No. 09-3386

IN THE APPELLATE COURT OF ILLINOIS
FIRST APPELLATE DISTRICT

LISA STONE, as mother and next friend of Jed Stone, Petitioner-Appellee, v. PADDOCK PUBLICATIONS, INC., Respondent, and JOHN DOE, Respondent-Appellant.	Appeal from Cook County Circuit Court Circuit Case No: 09 L 5636 Trial Judge: Jeffery Lawrence Date of Notice of Appeal: December 7, 2009 Date of Final Order: November 18, 2009

REPLY BRIEF OF RESPONDENT-APPELLANT JOHN DOE

Michael D. Furlong
Peter M. Trobe
Trobe, Babowice & Associates LLC
404 W. Water Street
Waukegan, IL 60085
(847) 625-8700

Charles Mudd, Jr.
Mudd Law Offices
31124 W. Irving Park Road, Suite 1W
Chicago, IL 60618
(773) 588-5410

Attorneys for Respondent-Appellant, John Doe

ORAL AGRUMENT REQUESTED

POINTS AND AUTHORITIES

Argument

I. Introduction

This appeal involves constitutional questions regarding Illinois courts' ability to order the disclosure of the identity of an anonymous online speaker in violation of his clearly recognized First Amendment right to anonymous speech. Respondent John Doe ("Respondent") has urged this Court to adopt the summary judgment standard enunciated in *Mobilisa, Inc. v. Doe*, 170 P.3d 712 (Ariz. Ct. App. 2007) in determining whether to disclose an anonymous speaker's identity through discovery. In her brief, the Petitioner pushes for the adoption of the less-stringent motion to dismiss standard recently adopted in *Maxon v. Ottawa Publishing Co.*, 929 N.E.2d 666 (3d Dist. 2010). This Court should adopt the *Mobilisa* summary judgment standard and, upon finding that the Petitioner fails to meet the standard, reverse the lower court's decision compelling disclosure of Respondent's identity. Even under the less stringent standard adopted in *Maxon*, the Petitioner's Amended Petition fails, and reversal is warranted. Given the foregoing and that the Respondent's alleged comments are also protected by the Illinois' Citizen Participation Act ("CPA"), this Court should reverse the lower court's decision compelling the disclosure of the Respondent's identity to the Petitioner.

II. First Amendment Protection of Anonymous Speech Extends to the Internet

Initially, the Petitioner incorrectly argues that Respondent seeks special status for anonymous speakers on the Internet with respect to First Amendment rights. Br. of Pet'r 22. The Supreme Court expressly extended the protection of anonymous speech to the Internet. *Reno v. ACLU*, 521 U.S. 844, 870 (1997) (there is "no basis for qualifying the level of First Amendment scrutiny that should be applied to" the Internet). Respondent

does not seek special status. Rather, he seeks proper application of the *same* First Amendment protections afforded anonymous speakers who use other mediums.

III. The *Mobilisa* Standard Best Balances the Interests of All Parties

This Court should adopt the *Mobilisa* standard for determining whether an anonymous speaker's identity should be disclosed in discovery—regardless of the discovery method used. Under the *Mobilisa* standard, a party seeking disclosure of information about an anonymous (or pseudonymous) individual must (a) provide notice to the anonymous individual and an opportunity to respond; (b) demonstrate that it would survive a summary judgment; and (c) demonstrate that a balance of all interests weighs in favor of disclosure. *Mobilisa*, 170 P.3d at 721. Conversely, the *Maxon* standard requires only that a petition be verified; state a claim for defamation with particularity against a 735 ILCS § 5/2-615 ("2-615") motion to dismiss standard; seek only the identity of targeted defendant(s); and, be subject to a hearing. *Maxon*, 929 N.E.2d at 673.[1]

As many courts have recognized, a motion to dismiss standard fails to exclude frivolous lawsuits and facilitates the disclosure of the identity of anonymous speakers engaged in legitimate protected speech. *Doe v. Cahill*, 884 A.2d 451, 458 (Del. 2005) ("the threshold for the showing a plaintiff must make to survive a motion to dismiss is low."); *Solers, Inc. v. Doe*, 977 A.2d 941, 952 (D.C. Ct. App. 2009) (the "lax motion to dismiss test may needlessly strip defendants of anonymity in situations where there is no substantial evidence of wrongdoing, effectively giving little or no First Amendment protection to that anonymity."); *Mobilisa*, 170 P.3d at 720 ("surviv[ing] a motion to dismiss [standard] would set the bar too low, chilling potential speakers from speaking

[1] It should be noted that neither *Mobilisa* nor *Maxon* constitute binding authority for this Court.

anonymously on the internet."); *see also Maxon*, 929 N.E.2d at 679 (Schmidt, J., dissenting). Indeed, the motion to dismiss standard may lead to the unwarranted disclosure of the identities of anonymous speakers. *See id.*

In contrast, a motion for summary judgment standard, particularly the *Mobilisa* standard, better protects the interests of all parties and First Amendment rights. A summary judgment standard "considers the strength of the Plaintiff's case at an earlier proceeding" in determining whether to identify an anonymous speaker. Anthony Ciolli, *Technology Policy, Internet Privacy, and the Federal Rules of Civil Procedure*, 11 Yale J.L. & Tech. 176, 187 (2009). Thus, the summary judgment standard allows for "compelling identification of anonymous internet speakers only as a means to redress legitimate misuses of speech rather than as a means to retaliate against or chill legitimate uses of speech." *Mobilisa*, 170 P.3d at 720.

Additionally, the summary judgment standard allows the anonymous speaker to address genuine issues of material fact as to whether defamation occurred. A motion to dismiss standard constrains the anonymous speaker to only challenging whether a petition or complaint failed to state a claim upon which relief can be granted.[2] By applying only the § 2-615 standard, the anonymous speaker would be precluded from attacking the veracity of the petitioner's allegations given that all well-pleaded facts are taken as true. *See Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 490 (Ill. 1996); *see Iseberg v. Gross*, 227 Ill. 2d 78, 86 (Ill. 2007) (well-pleaded facts are statements that can be proven, rather than statements that are conclusory); *Neurosurgery & Spine Surgery,*

[2] A motion to dismiss standard under § 2-615 does not even provide for the introduction of an affidavit and/or affirmative matter supporting a basis for dismissal under 735 ILCS § 5/2-619 including, but not limited to, an "affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS § 5/2-619.

S.C. v. Goldman, 339 Ill.App.3d 177, 182 (2d Dist. 2003) ("The plaintiff is not required to prove his or her case, but must allege sufficient facts to state all the elements of the asserted cause of action"). Thus, the motion to dismiss standard permits plaintiffs to improperly and unconstitutionally harass their critics. *Mobilisa*, 170 P.3d at 720 ("a motion to dismiss [standard] would set the bar too low, chilling potential speakers from speaking anonymously on the internet.").

Indeed, under a motion to dismiss standard, a petitioner can plead "unfounded" facts, survive a motion to dismiss, and obtain their critic's identity – all before a determination that the "facts" alleged never occurred. *See Maxon*, 929 N.E.2d at 679 (Schmidt, J., dissenting) ("Plaintiffs routinely plead 'facts' which later cannot be proven."). Thus, under such a standard, the identity of anonymous speakers, like that of the Respondent, will be revealed before a court adjudicates whether their statements were non-defamatory and thereby evaporate the speakers' constitutional right to anonymity. *Id.* ("If 'facts' are pled that lead to the discovery of the speaker's identity, and then these facts cannot later be proven, the harm to anonymous speech is a *fait accompli*."). Consequently, the *Maxon* motion to dismiss standard threatens "the principle that debate on public issues should be uninhibited, robust, and wide-open," because anonymous parties will be reluctant to speak when their identity can be easily revealed. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *see McIntyre v Ohio Elections Commission*, 514 U.S. 334, 357 (1995). Thus, the Court should adopt the summary judgment standard as articulated in *Mobilisa*. *Mobilisa*, 170 P.3d at 721.

Indeed, *Mobilisa* best protects the interests of *all* parties given that it requires a balancing of interests *and* factors—something *Maxon* does not even address. *Compare*

Mobilisa, 170 P.3d at 720-21 (addressing the importance of balancing all the parties' interests and other factors in not disclosing one's identity) *with Maxon*, 929 N.E.2d at 676 ("once the court has determined that the prima facie case has been met by the petitioner, he has made out a valid claim for damages and has a right to expect a remedy."). *Mobilisa* requires a court to consider:

> [the] type of speech involved, the speaker's expectation of privacy, the potential consequence of a discovery order to the speaker and others similarly situated, the need for the identity of the speaker to advance the requesting party's position, and the availability of alternative discovery methods. Requiring the court to consider and weigh these factors, and a myriad of other potential factors, would provide the court with the flexibility needed to ensure a proper balance is reached between the parties' competing interests on a case-by-case basis.

Mobilisa, 170 P.3d at 720. This requirement ensures the revelation of a speaker's identity will be based on the "merits of the lawsuit," rather than artful pleading. *Id.* at 721. Thus, the Court should adopt the *Mobilisa* standard and protect anonymous speakers from unmerited lawsuits, such as the case brought by the Petitioner. *See infra* IV. In doing so, this Court must also reverse the lower court's order compelling the disclosure of the Respondent's identity and, in fact, enjoin such disclosure.

IV. The Amended Petition Does Not Even Satisfy *Maxon*

Even under the *Maxon* 2-615 standard, the Amended Petition lacks legal sufficiency. In deciding whether a Rule 224 petition should be denied, *Maxon* requires that a verified petition state a claim for defamation with particularity against a § 2-615 standard; seek only the identity of targeted defendant(s); and, be subject to a hearing. *Maxon*, 929 N.E.2d at 673. Further, *Maxon* states the "plaintiff must plead facts to establish that the allegedly defamatory statements are not constitutionally protected." *Id.* at 674. If the petition fails to satisfy even one element, the petition will not be granted.

Id. at 673. The most critical elements, and the only elements at issue here, are whether the petition "states with particularity [the] facts that would establish a cause of action for defamation" and establishes "the allegedly defamatory statements are not constitutionally protected." *See id.* at 673, 674. The Petitioner cannot meet either of these two elements.

A. The Petitioner's Amended Petition Fails to Include Enough Facts to Properly State a Viable Cause of Action for Defamation

The Petitioner's Amended Petition fails to state "with particularity facts that would establish a cause of action for defamation" under § 2-615 scrutiny. *See id.* at 673-74. In Illinois, all allegedly defamatory statements must be plead with sufficient particularity and precision to avoid being dismissed. *Moore v. People for the Ethical Treatment of Animals*, No. 1-09-0768, 2010 Ill. App. LEXIS 594, at *23 (1st Dist. June 4, 2010). Further, the substance of the alleged statement "must be pled with sufficient precision and particularity so as to permit initial judicial review of its defamatory content." *Green v. Rogers*, 234 Ill.2d 478, 492 (Ill. 2009).

The Amended Petition never states the alleged defamatory statements with any particularity or precision. Br. of Resp't A3 ¶3 (the Amended Petition). In fact, it only states: "[o]n or about April 9, 2009 a comment was posted on this public forum [the Daily Herald web site] by Hipcheck16 [Doe] directed to the minor Petitioner that was defamatory in nature." *Id.* Again, the Amended Petition merely states the alleged comment "was defamatory in nature," and never provides the alleged statements with any particularity. *Id.* In fact, the Petitioner did not provide the statements at all. *Id.* Such cursory and conclusory statements fail to state a defamation claim as a matter of law. *Id.* A3 ¶3 (the Amended Petition); *see Green*, 234 Ill. 2d at 492. Indeed, the Amended Petition clearly does not meet *Maxon*'s requirement that "the petition must specify the

exact statement alleged to constitute the actionable speech [as required by] Rule 224." *Maxon*, 929 N.E.2d at 675 (emphasis added). Despite this, the circuit court issued an order compelling the disclosure of Respondent's identity under Rule 224. As a result, the circuit's court's order must be reversed. *Id.* For, applying *Maxon*, the Amended Petition should never have been granted. *See id.; Green*, 234 Ill.2d at 492.

B. The Amended Petition Does Not Address First Amendment Protections

In addition, the Amended Petition never addresses Doe's First Amendment rights much less establishes that the alleged defamatory statements (which have not been stated) lack constitutional protections. *See generally* Br. of Resp't A3-4 (the Amended Petition). Again, the Amended Petition merely states the alleged comments were "defamatory in nature." *Id.* As such, it fails to demonstrate that it could overcome the "first-amendment protections as part of the prima facie case." *See Maxon,* 929 N.E.2d at 674. This failure is fatal under Maxon. *Id.* As a result, the circuit's court's order must be reversed. *Id.* Again, applying *Maxon*, the Amended Petition should never have been granted. *See id.*

C. The Respondent is Not Required to file a 2-615 Motion in Response to the Amended Petition, Nor is He Required to Argue Against the Amended Petition Under *Maxon*

The Petitioner also erroneously and incredulously argues that, because the Respondent did not "challenge the legal sufficiency of Appellee's petition through a 2-615 motion assessing whether the petition alone stated sufficient facts to establish a cause of action," this Court should not be allowed to determine whether the Amended Petition fails to be legally sufficient. Br. of Pet'r 14-15. This is a convoluted argument. First, a Rule 224 petition is typically directed against the party possessing the information sought through the Rule 224 discovery vehicle. In this case, the Petition named Paddock Publications, Inc. ("Paddock")—not the anonymous speaker. The Petitioner never

expected the anonymous speaker to intervene or have the opportunity to file a § 2-615 motion (even assuming a proper § 2-615 motion to dismiss would be appropriate in a Rule 224 action). In fact, the Petitioner challenges Respondent's ability to intervene. *See infra* VII. However, the Respondent *did* intervene and *did* challenge the sufficiency of the Petition—facts which the Petitioner ignores.

More importantly, the Petitioner fails to understand the import of a standard—any standard—in determining whether she can obtain the Respondent's identity. Being the party seeking discovery of an anonymous speaker's identity, the Petitioner must meet the standard whether the anonymous speaker intervenes or not. *Maxon*, 929 N.E.2d at 679 (Schmidt, J., dissenting) ("As set forth above, this four-part test places the burden on a petitioner"). She must demonstrate to the Court that the elements of the applicable standard can be and have been met. *See Mobilisa*, 170 P.3d at 720-21; *Maxon*, 929 N.E.2d at 679 (Schmidt, J., dissenting). Given this, it matters not that the Respondent did not file a § 2-615 motion or a motion for summary judgment for that matter. Indeed, the burden requires the Petitioner to affirmatively demonstrate to the Court that her claims would survive a motion for summary judgment, in the case of *Mobilisa,* or a motion to dismiss, in the case of *Maxon*, to obtain the information sought. *Mobilisa*, 170 P.3d at 720-21; *Maxon*, 929 N.E.2d at 679 (Schmidt, J., dissenting). The Petitioner's efforts to shift *her* burden to the Respondent must fail.

As discussed *supra* IV.A, the Petitioner has not plead any claims. She merely contends in a conclusory manner that the Respondent made statements defamatory in nature. *See generally* Br. of Resp't A3-4 (the Amended Petition). How could the Respondent file a summary judgment or § 2-615 motion against non-existent claims?

More importantly, how could the Petitioner contend that the conclusory statement would satisfy any standard? As argued *supra* IV.A, she cannot. In any case, the Petitioner's argument that the second element of *Maxon* does not apply to her because Respondent Doe failed to file a proper § 2-615 motion or argue the deficiency of the Amended Petition under § 2-615 has no merit. Br. of Pet'r 14-15.

In a similar manner, the Petitioner argues that, because the "Appellant did not challenge the adequacy of the petition [under] . . . Section 2-615 . . . in this appeal," this court should not address the Amended Petition's legal sufficiency. Br. of Pet'r 14. In his Appellant brief, the Respondent argued the Amended Petition's legal defects under the *Mobilisa* standard. Br. of Resp't 2-15. The Petitioner first raised *Maxon* and the applicability of a less stringent § 2-615 motion to dismiss standard in her response. Br. of Pet'r 13-15. As a practical matter, the Respondent could not have addressed Petitioner's arguments before they had been made. In any case, he need not do so. It appears the Petitioner forgets that the appellate rules allow the Respondent to file this reply and respond "to arguments presented in the brief of the appellee," Ill. Sup. Ct. R. 341(j), as he does herein. *See supra* III-IV.A. For this reason and because the Respondent should not be penalized for proposing and arguing a standard that better protects all interests, the Petitioner's argument on this issue has no merit.

For the foregoing reasons, the Petitioner fails to satisfy the elements of *Maxon*, the trial court erred in compelling disclosure of the Respondent's identity, and the trial court's order must be reversed. In fact, this Court should enjoin disclosure of Respondent's identity.

V. Paddock's Privacy Polices Do Not Vitiate Expectation of Anonymity

Next, the Petitioner erroneously contends that Paddock's Privacy Policy and Terms of Use ("Policies") demonstrate that the Respondent should not have expected any privacy with respect to information collected by Paddock. Br. of Pet'r 18-19. Initially, an individual does not lose an expectation of anonymity and privacy when posting information on the Internet. *Reno v. ACLU*, 521 U.S. at 870. Were such a case, there would be no need for or adoption of standards insuring that constitutional rights have been protected. *See supra* III and IV. Perhaps recognizing this, the Petitioner contends that the terms of the Policies eliminate any such expectation to anonymity and privacy. Again, she is wrong.

In fact, Paddock's Privacy Policy provides well-defined boundaries on how it will obtain and employ a user's information in the context of protecting their anonymity and privacy. Generally, Paddock obtains personal information that the user *voluntarily* provides for further development of the website and for marketing purposes. Ap. to Br. of Pet'r Ex. 3 (Paddock's Privacy Policy).[3] Paddock does not require that a person provide identifying information. *Id.* Under such a policy, a user has a reasonable expectation of privacy and anonymity. *See McVicker v. King*, 266 F.R.D. 92, 96 (W.D. Pa. 2010) (stating that a similar privacy policy that allowed users to "voluntarily disclose personally identifiable information in public areas on the Site" still gave users an expectation of privacy). Additionally, Paddock acquires and aggregates non-identifying information for

[3] The Petitioner labeled her exhibits in the Appendix to her Brief's Table of Contents by number, but the tabs she provides label the same exhibits instead by letter. Consequently, what is labeled as Exhibit 1 in her Table of Contents is tabbed as Exhibit A. Thus, the number of the exhibit in the Table of Contents corresponds to the tab reflecting the respective sequential letter of the alphabet.

the primary purpose of improving its websites and determining consumer behavior.[4] *See generally* Ap. to Br. of Pet'r Ex. 3, Ex. 4 (Paddock's Privacy Policy and Terms of Use, respectively). Clearly, the aggregation of consumer behavior that cannot identify a particular consumer does not vitiate an expectation of privacy.

Paddock's Policies also narrowly limit the manner in which it will provide user information to third parties. *Id.* It provides this information only to companies providing services on Paddock's behalf. Ap. to Br. of Pet'r Ex. 3 (Paddock's Privacy Policy). As a result, the Respondent reasonably expected that his identity would remain private and not be disclosed to third parties that simply requested his identity or identifying information. Indeed, even when an Internet Service Provider ("ISP") states that it may disclose user information, a user still maintains an expectation of privacy and anonymity. *McVicker,* 266 F.R.D. at 96 (rejecting the plaintiff's argument that an ISP's terms of service created absolutely no expectation of privacy, even though the terms of services allowed disclosure of personal identifiable information). Similarly, the disclosure of personal information "only as permitted by law" will not diminish an expectation of anonymity. *Id.* (articulating there is a reasonable expectation of privacy when an ISP's privacy policy stated it "will use personally identifiable information 'only as permitted by law'"). Therefore, the Petitioner's appeal to Paddock's policies is unavailing.

VI. The First Amendment Protects Respondent's Comments

The First Amendment protects non-defamatory speech. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974). As previously argued, the Respondent's comments were

[4] The purpose of collecting this data is to "monitor the site's performance" and to "improve the content, advertising, and layout of the site." Ap. to Br. of Pet'r Ex. 3 (Paddock's Privacy Policy).

not defamatory. *Supra* IV.A; *see also* Br. of Resp't 7-11 (analyzing that the alleged statements are neither defamation *per se* or defamation *per quod*). As such, the First Amendment protects Respondent's comments. *See Gertz*, 418 U.S. at 340. Additionally, the First Amendment shields a speaker's identity when revealing that person may "deter perfectly peaceful discussions of public matters of importance." *Talley v. California*, 362 U.S. 60, 65 (1960). Anonymity must be protected when political speech involves citizens "criticiz[ing] oppressive practices and law." *Id.* at 64. Here, the Respondent made the comments within a political debate about the Petitioner's election. Indeed, the Respondent had made several posts in which he admonishes the Petitioner for placing illegally placed campaign signs, being unqualified and deceitful, being a bully, and failing to step in when the Petitioner's "supporters made anti-Semitic allegations about two of her opponents." Ap. to Br. of Pet'r Ex. 1 (these comments can be found at the following posts, respectively: Apr. 6, 2009 4:57 PM; Apr. 6, 2009 5:46 PM; Apr. 6, 2009 10:09 PM; Apr. 8, 2009 12:21 PM). Clearly, the Respondent's posts indicate that he engaged in peaceful, political speech critical of the Petitioner and her oppressive campaign tactics that demands constitutional protection of his identity. *See Talley*, 362 U.S. at 64-65.

VII. The Citizen Participation Act Protects Respondent's Comments

The Petitioner also makes a futile effort to attack the protections afforded the Respondent under the Citizen Participation Act ("CPA").

A. The Citizen Participation Act is Applicable to Rule 224 Discovery

The Petitioner erroneously contends that the CPA does not apply to her Rule 224 Amended Petition. The CPA applies to "any motion to dispose of a claim in a judicial

proceeding on the grounds that the claim is based on, relates to, or is in response to any act or acts of the moving party in furtherance of the moving party's rights of petition, speech, association, or to otherwise participate in government." 735 ILCS § 110/15. The CPA defines "claim" as "any lawsuit, cause of action, claim, cross-claim, counterclaim, or other judicial pleading or filing alleging injury." 735 ILCS § 110/10. Because her Amended Petition "asserts no claims for damages," the Petitioner contends that the CPA does not apply. Br. of Pet'r 28. However, the Petitioner ignores the very purpose of Rule 224 "[to] ascertain the identity of one who may be responsible in *damages*." Ill. Sup. Ct. R. 224(a)(1)(i) (emphasis added). The purpose of Rule 224 makes clear that "damages" play a critical and essential role in being able to obtain an individual's identity pursuant to the rule. Ill. Sup. Ct. R. 224(a)(1)(i); *see Roth v. St. Elizabeth's Hospital*, 241 Ill.App.3d 407, 413 (5th Dist. 1993). Because the Petitioner has sought relief pursuant to Rule 224, the CPA is applicable.[5] *Id.*; 735 ILCS § 110/15. However, if there are no damages or an intent to pursue damages, then the Petitioner should not be using Rule 224 to obtain the identity of the Respondent. *Id.*; *see also Roth*, 241 Ill.App.3d at 413.

B. Respondent's Comments Were Political and Sought Legitimate Government Action

Next, the Petitioner contends that the Respondent's comments are not political in nature. Br. of Pet'r 26. She is mistaken. For, in doing so, she takes the Respondent's comments (which she never presented in the Amended Petition) out of their context. *See supra* IV.A, VI. The CPA provides immunity from liability for "[a]cts in furtherance of the constitutional rights to petition, speech, association, and participation is government"

[5] This is especially true when the CPA must be "construed liberally to effectuate its purposes and intent fully." 735 ILCS § 110/30.

when those acts are "genuinely aimed at securing favorable government action, result, or outcome." 735 ILCS § 110/15. A court must dismiss claims subject to the CPA "unless the court finds that the responding party has produced clear and convincing evidence that the acts of the moving party are not immunized from, or not in furtherance of acts immunized from, liability by [the CPA]." 735 ILCS § 110/20.

The Respondent posted comments in a forum used for the exchange of political speech and ideas. *Supra* VI; Br. of Resp't 15, A38. Within the same post of which the Petitioner complains, the Respondent questioned the Petitioner's campaign strategy, suggested that the Petitioner should apologize to the other trustees on the board, and commented that the Petitioner needed to learn "something about finance before she is sworn in." Ap. to Br. of Pet'r Ex. 1 (last post in the exhibit). Further, the Respondent complained that the Petitioner was "accosting voters at the polls." *Id.* Clearly, these comments are political.

Yet, because the Respondent posted the comments two days after the election, the Petitioner argues that the comments cannot be about the election (of course, the protections afforded by the CPA are not limited to discussions of "elections"). Br. of Pet'r 26. Clearly, political debate on or about a candidate does not end (or need not end) upon the conclusion of election day or even when the final votes have been tallied. *See New York Times,* 376 U.S. at 281 ("It is of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages."). Through his comments, the Respondent clearly addressed the Petitioner for purposes of changing her ways so she might be effective in her political office. *See generally* Ap. to Br. of Pet'r Ex. 1 (containing the article and the readers' comments section where the Respondent

and Jed Stone's political exchange took place, including the alleged statement). Consequently, the Respondent's comments were in the public interest and about a public official. *See New York Times,* 376 U.S. at 281; *see generally* Ap. to Br. of Pet'r Ex. 1.

Based on the foregoing, the CPA applies to such comments. *See* 735 ILCS § 110/15. In making her argument to the contrary, the Petitioner fails to address the political context of the post in which the alleged defamatory comments were found. *See supra* VI; *see generally* Br. of Pet'r. As a result, the Petitioner has not provided clear and convincing evidence on why the CPA does not apply to the Respondent's comments. *See* 735 ILCS § 110/20. Therefore, the Petitioner's argument that the Respondent did not engage in political speech is groundless.

C. Petitioner's Appeal to the Antitrust "Sham" Test Is Inapplicable

The Petitioner next advocates application of the "sham" test in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993) to CPA actions. *Professional Real Estate Investors, Inc.* involved an antitrust action in which the Court explained that "sham" litigation in antitrust claims occurs when: (1) no "no reasonable litigant could realistically expect success on the merits;" and (2) "an attempt to interfere directly with the business relationships of a competitor." *Id.* at 60-61. Not surprisingly, the Petitioner fails to provide any substantive arguments on why antitrust law or this "sham" test in particular should be applied to the CPA and Respondent's comments. Br. of Pet'r 26. For, none exists. Consequently, this Court should not adopt the "sham" test in this context.

VII. Respondent Has Properly Intervened to Have His Appeal Heard

Finally, the Petitioner incorrectly claims the Respondent should not be allowed to intervene in the matter below and pursue this appeal. Br. of Pet'r 8 n.4. The Respondent has a substantial and direct interest in protecting his anonymity. For this reason, the Respondent intervened and participated substantially in the proceedings below. The court below never precluded such intervention or participation. As for bringing this appeal, it is well-settled law that a non-party may intervene and "bring an appeal when that person has a direct, immediate and substantial interest in the subject matter, which would be prejudiced by judgment or benefited by its reversal." *Citicorp Savings of Illinois v. First Chicago Trust Co.*, 269 Ill.App.3d 293, 299 (1st Dist. 1995). Here, the Respondent will directly and substantially benefit by the reversal of the lower court's ruling in that his identity and First Amendment rights will be protected. On the other hand, he will be significantly prejudiced by the judgment that discarded his First Amendment rights and compelled the disclosure of his identity. Given this, the Respondent remains a proper party on appeal. *See id.*

CONCLUSION

Based on the foregoing, this Court should reverse the lower court's order and enjoin the disclosure of the Respondent's identity.

RESPONDENT-APPELLANT
JOHN DOE

By one of his attorneys.
Charles Lee Mudd Jr.

Charles Lee Mudd Jr.
MUDD LAW OFFICES
3114 W. Irving Park Road, Suite 1W
Chicago, Illinois 60618
773.588.5410

Michael D. Furlong
Trobe Babowice & Associates LLC
404 West Water Street
Waukegan, Illinois 60085
847.625.8700

CERTIFICATE OF COMPLIANCE

I certify that this reply brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is **17** pages.

Dated: September 13, 2010
Chicago, Illinois

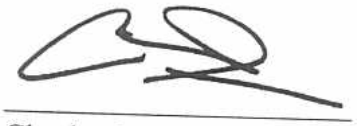
Charles Lee Mudd Jr.
MUDD LAW OFFICES
3114 W. Irving Park Road, Suite 1W
Chicago, Illinois 60618
773.588.5410
773.588.5440 (Fax)
cmudd@muddlawoffices.com
ARDC: 6257957

CERTIFICATEOF MAILING AND PROOF OF SERVICE

I certify that nine (9) copies of the REPLY BRIEF OF RESPONDENT-APPELLANT were delivered to the Clerk of this Court and that (3) copies were served upon the following:

Stephen L. Tyma
William A. O'Connor
Tyma O'Connor, P.C.
105 West Madison Street, Suite 2200
Chicago, Illinois 60602-4648

by having them enclosed in properly addressed envelopes with first class postage fully prepaid and having such envelopes deposited in a United States Mail receptacle located in Chicago, Illinois on the 13th day of September, 2010.



Dated: September 13, 2010
Chicago, Illinois

Charles Lee Mudd Jr.
MUDD LAW OFFICES
3114 W. Irving Park Road, Suite 1W
Chicago, Illinois 60618
773.588.5410
773.588.5440 (Fax)
cmudd@muddlawoffices.com
ARDC: 6257957

LEXIS CITED AUTHORITY

LEXSEE 2010 ILL. APP. LEXIS 594

AMI MOORE and DOGGIE DO-RIGHT-911, INC, Plaintiffs-Appellants, v. PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, INC, d/b/a PETA, DIANE OPRESNIK, JOHN KEENE, and MARY DePAOLO, Defendants-Appellees.

No. 1-09-0768

APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, FIFTH DIVISION

2010 Ill. App. LEXIS 594

June 4, 2010, Decided
June 4, 2010, Opinion Filed

SUBSEQUENT HISTORY: Released for Publication July 16, 2010.

PRIOR HISTORY: [*1]
Appeal from the Circuit Court of Cook County. No. 07 L 9302. Honorable James Egan, Judge Presiding.

DISPOSITION: Judgment affirmed.

COUNSEL: For APPELLANT: DiVINCENZO SCHOENFIELD SWARTZMAN, Chicago, IL Rick Schoenfield.

For APPELLEE: BEST, VANDERLAAN, & HARRINGTON. Chicago, IL James F. Best, Adam F. Haussermann.

For APPELLEE: DONOHUE BROWN MATHEWSON & SMYTH LLC. Chicago, IL Mark H. Boyle, Karen Kies DeGrand.

JUDGES: JUSTICE FITZGERALD SMITH delivered the opinion of the court. TOOMIN, P.J., and HOWSE, J., concur.

OPINION BY: FITZGERALD SMITH

OPINION

JUSTICE FITZGERALD SMITH delivered the opinion of the court:

Plaintiffs Ami Moore and Doggie Do Right-911, Inc. (collectively plaintiffs), alleged in the trial court that defendants People for the Ethical Treatment of Animals, Inc. (PETA), Diane Opresnik, John Keene, and Mary DePaolo (collectively defendants) defamed plaintiffs and placed them in a false light. The trial court dismissed plaintiffs' first amended complaint with prejudice and denied their motion for leave to file a second amended complaint. Plaintiffs now appeal, arguing that (1) defendants' statements constituted defamation *per se* and placed plaintiffs in a false light [1], and (2) the trial court abused its discretion in denying [*2] plaintiffs' motion for leave to amend. For the following reasons, we affirm.

1 Although plaintiffs mention "false light" in their brief, they do not specifically allege the cause of action of false light for any of the defendants, nor do they support their false light claims with references to law or fact. Accordingly, any argument regarding false light is waived for purposes of this appeal. See *Pilat v. Loizzo, 359 Ill. App. 3d 1062, 1063, 835 N.E.2d 942, 296 Ill. Dec. 589 (2005)* (appellant must argue the points that he or she raises or they are waived; mere conclusory statements without supporting analysis is not enough); 210 Ill. 2d. *R.*

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I. BACKGROUND

Doggie-Do-Right is a corporation that is in the business of training dogs, boarding dogs, and providing day care for dogs. At all times relevant, it was operated by Moore. On March 27, 2008, Plaintiffs filed a first amended complaint against PETA, Opresnik, Keene, and DePaolo. Count I alleged that PETA defamed plaintiffs when it sent out a press release on September 5, 2006, entitled "PETA Demands Jail Time, Psychiatric Intervention if Alleged Chicago Dog Abuser is Convicted," and an "Action Alert" on its web site entitled "Chicago's Self-Professed 'Dog Whisperer' Accused [*3] of Electrocuting Dog's Genitals: Let Your Call for Justice Be Anything but Quiet." Plaintiffs alleged that both the press release and the action alert named Moore and Doggie-Do-Right. Count II alleged that PETA placed plaintiffs in a false light.

Count III alleged that Opresnik defamed plaintiffs by making certain statements that were published in the Chicago Reader "on or about April 2, 2007." The alleged statement was that Moore strapped an electronic collar around the genitals of a bichon frise, and shocked the dog such that "[t]he Bichon was literally lifted into the air, that's how strong the shock was." Plaintiffs alleged that Opresnik also told Pam Zekman, in an interview which aired on CBS Channel 2 News on or about August 9, 2007, that Moore strapped an electronic collar around the genitals of a bichon frise and shocked the dog such that it "practically lifted off the ground."

Plaintiffs averred that on September 5, 2006, PETA published a press release, which still appears on the Internet, which stated that "Moore allegedly placed a shock device on one dog's genitals" and that Moore "reportedly strapped the devices on one dog's genitals." The action alert that was published [*4] on the Internet that same day, which allegedly remains on the Internet, states that "Moore reportedly strapped the devices on one dog's genitals."

Plaintiffs alleged that "on information and belief," Opresnik made the aforesaid allegations, which were then repeated and published by PET A, and that such allegations were false. Count IV of plaintiffs' first amended complaint alleged that Opresnik's statements were false and placed plaintiffs in a false light which would be highly offensive to a reasonable person.

Count V alleged defamation against Keene. Plaintiffs claimed that Keene posted, and continues to post, statements on the Internet calling Moore a "so-called dog trainer." Keene also posted that citizens had to witness Moore's "continued acts of cruelty" in handling dogs and that the dogs being trained by Moore prior to her arrest continued to suffer under her "cruel techniques." Plaintiffs alleged that such statements were false and that Keene therefore defamed plaintiffs. Count VI of the complaint alleged that such false statements placed Moore in a false light and would be highly offensive to a reasonable person.

Count VII of the complaint accused DePaolo of making substantially [*5] similar allegations to those that Opresnik allegedly made, which were then published by PET A. Plaintiffs further averred that "on information and belief, Mary DePaolo made substantially similar statements, regarding Moore having a shock collar on a dog's genitals to others in Moore's neighborhood at various times within one year of this suit being filed." Plaintiffs claimed that DePaolo knew such statements were false. Count VIII alleged that such false statements placed Moore in a false light and would be highly offensive to a reasonable person.

On April 29, 2008, PETA was dismissed from the case due to settlement.

On May 16, 2008, Opresnik filed a motion under *section 2-615* of the Code of Civil Procedure (*735 ILCS 5/2-615* (West 2006)) to dismiss counts III and IV of plaintiffs' first amended complaint. Opresnik alleged that the complaint did not specifically identify her allegedly defamatory statements in the body of the complaint. Opresnik noted that her complete published statement in the Chicago Reader appeared as follows:

> "Diane Opresnik, a friend of Davis's, says she saw Moore with the same dog that week. 'The Bichon was literally lifted into the air, that's how strong the shock [*6] was,' Opresnik says. 'I'd never seen someone stray a collar around a dog's genitals before, and when I confronted her, she said something like, "I'm just making sure this Bichon will never run into the street and get hit by a car. A live Bichon is better than a dead Bichon." *** It was so disturbing. I still can't get that sound out of

my head.'"

Opresnik further alleged that the comments she made on the Channel 2 News segment appeared as follows in the transcript:

> "One was around the neck, and then one was around the genitals [indicating on the video the waist/hindquarters of the dog]. She proceeds to go around the entire perimeter of the park zapping the dog every five seconds. The dog practically lifted off the ground. It was extremely disturbing."

Opresnik claimed that the above statements, taken individually or collectively, did not amount to defamation, defamation *per se*, or false light.

On September 4, 2008, DePaolo filed a motion to dismiss counts VII and VIII of the first amended complaint pursuant to *section 2-619* (*735 ILCS 5/2-619* (West 2006)) and *section 2-615* (*735 ILCS 5/2-615*) (West 2006)). In support of such motion, and pursuant to *section 2-615*, DePaolo alleged that plaintiffs' [*7] complaint had to be dismissed because plaintiffs failed to filed their claims for defamation and false light against DePaolo within the one-year statute of limitations.

In the alternative, DePaolo claimed that plaintiffs' complaint should be dismissed pursuant to *section 2-615* for failing to properly state a cause of action for defamation or false light. [2]

> 2 Subsequent to the filing of all briefs on appeal, DePaolo filed a motion for sanctions against plaintiffs alleging that plaintiffs' argument on appeal with regards to her was frivolous and in violation of *Illinois Supreme Court Rule 375* (210 Ill. 2d. R. 375), because plaintiffs failed to include any factual evidence to support their claim against DePaolo. We denied such motion and will address the merits of plaintiffs' argument in this opinion.

On December 3, 2008, the trial court dismissed with prejudice, pursuant to *section 2-615*, plaintiffs' defamation action (count III) and false light action (count IV) as to Opresnik. The trial court also dismissed with prejudice, pursuant to *section 2-615*, plaintiffs' defamation action (count V) and false light action (count VI) against Keene. The trial court denied plaintiffs' motion for leave [*8] to amend their first amended complaint. And finally, the trial court dismissed with prejudice count VII and count VIII of plaintiffs' complaint as to DePaolo.

Plaintiffs orally requested leave to file a second amended complaint during arguments regarding defendants' motion to dismiss. The trial court denied their request. Plaintiffs then filed a motion to reconsider the trial court's denial of their motion for leave to file an amended complaint and the trial court's dismissal of their first amended complaint with prejudice. They claimed they should have been allowed to specifically allege in their second amended complaint that the dog was female and that it was physically impossible to strap a collar around the genitals of a female dog.

The trial court denied plaintiffs' motion to reconsider, and the plaintiffs now appeal.

II. ANALYSIS

On appeal, plaintiffs argue that (1) defendants' statements constituted defamation *per se*, and (2) the trial court abused its discretion in denying plaintiffs' motion for leave to amend.

A. Standard of Review

We review the grant of a motion to dismiss pursuant to *section 2-615 de novo. Compton v. Country Mutual Insurance Co., 382 Ill. App. 3d 323, 325, 887 N.E.2d 878, 320 Ill. Dec. 734 (2008).* [*9] We review the dismissal of a complaint pursuant to *section 2-619 de novo. River Plaza Homeowner's Ass'n v. Healey, 389 Ill App. 3d 268, 275, 904 N.E.2d 1102, 328 Ill. Dec. 592 (2009).* The standard of review for whether leave to file an amended complaint should have been granted is abuse of discretion. *Droen v. Wechsler, 271 Ill. App. 3d 332, 335, 648 N.E.2d 981, 208 Ill. Dec. 59 (1995).*

B. Defamation *Per Se*

Plaintiffs' first argument on appeal is that the allegations in their complaint against all defendants were sufficient to state a cause of action for defamation *per se*. To establish defamation, a plaintiff must present facts showing that the defendant made a defamatory statement about the plaintiff, the defendant made an unprivileged

publication of that statement to a third party, and the publication caused damages.*Solaia Technology, LLC v. Specialty Publishing Co., 221 Ill. 2d 558, 579, 852 N.E.2d 825, 304 Ill. Dec. 369 (2006)*. "A defamatory statement is a statement that harms a person's reputation to the extent it lowers the person in the eves of the community or deters the community from associating with her or him." *Solaia, 221 Ill. 2d at 579*. Statements that do not contain factual assertions are protected under the *first amendment* and may not form the basis of a defamation action. [*10] *J. Maki Construction Co. v. Chicago Regional Council of Carpenters.379 Ill. App. 3d 189, 199-200, 882 N.E.2d 1173, 318 Ill. Dec. 50 (2008)*;. Likewise, a statement may not form the basis of a defamation action where it is substantially true. *J. Maki Construction.379 Ill. App. 3d at 203*;.

There are two types of defamatory statements: defamation *per se* and defamation *per quod. Brennan v. Kadner. 351 Ill. App. 3d 963. 968, 814 N.E.2d 951, 286 Ill. Dec. 725 (2004)*. In an action for defamation *per quod*, the plaintiff must plead and prove actual damages in order to recover. *Imperial Apparel, Ltd. v. Cosmo's Designer Direct, Inc., 227 Ill. 2d 381. 390, 882 N.E.2d 1011, 317 Ill. Dec. 855 (2008)*. If a defamatory statement is actionable *per se*. on the other hand, the plaintiff need not plead or prove actual damage to his or her reputation to recover. *Bryson v. News America Publications, Inc., 174 Ill. 2d 77. 87, 672 N.E.2d 1207, 220 Ill. Dec. 195 (1996)*. "Rather, statements that fall within these actionable *per se* categories are thought to be so obviously and materially harmful to the plaintiff that injury to [the plaintiff's] reputation may be presumed." *Bryson, 174 Ill. 2d at 87*.

"Illinois law recognizes five categories of statements which are considered actionable *per se*: (1) those imputing the commission of a criminal offense: (2) [*11] those imputing infection with a loathsome communicable disease: (3) those imputing an inability to perform or want of integrity in the discharge of duties of office or employment: (4) those that prejudice a party, or impute lack of ability, in his or her trade, profession or business; and (5) those imputing adultery or fornication." *Van Home v. Muller, 185 Ill. 2d 299, 307, 705 N.E.2d 898, 235 Ill. Dec. 715 (1998)*, see also *Bryson, 174 Ill. 2d at 88-89*. Plaintiffs argue that the defendants each made statements that imputed the commission of a crime and that imputed a lack of ability or otherwise prejudiced plaintiffs in their profession of dog training. We will address each defendant individually.

1. Diane Opresnik

The complained-of comments by Opresnik allegedly appeared in the Chicago Reader on or about April 2, 2007. Plaintiffs take issue with Opresnik's comment stating that Moore strapped an electronic collar around the genitals of a bichon frise and shocked the dog such that it was "literally lifted into the air, that's how strong the shock was." The following is the entire passage:

> "'The Bichon was literally lifted into the air, that's how strong the shock was,' Opresnik says. 'I'd never seen someone stray a collar [*12] around a dog's genitals before, and when I confronted her, she said something like, "I'm just making sure this Bichon will never run into the street and get hit by a car. A live Bichon is better than a dead Bichon." *** It was so disturbing. I still can't get that sound out of my head.'"

Plaintiffs also take issue with a statement that Opresnik made to Channel 2 News. The statement plaintiffs point to is where Opresnik stated that when the dog was shocked it "practically lifted off the ground." The following is the full passage as it appears in the transcript:

> "One was around the neck, and then one was around the genitals. She proceeds to go around the entire perimeter of the park zapping the dog every five seconds. The dog practically lifted off the ground. It was extremely disturbing."

Plaintiffs claim that the above statements amount to defamation *per se* because they impute the commission of the crime of animal cruelty (see *510 ILCS 70/3.01* (West 2006)), and they impute a lack of ability or otherwise prejudice plaintiffs in their profession of dog training. Opresinik responds that her statements were not verifiably false and that they were simply innocent observations of the plaintiffs' [*13] negative reinforcement training technique.

To constitute defamation *per se* based on imputing

the commission of a crime, "'the crime must be an indictable one, involving moral turpitude and punishable by death or by imprisonment in lieu of a fine.'" *Kirchner v. Greene, 294 Ill. App. 3d 672, 680, 691 N.E.2d 107, 229 Ill. Dec. 171 (1998)*, quoting *Adams v. Sussman & Hertzberg. Ltd., 292 Ill. App. 3d 30, 46, 684 N.E.2d 935, 225 Ill. Dec. 944 (1997)*. "'While the words charging the commission of a crime need not meet the technical requirements that are necessary for an indictment, the words must fairly impute the commission of a crime.'" *Kirchner, 294 Ill. App. 3d at 680*, quoting *Adams, 292 Ill. App. 3d at 47*.

The animal cruelty statute states that "[n]o person or owner may beat, cruelly treat, torment, starve, overwork or otherwise abuse any animal." *510 ILCS 70/3.01* (West 2006). A review of Opresnik's language in the case at bar reveals that plaintiffs' claim fails because there is no positive factual statement of criminal animal cruelty to support a defamation *per se* claim and, furthermore, the statements can be innocently construed.

The statements regarding Moore's placement of an electric collar on a dog's genitals are not positive factual statements that [*14] fairly impute criminal animal cruelty. Rather, the statements are consistent with how Moore herself described the placement of the collars. She admitted in an attachment to her first amended complaint that a training technique she used was to place an electric collar around a dog's neck as well as around its "hindquarters." We cannot say that Opresnik's use of the term "genitals" rather than "hindquarters" converted her statement into one which imputes criminal behavior.

However, even if we were to find that Opresnik's statements imputed a criminal offense, "the innocent construction rule applies in determining whether a statement alleged to be defamatory *per se* imputes a criminal offense." *Kirchner, 294 Ill. App. 3d at 680*. "'If the actual words spoken [or written] do not by themselves denote criminal (or unethical) conduct and in common usage have a more flexible and broader meaning than ascribed by plaintiff, then, as a matter of law, the words are nonactionable as defamation *per se*.'" *Kirchner, 294 Ill. App. 3d at 680*, quoting *Harris Trust & Savings Bank v. Phillips, 154 Ill. App. 3d 574, 581, 506 N.E.2d 1370, 107 Ill. Dec. 315 (1987)*. Whether an alleged defamatory statement is entitled to an innocent construction [*15] in an action for defamation *per se* is a question of law, which we review *de novo*. *Tuite v. Corbitt, 224 Ill. 2d 490, 503, 866 N.E.2d 114, 310 Ill. Dec. 303 (2006)*. The court must consider the allegedly defamatory statement in context with the words and the implications therefrom given their natural and obvious meaning. *Tuite, 224 Ill. 2d at 503*; *Chapski v. Copley Press, 92 Ill. 2d 344, 352, 442 N.E.2d 195, 65 Ill. Dec. 884 (1982)*. Thus, in determining the context of the defamatory statements, we must read the writing containing the defamatory statement as a whole. *Tuite, 224 Ill. 2d at 504*.

Here, the complained-of comments appeared in a Chicago Reader article entitled "Who Should You Trust to Train Your Dog?" The article described several different training methods, including positive and negative reinforcement methods. The article further described the use of electric collars in dog training in general. In the CBS interview, Opresnik was asked to describe what she witnessed. The use of electric dog collars as a training method is not a new or unheard of technique. In fact, in Moore's attachment to her first amended complaint, she included an exhibit whereby she described her training methods and states that she uses multiple electronic collars on dogs, [*16] including one wrapped around the dog's hindquarters. If such exhibit does not impute animal cruelty and in fact touts the uniqueness of her dog training, then it follows that Opresnik's statements impute neither animal cruelty nor a lack of Moore's dog training ability. Accordingly, Opresnik's statements were subject to an innocent construction.

Plaintiffs argue that innocent construction does not apply because Opresnik used phrases like, "It was so disturbing. I still can't get the sound out of my head," and "It was extremely disturbing." Such language is a mere reaction and interpretation of what Opresnik witnessed. A person can be disturbed by a wide range of behavior and, therefore, cannot be accused of defamation when that person is reacting to such behavior.

Moreover, we find that Opresnik's statements regarding Moore's training techniques were substantially true. A defendant is not liable for a defamatory statement if the statement is true. *Wynne v. Loyola University of Chicago, 318 Ill App. 3d 443, 451, 741 N.E.2d 669, 251 Ill. Dec. 782 (2000)*. Only "substantial truth" is required for the defense. *Wynne, 318 Ill. App. 3d at 451*. While determining "substantial truth" is normally a question for the jury, the question [*17] is one of law where no reasonable jury could find that substantial truth had not

been established. *Wynne, 318 Ill. App. 3d at 451-52.* Substantial truth refers to the fact that a defendant need prove only the "gist" or the "sting" of the statement. *American International Hospital v. Chicago Tribune Co., 136 Ill. App. 3d 1019, 1022, 483 N.E.2d 965, 91 Ill. Dec. 479(1985).*

In the case at bar, as stated above, Moore herself admitted to using multiple shock collars including one on the hindquarters of the dog. Opresnik stated that there was a shock collar around the bichon's genitals. Genitals are defined as, "of, relating to, or being a sexual organ." Webster's Ninth New Collegiate Dictionary 511 (1988), Sexual organs reside in the hindquarters of dogs. Therefore, we find that Opresnik's description of the location of the shock collar as the genitals is substantially true, and therefore not actionable as defamation *per se*.

2. John Keene

Plaintiffs allege that Keene's statements which were posted on the Internet constituted defamation *per se*. However, plaintiffs do not allege where these posting were made or at what time they were made. See *Green v. Rogers, 234 Ill. 2d 478, 492, 917 N.E.2d 450, 334 Ill. Dec. 624 (2009)*, citing *Mittelman v. Witous, 135 Ill. 2d 220, 229-30, 552 N.E.2d 973, 142 Ill. Dec. 232 (1989).* [*18] *abrogated on other grounds by Kuwik v. Starmark Star Marketing & Administration, Inc., 156 Ill. 2d 16, 619 N.E.2d 129, 188 Ill. Dec. 765 (1993)* ("[although a complaint for defamation *per se* need not set forth the allegedly defamatory words *in haec verba*, the substance of the statement must be pled with sufficient precision and particularity so as to permit initial judicial review of its defamatory content"). Accordingly, due to lack of sufficient precision, plaintiffs have waived this issue on review. Waiver aside, we will nevertheless review this issue.

The first statement plaintiffs take issue with was Keene's reference to Moore as a "so-called dog trainer." This does not impute a lack of ability on Moore's part to perform her job. The paragraph within which this phrase appears describes the story that Pam Zekman aired on Channel 2 News. In that story, Zekman indicated that there are no recognized certifications or licenses for dog trainers. Accordingly, Zekman stated that anyone can call himself or herself a dog trainer. Calling Moore a "so-called" dog trainer therefore does not prejudice her business or impute a lack of ability to dog train because there is no such thing as a certified dog trainer.

The second statement [*19] followed a statement which stated that Moore "opened a training facility in the West Loop neighborhood and shortly thereafter was seen by several area residents using what the residents felt [were] cruel techniques on various dogs." The complained-of statement, in context, allegedly read as follows:

> "Furthermore, these citizens were getting so frustrated by the continued acts of cruelty they had to witness that they even talked about pooling their money to hire a private investigator to follow Ms. Moore and collect evidence."

Such a statement, posted by Keene on the Internet, does not impute criminal behavior or Moore's lack of dog-training abilities. Rather, it is a statement regarding how the residents of Moore's neighborhood felt she was treating the dogs in her care and their responses to such treatment. Keene did not himself state that Moore was being cruel to animals or that he witnessed her being cruel to animals. The first requirement in proving defamation is that "a plaintiff must present facts showing that the defendant made a [defamatory] statement about the plaintiff." *Solaia, 221 Ill. 2d at 579.* Because Keene did not himself make the defamatory statements, his statements [*20] fall outside the scope of defamation *per se*.

3. Mary DePaolo

Finally, plaintiffs complain that DePaolo made statements which constituted defamation *per se*. However, the only argument in support of such allegation within plaintiffs' brief states as follows: "It was alleged that DePaolo falsely claimed that an electronic shock device was strapped to the dog's genitals." Plaintiffs' brief then goes on to focus on the other defendants, without mentioning DePaolo by name again. We find that this conclusory argument is without merit as it is unsupported by specific allegations. See *Niedermeyer v. Streamwood Park District, 3 Ill. App. 3d 1078, 280 N.E.2d 13 (1972)* (reviewing courts should disregard conclusions of law or conclusions of material fact unsupported by specific factual allegations). Thus, plaintiffs have waived this argument in regard to DePaolo.

However, even if we were to review this issue, we would nevertheless find that DePaolo's comments did not

constitute defamation *per se*. Plaintiffs' first amended complaint does not specifically state what DePaolo actually said. Instead, the complaint alleged that, upon information and belief, the plaintiffs believed DePaolo made statements that were repeated [*21] in a press release from PETA as follows: "Moore allegedly placed a shock device on one dog's genitals," and, "Moore reportedly strapped the devices on one dog's genitals."

DePaolo first argues that first amended complaint against DePaolo was properly dismissed by the trial court because plaintiffs failed to file their defamation claim within the one-year statute of limitations. The Illinois Code of Civil Procedure provides that a motion for dismissal is appropriate if "[t]he action was not commenced within the time limited by law." *735 ILCS 5/2-619(a)(5)* (West 2006).

The statute of limitations in Illinois for a claim for defamation is one year from when the cause of action accrued. *735 ILCS 5/13-201* (West 2006). Under Illinois law, the cause of action for defamation accrues, and the statute of limitations begins to run, on the date of publication of the defamatory material. *Tom Olesker's Exciting "World of Fashion. Inc. v. Dun & Bradstreet, Inc., 61 Ill. 2d 129, 131-32, 334 N.E.2d 160 (1975)*. DePaolo was first named as a defendant in the first amended complaint, which was filed on March 27, 2008. Such complaint alleged that the PETA press release was published on September 5, 2006. Accordingly, it follows [*22] that DePaolo's alleged statements to PETA must have occurred prior to the publication of the September 5, 2006, press release. Thus, the trial court properly dismissed the action against DePaolo pursuant to *section 2-619* for falling outside the statute of limitations period.

Plaintiffs argue, however, that although the first PETA publication was on September 5, 2006, PETA continued to publish the press release on its web site at the time the first amended complaint was filed, bringing the press release within the statute of limitations. They also allege that the language in their first amended complaint brought the claim within the statute of limitations. We disagree.

With regard to "republishing," the issue here is not when the PETA press release was published, but rather when DePaolo made her alleged statements to PETA, since this is an action against DePaolo and not PETA. And presumably, if PETA published these statements on September 5, 2006, then DePaolo made such statements prior to that date. Accordingly, her statements fell outside the statute of limitations for defamation.

As to the language that appears in plaintiffs' first amended complaint, such language appeared as follows: [*23] "On information and belief, Mary DePaolo made substantially similar statements, regarding Moore having a shock collar on a dog's genitals to others in Moore's neighborhood at various times within one year of this suit being filed." As we have noted above, a pleading for defamation must be pled with sufficient precision and particularity. See *Green, 234 Ill. 2d at 492*. Plaintiffs fail to mention when these statements were made to neighbors, to which neighbors the statements were made, and what exactly was said to the neighbors. Accordingly, we are unpersuaded by plaintiffs' argument that such vague language in their first amended complaint brought this claim within the statute of limitations.

However, even if we were to find that DePaolo's alleged statements fell within the statute of limitations, we would nevertheless find that they did not amount to defamation *per se*. Plaintiffs argue that her alleged comments imputed the commission of a crime and imputed a lack of ability to be a dog trainer. As DePaolo notes in her brief, PETA's press release did not mention DePaolo by name. Rather, plaintiffs' claim, "on information and belief," that PETA acquired its information regarding the shock [*24] collars from DePaolo is unsupported by factual allegations. Their first amended complaint does not specifically state what DePaolo ever said, when DePaolo made statements to PETA, to whom she communicated, and in what manner she made the statements. See *Green, 234 Ill. 2d at 492* ("[although a complaint for defamation *per se* need not set forth the allegedly defamatory words *in haec verba*, the substance of the statement must be pled with sufficient precision and particularity so as to permit initial judicial review of its defamatory content"). Accordingly, because plaintiffs did not plead the substance of the statement with sufficient precision and particularity, they failed to adequately state a cause of action for defamation *per se*.

Even if we were to find that they provided sufficient information, we would nevertheless find that the statements allegedly made would not constitute defamation *per se* for the reasons set forth above in connection with both Opresnik and Keene.

C. Motion for Leave to File Second Amended Complaint

Plaintiffs' final contention on appeal is that the trial court erred in refusing to grant plaintiffs leave to file a second amended complaint. Specifically, plaintiffs [*25] argue that they should have been granted leave to file so they could amend their complaint to specify that the dog in question was female. Defendants respond that the trial court was within its discretion when it denied plaintiffs leave to file a second amended complaint because the proposed changes would not have cured the deficiencies in plaintiffs' first amended complaint. We agree with defendants.

Whether to allow an amendment of a complaint is a matter within the sound discretion of the trial court, and absent an abuse of that discretion, the court's determination will not be overturned. *Compton v. Country Mutual Insurance Co., 382 Ill. App. 3d 323, 331, 887 N.E.2d 878, 320 Ill. Dec. 734 (2008)*. An abuse of discretion will be found only where no reasonable person would take the view adopted by the trial court. *Compton, 382 Ill. App. 3d at 331-32*.

In considering whether a trial court abused its discretion in ruling on a motion for leave to file an amended complaint, we consider the following factors: "'(1) whether the proposed amendment would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment is timely; [*26] and (4) whether previous opportunities to amend the pleadings could be identified.'" *Compton, 382 Ill. App. 3d at 332*, quoting *Loyola Academy v. S&S Roof Maintenance, Inc., 146 Ill. 2d 263, 273, 586 N.E.2d 1211, 166 Ill. Dec. 882 (1992)*.

Here, plaintiffs' only proposed change was to add that the bichon in question was female. All other allegations against defendants remained the same. We do not see how the gender of the dog would not have changed the nature of any of the statements made by the defendants. At oral arguments, plaintiffs' counsel argued that if the dog was female, that would make it impossible for an electric collar to be strapped around the dog's genitals. We disagree. As stated above, "genitals" is a broad term, the meaning of which encompasses body parts of or related to the genitals. We fail to see how it is impossible for a collar wrapped around a female dog's hindquarters to touch parts of the dog that are of and related to its genitals. Therefore, stating that the dog in question was female would not have cured the deficiencies in plaintiffs' first amended complaint.

Moreover, plaintiffs' motion for leave to file was untimely. The motion was made during oral argument on defendants' motion to dismiss. [*27] Additionally, plaintiffs knew the gender of the dog when the original complaint was filed and therefore could have pled the gender at an earlier time. Accordingly, we find that the trial court did not abuse its discretion in denying their motion for leave to file a second amended complaint.

III. CONCLUSION

For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

Judgment affirmed.

TOOMIN, P.J., and HOWSE, J., concur.