NOTICE
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2019 IL App (5th) 180208-U

NO. 5-18-0208

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).

NICHOLAS G. BYRON, Plaintiff-Appellant and Cross-Appellee, v. LESTER BRICKMAN, Defendant-Appellee and Cross-Appellant, and HEATHER ISRINGHAUSEN GVILLO and THE MADISON COUNTY RECORD, INC., Defendants-Appellees.	)	Appeal from the Circuit Court of Madison County. No. 15-L-1133 Honorable J. Marc Kelly, Judge, presiding.

JUSTICE MOORE delivered the judgment of the court.
Presiding Justice Overstreet and Justice Barberis concurred in the judgment.

ORDER

¶ 1 *Held*: Statement quoted in article that former circuit judge "was corrupt as the day is long" in his former judicial capacity is protected from defamation and false light claims by the first amendment (U.S. Const., amend. I) because, based on the context of the statement, it cannot be reasonably interpreted as stating actual facts about the judge because it lacks a precise and readily understood meaning, and uses loose, figurative, rhetorical, or hyperbolic language.

¶ 2 The plaintiff, Nicholas G. Byron, appeals the February 23, 2018, order of the circuit court of Madison County which dismissed, with prejudice, his complaint against the defendants, Lester Brickman, Heather Isringhausen Gvillo, and the Madison County Record, Inc. (the Record). Brickman cross-appeals that portion of the circuit court's order which denied his motion to dismiss based on a lack of personal jurisdiction. For the reasons that follow, we affirm the circuit court's February 23, 2018, dismissal of the complaint in its entirety on first amendment grounds, rendering it unnecessary for us to address Brickman's cross-appeal.

¶ 3 FACTS

¶ 4 On September 2, 2015, the plaintiff, a former judge of the circuit court of Madison County, filed a complaint in the circuit court of Madison County, naming Brickman, Gvillo, and the Record as defendants. According to the complaint, on or about September 10, 2014, the Record printed, published, and disseminated an article entitled "Asbestos Litigation Explodes Under Byron's Watch" (the Article). The complaint alleges the Article was written by Gvillo, a reporter for the Record. The Article contains a statement, attributed to Brickman, that the plaintiff "was corrupt as the day is long" (the Statement).

¶ 5 Count I purports to state a cause of action for defamation against all of the defendants. In particular, count I alleges the Statement was false, the defendants made an unprivileged publication of the Statement to third parties, and published the Statement "knowing the statement was false or with a reckless disregard for its truth or falsity, which constitutes actual malice." In addition, count I alleges that in addition to constituting defamation generally, the Statement constitutes defamation *per se* in that it

imputes the want of integrity of the plaintiff as a former judicial officer of the circuit court and imputes wrongdoing on the part of the plaintiff pursuant to various provisions of the Code of Judicial Conduct. Specifically, the complaint alleges the Statement imputes wrongdoing on the part of the plaintiff in failing to: (1) uphold the integrity and independence of the judiciary (Ill. S. Ct. R. 61 (eff. Oct. 15, 1993)); (2) avoid impropriety and the appearance of impropriety in all activities (Ill. S. Ct. R. 62 (eff. Oct. 15, 1993)); (3) be faithful to the law and maintain professional competence (Ill. S. Ct. R. 63 (eff. Mar. 26, 2001)); and (4) perform judicial duties without bias and prejudice (*id.*).

¶ 6 In addition, count I alleges the Statement amounts to defamation *per se* because it imputes a lack of integrity of the plaintiff as a practicing lawyer generally pursuant to various provisions of the Illinois Rules of Professional Conduct. Specifically, count I alleges the Statement imputes a lack of integrity on the part of the plaintiff in failing to: (1) be candid with a tribunal (Ill. R. Prof'l Conduct (2010) R. 3.3 (eff. Jan. 1, 2010)); (2) be fair to opposing parties and counsel (Ill. R. Prof'l Conduct (2010) R. 3.4 (eff. Jan. 1, 2010)); (3) be impartial and act with proper decorum with a tribunal (Ill. R. Prof'l Conduct (2010) R. 3.5 (eff. Jan. 1, 2010); (4) be truthful with statements to others (Ill. R. Prof'l Conduct (2010) R. 4.1 (eff. Jan. 1, 2010)); and (5) avoid misconduct (Ill. R. Prof'l Conduct (2010) R. 8.4 (eff. Jan. 1, 2010)). Count I seeks money damages from the defendants in an amount in excess of $50,000.

¶ 7 Count II purports to state a cause of action for placing the plaintiff in a false light before the public. It incorporates all allegations made in count I, adding that the Statement was highly offensive to a reasonable person and caused the plaintiff substantial

damage. Count II also seeks money damages from the defendant in an amount in excess of $50,000.

¶ 8 The Article, as it appeared in the Record, is attached to the complaint as an exhibit. Because our analysis of the issues raised on appeal requires this court to view the Statement in context, we explain the substance of the Article in detail. The full title of the Article is "Asbestos [L]itigation [E]xploded [U]nder Byron's [W]atch; Docket [D]esigned to '[B]eat [D]efendants [I]nto [S]ubmission,' [C]ritic [S]ays." Gvillo is listed as the author of the article and it is dated September 4, 2014. The article notes the drastic increase in asbestos-related lawsuit filings in Madison County between 2001 and 2013.

¶ 9 The Article contains quotes from Darren McKinney, Communications Director for the American Tort Reform Association, who is not a defendant herein. He is quoted in the Article as stating, "I would say that the biggest factor in Madison County's reputation as an asbestos Hellhole boils down to one man, and that was [the plaintiff]." In addition, McKinney is quoted in the Article as stating that the plaintiff designed the docket to "beat defendants into submissions before going to trial," and that he "was so shamelessly plaintiff friendly that it was almost instantaneous that the local attorneys came to understand that, '[t]his was a place where we could have our way.' " The Article attributes to McKinney an explanation that the plaintiff would schedule trial slots for a single defendant in multiple cases on a single day, resulting in the inability of defendants to adequately prepare for trial, resulting in their decision to settle. This discussion immediately precedes the Statement by Brickman that, "[h]e was corrupt as the day is long."

¶ 10 Immediately following the Statement, the Article explains that in 2002, while running for retention, the plaintiff received $65,750 in campaign donations "mostly from asbestos plaintiff lawyers." This information is not attributed to Brickman, however. The Article goes on to state, without citation to source, that over a 17-year period, the plaintiff made Madison County "the friendliest venue in America for asbestos litigation, docketing nearly a thousand cases in a single year—953 in 2003—which set a record at the time."

¶ 11 The Article also comments on other statements made by Brickman, who the Article states is "a national asbestos expert" and a law professor of the Benjamin N. Cardozo School of Law at Yeshiva University in New York. In addition to the Statement, Brickman is quoted in the Article as stating the plaintiff was so pro-plaintiff that he "accommodated the plaintiff's bar in virtually every conceivable way." The Article continues to give a history of the judges in charge of the asbestos docket in Madison County in the years following the plaintiff's tenure, and how their actions affected the administration of the docket.

¶ 12 On October 22, 2015, Gvillo and the Record filed a motion to dismiss, with prejudice, all the plaintiff's claims against them pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2014)). Gvillo and the Record set forth the following as the basis for their motion to dismiss: (1) the first amendment (U.S. Const., amend. I) precludes basing a claim on the rhetorical phrase "corrupt as the day is long," because it expresses Brickman's opinion of the plaintiff in loose and figurative terms rather than stating a precisely and readily understood fact that can be proven true or false; (2) the Statement is not actionable under the "innocent construction rule"; (3) the

Statement is not actionable under the neutral reporting privilege; and (4) the complaint fails to allege adequate facts to support its conclusion that Gvillo and the Record published the Statement with actual malice.

¶ 13 On November 25, 2015, Brickman filed a motion to dismiss for lack of personal jurisdiction. In his affidavit in support of his motion, Brickman attested that he has no contacts with the State of Illinois and believed he was interviewed by Gvillo in connection with an article she was writing for an online publication, Legal Newsline, which covers litigation in all jurisdictions nationwide. Brickman further averred he never heard of the Record and had no knowledge that his statements in his telephone interview would be published or disseminated in Illinois. In opposition to Brickman's motion, the plaintiff submitted documentation to prove that Legal Newsline is owned by the Record.

¶ 14 On July 18, 2016, the Illinois Supreme Court issued an order assigning this matter to be heard by a judge of the fourth circuit. After full briefing regarding the motions to dismiss, the circuit court held a hearing on the motions on December 20, 2017. On February 23, 2018, the circuit court entered an order denying Brickman's motion to dismiss for a lack of jurisdiction. However, the circuit court granted Gvillo and the Record's motion to dismiss because the circuit court found the Statement to be protected by the first amendment. U.S. Const., amend. I. The circuit court further found that its ruling would also apply to the plaintiff's claims against Brickman. Accordingly, in the interests of judicial economy, the circuit court dismissed the plaintiff's claims against Brickman on the same basis. The plaintiff filed a timely notice of appeal, and Brickman

filed a timely notice of cross-appeal from the circuit court's order denying his motion to dismiss on the basis of a lack of personal jurisdiction.

¶ 15 ANALYSIS

¶ 16 We begin our analysis of the issues raised in this appeal with our standard of review:

> "A motion to dismiss under section 2-615 of [the Code] [citation] attacks the legal sufficiency of a complaint. [Citation.] A cause of action should not be dismissed under section 2-615 unless it is clear that no set of facts can be proved under the pleadings that would entitle the plaintiff to recover. [Citation.] Whether a complaint should be dismissed under section 2-615 presents a question of law, which we review *de novo*. [Citation.]" *Imperial Apparel, Ltd. v. Cosmo's Designer Direct, Inc.*, 227 Ill. 2d 381, 392 (2008).

¶ 17 If, as the circuit court found, the Statement is protected by the first amendment (U.S. Const., amend. I), the Statement can be a basis for neither the plaintiff's defamation claims nor his "false light" claims. *Id.* at 393. For this reason, we proceed to a discussion of the first amendment's protections in this context. While the fact that a statement is phrased in the form of an opinion does not cloak it with first amendment protection, the first amendment does impose limits on the type of speech which may be the subject of state common law actions. *Id.* at 397 (citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16 (1990)). "Specifically, the first amendment prohibits defamation actions based on loose, figurative language that no reasonable person would believe presented facts." *Id.* "The principle that an allegedly defamatory statement is protected by the first amendment

unless the plaintiff shows that the statement is factual has been found to apply to three types of actions: those brought by public officials, those brought by public figures, and those brought by private individuals against media defendants." *Id.* at 398-99.

¶ 18 As heretofore stated, "[t]he test for determining whether a statement is protected from defamation claims under the first amendment is whether it can reasonably be interpreted as stating actual fact." *Id.* at 398. Criteria to guide our determination of whether a statement meets this test are: (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. *Id.* (citing *Solaia Technology, LLC v. Specialty Publishing Co.*, 221 Ill. 2d 558, 581 (2006)). "The statement is evaluated from the perspective of an ordinary reader, but whether or not a statement is a factual assertion that could give rise to a defamation claim is a question of law for the court." *Id.*

¶ 19 Here, the plaintiff does not dispute the truth of any statement made in the Article other than the Statement, which we reiterate is a statement, attributed to Brickman, that the plaintiff "was corrupt as the day is long." This is precisely the type of language that our courts have held to be protected by the first amendment. See *Coghlan v. Beck*, 2013 IL App (1st) 120891, ¶ 50 (citing *Imperial Apparel, Ltd.*, 227 Ill. 2d at 398) ("the terms 'corrupt director,' 'bully tactics,' and 'fraud machine' do not have a 'precise and readily understood meaning' "); see also *Imperial Apparel, Ltd.*, 227 Ill. 2d at 397-98 (citing *Troy Group, Inc. v. Tilson*, 364 F. Supp. 2d 1149, 1157 (C.D. Cal. 2005) (defendant's characterization of parties associated with plaintiff 'as the biggest crooks on the planet'

not actionable because, viewed in context, it was exaggerated, figurative, and hyperbolic speech protected by the first amendment); *Levinsky's, Inc. v. Wal-Mart Stores, Inc.*, 127 F.3d 122, 129 (1st Cir. 1997) (defendant's reference to competitor as "trashy" not actionable); *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264, 284-86 (1974) (use of the word "traitor" to define a worker who crossed a picket line not actionable); *Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6, 13-14 (1970) (characterization of a developer's negotiating position as "blackmail" not defamatory and under the circumstances did not suggest commission of a crime); and *Phantom Touring Inc. v. Affiliated Publications*, 953 F.2d 724, 728 (1st Cir. 1992) (calling play " 'a rip-off, a fraud, a scandal, a snake-oil job' " was mere hyperbole and, thus, constitutionally protected)).

¶ 20 In his brief, the plaintiff argues that the word "corrupt" is easily defined by reference to the dictionary, and can only be construed as accusing the plaintiff of improper conduct, such as bribery or violations of relevant provisions of the Illinois Code of Judicial Conduct and the Illinois Rules of Professional Conduct. However, the fact that the word "corrupt" has a negative connotation is irrelevant to the legal standards that have been articulated by our courts for determining whether the Statement is protected by the first amendment. The literary context for the Statement is readily apparent when reading the Article. The Article contains no reference to illegal conduct or violation of ethics rules. Rather, the Article speaks of the administration of the asbestos docket in Madison County and the opinions of certain experts as to how and why the filings for asbestos injuries in Madison County increased dramatically under the plaintiff's tenure.

Brickman, in particular, in addition to making the Statement, characterized the plaintiff as "pro plaintiff" and stated that he "accommodated the plaintiff's bar in virtually every conceivable way." Immediately following the Statement, the Article mentions that, "[i]n 2002, while running for retention, [the plaintiff] received $65,750 in campaign donations mostly from asbestos plaintiff lawyers." The plaintiff does not allege that any of these other statements are false. We find that, considering this context, an ordinary reader would view the Statement as a hyperbolic or exaggerated recharacterization of the plaintiff's activities as set forth in the Article, rather than an independent statement of fact with a precisely understood meaning. Accordingly, based on the criteria set forth by our supreme court, and the plethora of precedent cited herein, we find the Statement is protected by the first amendment and is not actionable. Hence, the circuit court did not err in dismissing the complaint on that basis, and we need not address the cross-appeal brought by Brickman, which sets forth an additional basis for dismissal of the complaint as against him.

¶ 21 CONCLUSION

¶ 22 For the foregoing reasons, we affirm the circuit court's February 23, 2018, dismissal of the complaint in its entirety on first amendment grounds, rendering it unnecessary for us to address Brickman's cross-appeal.

¶ 23 Affirmed.