

NOTICE  
Decision filed 07/09/12. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2012 IL App (5th) 120011-U  
NO. 5-12-0011  
IN THE  
APPELLATE COURT OF ILLINOIS  
FIFTH DISTRICT

NOTICE  
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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DOMINIC DUNNAVANT,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	St. Clair County.
	)	
v.	)	No. 11-L-495
	)	
CAROLYN DUNNAVANT,	)	Honorable
	)	Robert P. LeChien,
Defendant-Appellee.	)	Judge, presiding.

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JUSTICE CHAPMAN delivered the judgment of the court.  
Justices Welch and Spomer concurred in the judgment.

**ORDER**

¶ 1 *Held:* Where the record on appeal is incomplete, we conclude that the trial court's order dismissing plaintiff's complaint with prejudice was proper.

¶ 2 Dominic Dunnivant appeals from the trial court's summary dismissal of his complaint which sought damages for abuse of process, intentional infliction of emotional distress, and defamation *per se*. Neither party was represented by counsel in the trial court. In response to Dominic's complaint, Carolyn Dunnivant filed a one-sentence response asking that the trial court dismiss the complaint. On December 21, 2011, the trial court dismissed Dominic's complaint with prejudice.

¶ 3 **FACTS**

¶ 4 Dominic and Carolyn were still married on September 6, 2011, the date on which Dominic filed his complaint against Carolyn. Although we do not have the entire dissolution-of-marriage file, it appears from documents contained within this record on

appeal that Dominic and Carolyn were married on September 23, 2009, in Madison County. Carolyn and Dominic lived together until July 2010. At some time in the first half of 2010, Carolyn sought an order of protection against Dominic. On June 4, 2010, Carolyn voluntarily dismissed her case. At a later date, this file was reactivated. On March 16, 2011, an order was entered in the reactivated order-of-protection case dismissing without prejudice the interim and plenary orders of protection by agreement of the parties. In this March 15, 2011, order, the trial court wrote the following order:

"Each party agrees to have no contact with the other party by direct or indirect means."

On an unspecified date in 2011, Carolyn filed a petition in St. Clair County to dissolve her marriage. Dominic was served with the divorce papers on June 28, 2011. He never entered an appearance in the dissolution case, and the court found him to be in default. Ultimately, the court entered its judgment of dissolution of marriage on October 18, 2011. In this judgment order, the court noted:

"[A] Plenary Order of Protection was previously entered as cause number 10-OP-329, on May 11, 2010. This Plenary order of Protection was reduced to a Civil No-Contact Order on March 16, 2011."

As a part of this judgment, the court incorporated "the Civil No-Contact Order previously entered as cause number 10-OP-329."

¶ 5 Dominic's civil complaint against Carolyn was in three counts. Count I alleged that Carolyn abused the process of St. Clair County by filing for an emergency order of protection on October 14, 2010, based largely upon alleged threats Dominic made to Carolyn. Dominic's complaint includes the following quote apparently taken from the petition for an order of protection, and purports to be statements he made to Carolyn:

"I will kill you, your son and your sister. Let's die like [R]omeo and [J]uliet[.] [O]ur

love will last in the eyes of [G]od. I am going to enjoy killing you. How do you want to die wife—you want me to strangle you—stab you or just shoot you in the heart[?] How are you enjoying breathing your last few hours[?] [T]ime is near my wife."

In the abuse-of-process count, Dominic alleged that Carolyn created these statements in order to harass Dominic—who allegedly lost his job as a security guard upon notification of his employer that his wife had obtained an order of protection against him—and that as a result of the court's order he could not carry a firearm—a job requirement. The crux of his complaint was that Carolyn made false statements in a verified petition to the court. He contended that Carolyn's allegations caused him embarrassment, humiliation, and financial harm in the form of lost wages and legal fees resulting from defense of the order.

¶ 6 Count II of his petition alleged intentional infliction of emotional distress. He repeated the allegations contained within his abuse-of-process claim stating that Carolyn's actions were extreme and outrageous in that she intentionally or carelessly caused Dominic to suffer extreme emotional distress. He sought an award of compensatory and punitive damages resulting from this emotional distress.

¶ 7 Count III of his petition alleged defamation *per se*. Dominic claimed that Carolyn made false unprivileged statements to an unspecified third person that he had committed criminal offenses, including physical abuse or battery. Dominic alleged that these false statements caused damage to his reputation amongst his peers. He further alleged that as a direct and proximate result "of the foregoing," he had found it difficult to find substitute security employment following his termination for allegedly making threats to Carolyn. For this alleged defamation *per se*, Dominic sought both compensatory and punitive damages.

¶ 8 Carolyn was served with this complaint on September 7, 2011. On September 19, 2011, Carolyn filed her handwritten answer in which she denied all the allegations made in the complaint and prayed for the court to dismiss the case against her. Apparently, this

answer was not served upon Dominic as there was no indication by proof of service or otherwise.

¶ 9 On December 7, 2011, Dominic filed a motion for default judgment on the basis that the time had passed for Carolyn to have responded to his complaint. In this motion for default, Dominic indicated that if requested, he would present testimony that within one year before September 6, 2011, Carolyn made a statement to a third person, who was not a police officer, that Dominic committed a battery—a criminal offense. The balance of the evidence he indicated he would present reiterated the allegations of his complaint. Dominic scheduled the motion for a hearing on December 21, 2011, and he filed his notice of hearing.

¶ 10 Although no notice of hearing was filed relative to Carolyn's motion to dismiss, on December 21, 2011, the trial court addressed Carolyn's motion to dismiss, apparently utilizing the scheduled hearing on Dominic's default judgment motion. The trial court's order states:

"Defendant['s] Motion to Dismiss, [a]long with documents submitted, is hereby [a]llowed. Case dismissed with prejudice."

From the record, we do not know if Dominic or Carolyn was present for the hearing. We do not know what documents were submitted by Carolyn, but because certain documents are included in the common law record on appeal, we presume that the records referenced are the two orders entered in the order-of-protection case, along with the judgment of dissolution of marriage.

¶ 11 From this order, Dominic timely appeals.

¶ 12 **ISSUES, LAW, AND ANALYSIS**

¶ 13 On appeal, Dominic argues only that the trial court erred in dismissing the defamation count of his complaint. He does not challenge the court's dismissal of the other two counts of his complaint.

¶ 14 When the trial court is presented with a motion to dismiss a case for a failure to state a cause of action pursuant to either section 2-615 or section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-615, 2-619 (West 2010)), the court must determine whether the complaint sets forth sufficient facts that, if established, could entitle the plaintiff to relief. *Bryson v. News America Publications, Inc.*, 174 Ill. 2d 77, 86, 672 N.E.2d 1207, 1214 (1996) (section 2-615); *Doyle v. Holy Cross Hospital*, 186 Ill. 2d 104, 109-10, 708 N.E.2d 1140, 1144 (1999) (section 2-619). The trial court must accept all well-pleaded facts in the complaint as true and draw reasonable inferences from those facts that are favorable to the plaintiff. *Bryson*, 174 Ill. 2d at 86, 672 N.E.2d at 1213. Granting a motion to dismiss is only appropriate as a matter of law if there is no issue of material fact to be decided. *Doyle*, 186 Ill. 2d at 109-10, 708 N.E.2d at 1144. Because the trial court is not being called upon to judge any witness's credibility or to weigh facts, on appeal, we review the matter *de novo*. *Jackson v. Michael Reese Hospital & Medical Center*, 294 Ill. App. 3d 1, 9, 689 N.E.2d 205, 211 (1997).

¶ 15 To allege a claim for defamation, the plaintiff is required to state facts establishing that the defendant made a false statement about the plaintiff in an unprivileged publication to a third party, and that this publication of the false statement caused the plaintiff damages. *Solaia Technology, LLC v. Specialty Publication Co.*, 221 Ill. 2d 558, 579, 852 N.E.2d 825, 840 (2006).

¶ 16 Dominic alleged a special type of defamation in his complaint—defamation *per se*. Only certain types of defamation are considered to be defamatory *per se*. False unprotected statements, to the effect that an individual committed a criminal offense, are one type of defamatory *per se* statements. *Bryson v. News America Publications, Inc.*, 174 Ill. 2d 77, 88-89, 672 N.E.2d 1207, 1214-15 (1996). In a defamation *per se* case, while the plaintiff must still allege that the defendant made a false statement which was unprotected and was

published to a third party, the plaintiff does not need to allege and prove damages. *Owen v. Carr*, 113 Ill. 2d 273, 277, 497 N.E.2d 1145, 1147 (1986). Given the nature of the special categories of statements, damages are presumed. *Id.* While there are situations in which a defamatory *per se* statement is considered a protected communication, the privilege extends only to those involved within the context of litigation—to the court and the attorneys involved. See *Edelman, Combs & Lattner v. Hinshaw & Culbertson*, 338 Ill. App. 3d 156, 158, 788 N.E.2d 740, 748-49 (2003). Plainly stated, although defamatory *per se* statements could be made without recourse if made to those within the circle of protection, those statements, if uttered outside the circle of protection, remain actionable *per se*. *Id.*

¶ 17 In this case, Dominic alleged that Carolyn made a false statement that was not of a protected nature, and that she made this false statement to a third person. Additionally, Dominic alleged that the false statement involved his having committed a criminal offense—a battery. Although damages would have been presumed, Dominic went on to specifically allege damages to his reputation. From our review of Dominic's complaint, we find that the allegations were vague. The complaint lacked factual specificity as to the exact false statement made by Carolyn and the identity of the third person to whom Carolyn relayed the information about the battery. Factual pleading is mandated in Illinois. See 735 ILCS 5/2-603 (West 2010). In response to the complaint and in addition to Carolyn's answer/motion to dismiss, the record contains copies of orders from the order-of-protection proceeding between the two parties and a copy of the judgment of dissolution of marriage.

¶ 18 The orders included in the record establish that there was an order of protection against Dominic in effect for a period of time. By agreement of Dominic and Carolyn, that order was dismissed and replaced with a no-contact order. The judge who dissolved the parties' marriage referred to the entry of this no-contact order as a "reduction" from the original order of protection. We are puzzled by the "reduction" of the order of protection to

a civil no-contact order. A civil no-contact order in Illinois is a very serious order based upon the Civil No Contact Order Act (740 ILCS 22/101 to 302 (West 2010)). The respondent to a civil no-contact order is a person who either committed or aided and abetted the commission of an act of nonconsensual sexual conduct or nonconsensual sexual penetration against the petitioner. 740 ILCS 22/103 (West 2010). Because the order of protection is not included in the record on appeal, we do not know if the order of protection Carolyn sought was based upon a sexual attack or sexual conduct.

¶ 19 Dominic agreed to this order on March 16, 2011. Clearly, if the allegations made by Carolyn against Dominic in the original order of protection involved nonconsensual sexual contact or penetration, a battery would have been a part of those actions. However, we do not have any way of knowing what actions and/or statements formed the basis for Carolyn's requested order of protection. Assuming that the request for an order of protection involved battery, by agreeing to the order, Dominic appears to have admitted to battery against Carolyn. By admitting his actions, Dominic cannot state a claim against Carolyn for defamation *per se* on the basis of her nonprotected publication of her contentions that he committed battery—as he appears to have admitted the truth of those claims.

¶ 20 If the "no contact" order referenced in the March 16, 2011, order and in the October 18, 2011, judgment of dissolution of marriage was not an order pursuant to the Civil No Contact Order Act, the record contains no additional documents or means for this court to determine that fact.

¶ 21 The responsibility for preparing a full and complete appellate record falls on the shoulders of the appellant. *Midstate Siding & Window Co. v. Rogers*, 204 Ill. 2d 314, 319, 789 N.E.2d 1248, 1251 (2003). In the absence of a complete record on appeal, "the reviewing court will presume that the order entered by the trial court was in conformity with the law and had a sufficient factual basis [citations]." *Id.* at 319, 789 N.E.2d at 1252.

¶ 22 Accordingly, we conclude that the trial court's dismissal was appropriate on both legal and factual grounds.

¶ 23

### CONCLUSION

¶ 24 For the foregoing reasons, the judgment of the circuit court of St. Clair County is hereby affirmed.

¶ 25 Affirmed.