IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT--LAW DIVISION

ROD SACHARNOSKI,

Plaintiff,

v.

DON CUNNINGHAM and JEFF BOLER,

Defendants.

No. 01 L 015378

MEMORANDUM IN SUPPORT OF MOTION OF DEFENDANT CUNNINGHAM FOR SUMMARY JUDGMENT ON COUNTS I AND II OF AMENDED COMPLAINT

COUNT I--DEFAMATION PER SE

In this defamation case, Plaintiff bears the burden of proving each of the following elements:

1. The statements are false;
2. The statements were published by Cunningham;
3. The statements have a defamatory effect;
4. Cunningham acted with actual malice in publishing the same;
5. Defendant's actions were a legal cause of injury to Plaintiff; and
6. Plaintiff suffered damages as a result of Defendant's actions.

Krasinski v. United Parcel Service, Inc., 124 Ill.2d 483, 530 N.E.2d 468 (1988).

In addition to the above elements, Plaintiff is required to prove that the false statements are ones of fact rather than ones of opinion. Naked City, Inc. v. Chicago Sun-Times, Inc., 77 Ill.App.3d 188, 395 N.E.2d 1042, 1043 (1st Dist. 1979).

Plaintiff must also prove that the statements qualify as defamation per se, as his pleading expressly claims per se defamation and while failing to plead particular special damages. Chapski v. Copley Press, Inc., 92 Ill.2d 344, 442 N.E.2d 195, 199 (1982).

I. THERE WAS NO PUBLICATION BY CUNNINGHAM OF FIVE OF THE SIX STATEMENTS ALLEGED AS DEFAMATORY

Publication by Cunningham is an element of the cause of defamation. Krasinski, supra.

Amended Complaint 5 alleges that Cunningham published the statements of Amended Complaint ¶6(a-e) on the website known as "Budo Quackwatch" with the address www.geocities.com/bolerjp/sacharnoski.htm.

Cunningham's affidavit, attached hereto as Exhibit A, confirms that he did not publish, nor did he consent to publication, or authorize publication, or even have advance knowledge of the publication, on "Budo Quackwatch" site. Affidavit ¶7.

To make the issue clear, Cunningham attests that he did not publish, or cause to be published, or give permission to be published, any statements regarding Plaintiff Rod Sacharnoski whatsoever on the website known as "Budo Quackwatch".

And should Plaintiff amend his pleading to allege that "Budo Quackwatch" was a republication of statements originally made by Cunningham, judgment must still issue[1]. This Court has already informed Plaintiff of the Uniform Single Publication Act preventing new liability for a republication, particularly because it was done without the permission or knowledge of Cunningham. Founding Church of Scientology, 60 Ill.App.3d 586, 377 N.E.2d 158 (1st Dist. 1978).

There is no issue of material fact as to whether Cunningham published statements alleged in Amended Complaint ¶6(a-e). As he did not, judgment must enter on all the claims for defamation arising from those alleged statements, and only the statement alleged in Amended

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[1] The pleadings evidence Plaintiff's attempt to plead around the statute of limitations by failing to distinguish between an original publication and republication. The original complaint alleged the false statements were made "during the period of late 2000 through summer of 2001". Complaint ¶5. This Court asked Plaintiff to replead to state the dates of publication, explicitly raising the issue of the statute of limitations and the Uniform Single Publication Act. The amended complaint added "Published May 31, 2001", see Amended Complaint ¶6(a-e), and yet still alleged publication in "late 2000", Amended Complaint ¶6.

Complaint ¶6(f), allegedly published on a different site at a different time, remains.

II. NONE OF THE ALLEGED STATEMENTS ARE DEFAMATION PER SE

A. The Statements Do Not Accuse Plaintiff of Lies or Fraud

The issue of defamation per se is initially one for the court to determine. Chapski v. Copley Press, Inc., 92 Ill.2d 344, 442 N.E.2d 195, 199 (1982).

Plaintiff alleges that the various statements "falsely impute to him an inability to perform his job, and a lack of integrity in the discharge of his employment by accusing him of perpetrating various frauds and lies." Amended Complaint ¶9 (emphasis added).

A quick perusal of the actual statements alleged in Amended Complaint ¶6(a-f) shows that none of the statements accuse Plaintiff of frauds and/or lies. None of the alleged statements describe Plaintiff or his actions or his course of conduct as fraudulent or lies, or any similar term. Amended Complaint ¶6(a-f).

As the only basis for the claim of per se damages is this allegation that the statements "accuse him of perpetrating frauds and lies", and there is no such

accusation contained in the alleged statements, judgement must issue on the claim of per se defamation.

B. Because Extrinsic Facts are Needed to Show Defamatory Effect, The Statements Are At Best Per Quod

No doubt the Plaintiff stands ready to explain how it is that the statements are injurious to him, despite not actually accusing him of "fraud and lies". But the fact that Plaintiff can explain how the statements are defamatory in the context of his martial arts school does not make them defamatory per se. In fact, by definition defamation per se is only a statement that can be seen to be defamatory without resort to any facts extrinsic to the statement itself. See Fried v. Jacobsen, 107 Ill.App.3d 780, 438 N.E.2d 495 (1st Dist. 1982). On the other hand, "Statements are considered defamatory per quod if the defamatory character of the statement is not apparent of its face, and extrinsic facts are required to explain its defamatory meaning." Kolegas v. Heftel Broadcasting Corp., 154 Ill.2d 1, 607 N.E.2d 201, 206 (1992).

Indeed, if knowledge of only ONE fact extrinsic to the statements themselves is needed to assess the harmful nature of the statement, it is not defamation per se. Lowe Excavation Co. v. Intern. Union of Operating Engineers, 327 Ill.App.3d 711, 765 N.E.2d 21, 31 (2d Dist. 2002). In that

case, defendant said plaintiff was not paying the prevailing wage. The Court ruled that such was not defamatory per se, because "the harmful nature of the Union's statements was not obvious but required knowledge of an extrinsic fact, that is, that the Ballashire Hall project was federally funded."

A quick perusal shows that the alleged statements are at best defamatory per quod.

Amended Complaint 6(a) alleges a statement that "No legitimate Japanese koryu association has ever recognized (Judo-Kai International)". But it is not alleged that Plaintiff had claimed or advertised that it was recognized by a legitimate Japanese koryu association. Therefore the statement is not an accusation of a fraud or a lie even by implication. Rather, the statement merely sets forth a lack of recognition, and Plaintiff needs to explain why an accusation of a lack of recognition from a Japanese koryu association is relevant to Plaintiff's business. Because Plaintiff needs to explain the harm from the statement business, it is at best defamation per quod by definition. Kolegas, supra.

Each of the other alleged statements each require some facts to explain how it is defamatory, and they are therefore defamatory per quod only.

For example, extrinsic information is needed to demonstrate defamatory effect from statements that Plaintiff's "8th dan ranking" from the USJF was issued to him without authority. Or the defamatory effect from a statement that Plaintiff styles himself "professor" or "doctor" in teaching martial arts, when the statement also admits that Plaintiff has a Ph.D. in Criminal Justice. Or a statement that Plaintiff requested a "Dan rank". Or a statement that Plaintiff made a mistake in Japanese translation. Or a statement that Plaintiff's martial arts school is not qualified to issue degrees in the State of Maine. See Amended Complaint ¶6(b-f).

C. The Innocent Construction Rule Requires Rejection of Plaintiff's "Interpretation" of the Statements

The innocent construction rule clinches the issue. "Even if a statement falls into one of these categories [of defamation per se], it will not be found to be defamation per se if it is reasonably capable of an innocent construction". Kolegas, 607 N.E.2d at 206 (emphasis added). By "innocent" construction, the courts merely mean whether the alleged statement can be reasonably read to be defamatory per quod rather than per se. Id. Therefore this Court cannot accept Plaintiff's strained finding of an

"accusation of lies and fraud" unless that construction is the only reasonable reading of the alleged statements.

Amended Complaint ¶6(e) alleges a statement to the effect that Plaintiff's school certificates use a Japanese character meaning "sex way house". "Innocent construction" means that the statement should be construed as a knock on Plaintiff's skill in Japanese rather than an accusation of fraud or lies or lack of ability or any of the four categories of defamation per se.

Amended Complaint ¶6(b) states that "USJF officials have since insisted that they never recognized [plaintiff's] claim to 8th dan rank, and that the card was issued without authority". This statement may be reasonably read as reporting on another's claim that issuance of the card to Plaintiff was erroneous. It does not necessarily imply that Plaintiff is lying when he says that he was issued a card, or that he was not of a skill commensurate to an 8th dan. Under the innocent construction rule, the first possible meaning, which is not defamatory per se, is mandated.

Amended Complaint ¶6(c) is a statement read by Plaintiff as implying that Plaintiff's degree is not legitimate. But the alleged statement clearly sets forth that indeed Plaintiff "*evidently received* a Ph.D. in 1982",

so clearly there is no implication that the claim to a Ph.D. is false. Rather, the innocent construction rule mandates the statement in Amended Complaint ¶6(c) be construed merely as a criticism of the use of the titles "doctor" and "professor" by a teacher in a martial arts school.

Judgment should enter on the per se claim, and Plaintiff given leave to amend to meet the requirement of pleading his special damages with particularity—if such a pleading is possible under Supreme Court Rule 137. Kolegas, supra; Lowe, supra.

COUNT II--FALSE LIGHT INVASION OF PRIVACY

III. CUNNINGHAM DID NOT PUBLISH THE STATEMENTS

The Supreme Court said that to state a cause of action for false light, "the allegations in the complaint must show that the plaintiffs were placed in a false light before the public as a result of the defendants' actions." Kolegas, 607 N.E.2d at 209(emphasis added).

The facts established by Cunningham's affidavit attached hereto establish that there is no issue of fact: Cunningham did not cause the statements in Amended Complaint ¶6(a-e) to be published and therefore any "false

light" is not a "result of defendants' actions). Summary judgement must issue on the statements of Amended Complaint ¶6(a-e)

IV. THERE IS NO INVASION OF PRIVACY BY THE STATEMENTS REFERRING TO PLAINTIFF'S PUBLIC, COMMERICAL ACTIVITY

Plaintiff in his Count II claims against Plaintiff for the exact facts under an action for "false light invasion of privacy.

"False light" is an action for invasion of privacy by publicity. Kolegas, supra, 607 N.E.2d at 315. "The purpose underlying the false light cause of action is to define and protect an area within which every citizen must be left alone." Kolegas, 607 N.E.2d at 316. But each of the alleged statements deal with Plaintiff's very public activities at public events or in the operation of a marital arts school open to the public, and no private areas of Plaintiff's life have been invaded or publicized. Because Plaintiff's injury arises from the alleged falsity of the statements, not from an invasion of privacy, defamation is the only cause.

If this Court allows an action for false light invasion of privacy for statements about a public school and public activity, there will be a new cause that is exactly the same as defamation, except that truth is not a

defense and innocent construction is not available. This will not be an action for invasion of privacy, but an action for daring to comment on the Plaintiff's public or commercial activity--an invasion of Plaintiff's publicity, as it were.

The advantage of a false light invasion of publicity, Plaintiff believes, is that he need not prove the statements were literally or impliedly false. In Count II, Plaintiff does not plead falsity of the statements, only that they cast "false light" and "paint" plaintiff as "a dishonest teacher as well as a criminal". Amended Complaint ¶¶16-17.

This Court would not want to open the door to suits by public businesses for statements that are not false by merely incomplete or imperfect and therefore cast a "false light". If one makes a statement about the food in a restaurant, does the chef sue for invasion of privacy? Or should traditional causes for false and defamatory statements apply, with all the restrictions on them created from years of consideration of the freedom of speech and other considerations?

WHEREFORE, Cunningham prays that:

a) Summary Judgment enter in his favor on Count I on the alleged statements in Amended Complaint ¶6(a-e), as he did not publish the same;

b) Summary Judgment enter in his favor on all claims for defamation per se in Count I;

c) Summary Judgment enter in his favor on all claims for false light invasion of privacy in Count II on the I on the alleged statements in Amended Complaint ¶6(a-e), as he did not publish the same; and

d) Summary Judgment enter in his favor on all claims for false light invasion of privacy for the alleged statements in Amended Complaint ¶6(a-e), as there was no invasion of privacy.

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by:
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