciplinary actions.

¶ 36 IV. Releases of Liability

¶ 37 Defendant also contends plaintiff's release of liability forms acted as a total bar to plaintiff's claim for defamation *per se* against defendant. The language of the St. Mary's release, personally executed by plaintiff, authorized defendant to disclose "peer review" information. Additionally, defendant received a similar, but broader and more general release from Weatherby, which was "DocuSigned" by plaintiff.[3] The Weatherby release was sent to defendant within the same time frame as the St. Mary's release and defendant provided no more and no less information as previously disclosed pursuant to the release from St. Mary's.

[3] We note that, during appellate argument, plaintiff's counsel raised a question regarding whether plaintiff properly executed the Weatherby release, however, defense counsel correctly argued that plaintiff did not challenge the validity of the Weatherby release either at the trial court level or in his initial appellate brief. Therefore, plaintiff has forfeited any argument questioning the validity of plaintiff's execution of the Weatherby release.

¶ 38 It is well established that a court will enforce an exculpatory clause, such as a release of liability form, unless it is against public policy or there is something in the social relationship between the parties militating against enforcement. *Stratman v. Brent*, 291 Ill. App. 3d 123, 137 (1997); citing *Tyler Enterprises of Elwood, Inc. v. Skiver*, 260 Ill. App. 3d 742, 750 (1994). Such agreements are strictly construed against the drafting party (the prospective employers in the instant case) and "must spell out the intention of the parties with great particularity." *Id*. (quoting *Scott & Fetzer Co. v. Montgomery Ward & Co.*, 112 Ill. 2d 378, 395 (1986)). However, an exculpatory agreement "will not be construed to defeat a claim which is not explicitly covered by [its] terms." *Scott*, 112 Ill. 2d at 395. We review the interpretation of an exculpatory agreement or release of liability authorization *de novo*. *Stratman*, 291 Ill. App. 3d at 137.

¶ 39 In the instant case, St. Mary's release specifically provided in relevant part:

> "I hereby release from any liability any and all individuals and organizations who provide information concerning my licensure, appointment/reappointment, corrective actions, hearing and appellate reviews, specific training, experience, health status including physical or mental capabilities to exercise clinical privileges, clinical competence, peer review, quality improvement activities, ethics, character, ability to work cooperatively with others, civil or criminal proceedings, and/or any other matter that might directly or indirectly affect patient care or the orderly operation of any health care facility."

¶ 40 Weatherby's release specifically provided in relevant part:

> "I authorize Weatherby to disclose and receive from current, prior, or potential employers *** information relating to my qualifications, ability, and

character to practice medicine, including information from the following sources: *** organizations, hospitals, employers, personal references, physicians, attorneys, companies or agencies who may furnish my criminal background history, companies that perform drug screens, medical malpractice carriers or organizations, business and professional associates. ***

I hereby forever waive and release Weatherby *** and third parties which provide or receive information regarding my credentials, *** from any claims, causes of action, damages and expenses, including reasonable attorney's fees arising from or relating to the provision, collection, verification, and dissemination of information about me."

Turning to the language set forth above, it appears that St. Mary's release expressly authorized disclosure of information concerning any "peer review," the language at issue in this case. Weatherby's release specifically allowed defendant to release *any* information relating to plaintiff's "qualifications, ability, and character to practice medicine." We conclude the language of defendant's letters did not exceed the scope of the information authorized in plaintiff's executed release of liability forms and the dismissal of plaintiff's complaint was also proper, based on the releases, under section 2-619(a)(9) of the Code. 735 ILCS 5/2-619(a)(9) (West 2012).

¶ 41 Having determined that defendant's motion to dismiss was properly granted based on the foregoing grounds, there is no need to address the remaining issues relating to qualified privilege and statutory immunity.

¶ 42 CONCLUSION

¶ 43 For the foregoing reasons, we affirm the decision of the trial judge of Knox County granting defendant's motion to dismiss.

¶ 44 Affirmed.