No. 126024

In the

SUPREME COURT OF ILLINOIS

PAUL J. CIOLINO,

Plaintiff-Appellee,

v.

TERRY A. EKL,

Defendant-Appellant,

ALSTORY SIMON, JAMES DeLORTO, JAMES G. SOTOS, MARTIN PREIB, WILLIAM B. CRAWFORD, ANITA ALVAREZ, ANDREW M. HALE, and WHOLE TRUTH FILMS, LLC,

Defendants.

Appeal from the Appellate Court of Illinois, First Judicial District,
No. 1-19-0181
There Heard on Appeal from the Circuit Court of Cook County, Illinois,
County Department, Law Division No. 18 L 000044.
The Honorable **Christopher E. Lawler**, Judge Presiding

BRIEF OF APPELLEE PAUL J. CIOLINO

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NATURE OF THE CASE

Plaintiff, Paul J. Ciolino ("Ciolino"), brought a Complaint against Defendant, Terry A. Ekl ("Ekl"), and others for defamation, false light, intentional infliction of emotional distress, and civil conspiracy. (Deft. A.11-97) The Circuit Court of Cook County denied Defendant Ekl's motion to dismiss pursuant to 735 ILCS 5/2-615 ("2-615 motion") but granted Defendant Ekl's motion to dismiss pursuant 735 ILCS 5/2-619(5) ("2-619 motion") on statute of limitations grounds. (Deft. A1-10)

Plaintiff appealed the circuit court's judgment granting Defendant Ekl's 2-619 motion to dismiss. (Deft. A.63) The Illinois Appellate Court reversed in a published decision *Ciolino v. Simon, et al.,* 2020 IL App (1st) 190181. (Deft. A.65-97)

Defendant Ekl did not appeal the circuit court's judgment denying his 2-615 motion. Because this Court lacks jurisdiction to consider Ekl's appeal from the denial of his 2-615 motion where he never appealed that judgment, the sufficiency of the pleadings is not an issue in the case.

STATEMENT OF FACTS

On June 9, 2015, Defendant William Crawford published a book entitled Justice Perverted: How the Innocence Project of Northwestern University's Medill School of Journalism Sent an Innocent Man to Prison ("Justice Perverted"). The book inspired a similarly-themed documentary entitled "Murder in the Park" ("MIP") produced by Defendant Andrew Hale via his production company Defendant Whole Truth Films ("WTF"). (Deft. A.11-97; R. C.22-24; 31-32; 53-57; 60-63)[1]

As set forth in Plaintiff's Complaint (Deft. A.11-91; R. C.22-72), "Justice Perverted" and MIP spread an outrageous and demonstrably false narrative that Plaintiff, along with Northwestern University Medill School of Journalism Professor David Protess, framed an innocent man [Defendant Alstory Simon] for the 1982 murders of Jerry Hillard and Marilyn Green. (R. C. 22-27; C. 52-63) According to MIP, Plaintiff Ciolino and Professor Protess [with the support of Northwestern University] framed Simon for the Hillard/Green murders so that they could secure the release of the true killer, death-row inmate Anthony Porter. (R. C. 22-27; C. 52-63) MIP posits that despite a long and illustrious career exposing miscarriages of justice, Professor Protess and the Plaintiff conspired to knowingly overturn the just conviction of Anthony Porter so that they could make Porter the 'poster boy'

[1] Plaintiff will cite to the record below as follows: ("R.#") When appropriate Plaintiff will also cite to the Defendant's appendix as ("Deft. A.#")

for the bid to end executions in Illinois. (R. C. 27; C. 52-63) The documentary, featuring a number of defendants to this lawsuit, including Defendant Ekl, falsely claim that Plaintiff engaged in a variety of crimes (impersonation of a police officer, home invasion, assault, witness tampering, obstruction of justice) to secure a false confession from Simon that was later used to charge him and led to his plea of guilty. (R. C. 52-63)

On February 3, 1999, Plaintiff Ciolino secured a video-recorded statement from Defendant Alstory Simon in which he confessed that he was responsible for the shooting that killed Hillard and Green. Thereafter, former Cook County State's Attorney Richard Devine vacated Porter's convictions and sentence of death and empaneled a grand jury that indicted Simon for the murders. (R. C. 34) In September 1999, Simon pled guilty to the Hillard/Green murders, apologizing in open court to the victim's family. (R. C. 35) Simon continued to confess to the Hillard/Green murders in a televised news interview, in an apology letter to Anthony Porter, to a correctional officer, and both orally and in written letters to a number of different attorneys, including his own. (R. C. 34-37)

Notwithstanding overwhelming evidence of Simon's guilt, and in direct contradiction to the findings of her own Conviction Integrity Unit which recommended *against* springing Simon, then Cook County State's Attorney Anita Alvarez vacated Simon's convictions on October 30, 2014. Mills, Steve, CHICAGO TRIBUNE, "Alvarez backed inmate's release despite aids' findings,

report shows" (Jun. 7, 2017).[2] At a press conference held that same day, Alvarez admitted that she could not say whether Simon was innocent but felt compelled to vacate his convictions because of the unlawful investigative conduct of Plaintiff and Professor Protess. (R. C 49-52) Plaintiff's Complaint alleged that Alvarez's statements at the October 30, 2014 press conference were false and defamatory.[3] As pled, Alvarez released Simon, not because of any belief that his conviction was unjust, but because she was eager to undermine the Porter exoneration and the work of Protess who had been highly critical of her handling of a number of wrongful conviction cases. (R. C.49-52)

In his Complaint, Plaintiff alleges that the false tale advanced in MIP was the culmination of a protracted conspiracy by the Defendants to defame Plaintiff, David Protess and Northwestern University's innocence project with a wider goal of discrediting the wrongful conviction movement as a whole. (C. 38-49) For their part, Defendants Ekl and Sotos (later joined by Defendant Hale) took up the criminal representation of Simon and eventually his civil representation in a malicious prosecution case brought against Plaintiff, Protess, and Northwestern. The malicious prosecution lawsuit was

[2] https://www.chicagotribune.com/news/breaking/ct-anthony-porter-alstory-simon-case-met-20170608-story.html

[3] The appellate court found that Plaintiff's defamation claim against Alvarez stemming from her press conference was time-barred. (Deft. A.90, ¶70)

made possible by Alvarez's decision to vacate Simon's conviction and dismiss all charges against Simon. (R. C.40)

Ekl, Sotos, and Hale were vocal critics of the so-called "innocence industry" and expressed those views in MIP. As Plaintiff alleged in his complaint, Defendant Ekl made a number of false and defamatory statements in MIP that advanced the alluring, but entirely false, narrative that Plaintiff and Protess framed Simon. Specifically, Ekl stated that Ciolino coerced witnesses to make false statements that fit his theory of the case. (R.C. 53, ¶149) Ekl stated that Ciolino (and Protess) would go to "impoverished people who don't have a lot of money, make them promises and basically get them to recant." *Id.*. Ekl further stated that after Ciolino forced Simon to confess he "handed him over to his office mate" to force Simon to plead guilty. *Id*.

MIP was purchased by Sundance Select and aired on Showtime for the first time on February 17, 2016. (R. C. 53) It continues to be readily available on a number of on-line streaming platforms, including Netflix and Amazon. *Id*. Prior to its mass-publication, the filmmakers screened the film two times to local audiences in New York City and Cleveland, Ohio as part of small film festivals. The dates and locations of the screenings were not advertised to the general public. On July 15, 2015, MIP premiered to a small audience at the Gene Siskel Film Center in Chicago, Illinois. (C. 52) As pled in Plaintiff's complaint, the release of the film to a national audience destroyed his

reputation and career as an investigator, causing unquantifiable financial and emotional hardship. (C. 53)

Alstory Simon's Federal Lawsuit and Plaintiff's Counter Complaint

Several months before MIP premiered in Chicago, Defendant Simon sued Northwestern University, David Protess and Plaintiff Ciolino for malicious prosecution in the United States District Court for the Northern District of Illinois. (R. C. 24) Simon was represented by Defendants Hale, Sotos, and Ekl – the MIP creator and participants. On April 27, 2016, Ciolino filed an Answer to the complaint and a counter complaint pursuant to Fed. R. Civ. P. 13(b). (R. C. 24) Ciolino's counter complaint raised claims of defamation, false light, intentional infliction of emotional distress, and conspiracy against Simon and additional counter complaint co-defendants Alvarez, Hale, Sotos, Ekl, Delorto, Preib and Crawford [all named as Defendants in the state court complaint]. Plaintiff's counter complaint largely mirrored the state court complaint that is the subject of this appeal. (*Compare* R. C. 22-72 & R. C. 1926-1972)

On January 3, 2017, the United States District Court dismissed Plaintiff's counter complaint for lack of subject matter jurisdiction, finding that the claims did not raise compulsory counter claims and declining to exercise supplemental jurisdiction. (R. C. 25) The District Court noted that Plaintiff was not left without a forum as he could bring his claims in state

court. *See Simon v. Northwestern Univ.,* 2017 U.S. Dist. LEXIS 123, *17 (N.D. Ill. Jan. 3, 2017)

Simon later voluntarily dismissed all claims of malicious prosecution against Plaintiff. (R. C. 2175)

Plaintiff's State Court Complaint

Plaintiff Ciolino filed a state court complaint in the Circuit Court of Cook County on January 2, 2018. Plaintiff raised the same claims against the same defendants in his state court complaint as he previously raised in his counter complaint filed in federal court. (*Compare* R. C. 22-72 & R. C. 1926-1972)

All Defendants unsuccessfully moved to dismiss Plaintiff's Complaint pursuant to 735 ILCS 5/2-606. (R. C. 404-461; R. C. 524-525) Defendants subsequently moved to dismiss Plaintiff's Complaint pursuant to 735 ILCS 5/2-619 under a number of different theories, including that the Complaint was not filed within the statute of limitations. (R. C. 316-325 -Alvarez MTD) (R. C.533-541- Crawford MTD) (R. C. 708-846 – Ekl's MTD) (R. C. 847-1024 – Sotos' MTD) (R. C. 1025-1666 – Hale, WTF, Delorto, Simon MTD) (R. C.1667-1706 – Preib's MTD) Defendant Ekl also moved to dismiss the Complaint pursuant to 2-615. (R. C. 708-846)

Cook County Circuit Court Judge Lawler denied Defendant Ekl's motions to dismiss pursuant 2-615, finding that Plaintiff pled sufficient facts to state claims for defamation, false light, and intentional infliction of

emotion distress. (Deft. A.1-10; R. C. 2209-2218) However, the circuit court granted all of the defendants' 2-619(5) motions, finding that Plaintiff had failed to file his state court complaint within the statute of limitations. *Id.*

Plaintiff appealed to the appellate court which vacated the circuit court's dismissal of Plaintiff's defamation, false light, and derivative IIED and Conspiracy claims against all Defendants with the exception of Defendant Alvarez. *Ciolino v. Simon, et al.,* 2020 IL App (1st) 190181. (Deft. A.65-97)

This Court granted Defendant Ekl's petition for leave to appeal and this appeal followed.

STANDARD OF REVIEW

Plaintiff agrees that this Court's review of a dismissal under 735 ILCS 5/2-619 is *de novo. Schrager v. Bailey,* 2012 IL App (1st) 11943, ¶16. That is, this Court considers whether there was a genuine issue of material fact that precluded dismissal or, absent a general fact question, whether dismissal was proper as a matter of law. *Id.*

However, since Defendant Ekl did not file a notice of appeal from the Circuit Court's denial of his motion to dismiss pursuant to 735 ILCS 5/2-615, this Court lacks jurisdiction to review that issue under any standard of review.

ARGUMENT

I. Where Genuine Issues of Material Fact Exist on the Question of Whether Plaintiff Should Have Known of the Defamatory Content of MIP Prior to MIP's Mass-Publication, the Appellate Court Appropriately and Fairly Reversed the Circuit Court's Judgment Granting Ekl's 2-619 Motion.[4]

Defendant Ekl asks this Court to overrule long-standing precedent that the discovery rule may apply to defamation and false light claims when the defamatory material has not been made available to a mass sector of the public. In a fair and reasoned decision, the appellate court held that general issues of material fact exist as to the question of whether Plaintiff knew or should have known of the defamatory contents of MIP prior to its Chicago screening on July 15, 2015. Ekl concedes that Plaintiff may not have actually known about the isolated showing of the documentary in New York City eight months earlier but urges this Court to hold that because MIP was not

[4] Although Ekl argues that the trial court "correctly" dismissed Plaintiff's claims pursuant to the one-year statute of limitations, he fails to acknowledge that the trial court never examined the discovery rule issue that is presently before this Court. Rather, the trial court dismissed Plaintiff's Complaint under the grave misapprehension that Plaintiff's defamation claims were not filed until nearly two years after MIP aired on Showtime to the general public. Inexplicably, the trial court failed to recognize or take into account the Illinois Savings Statute when determining the filing date of Plaintiff's claims which was the date on which he filed his counter complaint in federal court not the date on which he filed his state court complaint. 735 ILCS 5/13-217. *See also Ciolino,* 2020 IL App (1st) 190181, ¶39.

actively concealed from Plaintiff, the discovery rule does not apply - as a matter of law.

No authority from this Court *or* the appellate court exists to support such a draconian rule that turns on the intent of the defamer and will inevitably serve to shield wrongdoers rather than discourage litigants from sitting on their rights. Significantly, Ekl identifies no prejudice to his future defense, but nonetheless seeks to avoid even answering Plaintiff's claims, urging this Court to craft a new, bright-line rule for his benefit. Importantly, the question of whether plaintiff knew or should have known about the earlier screenings of MIP is a factual inquiry and neither Defendant Ekl, nor any Defendant, is precluded by the appellate court decision from reasserting their statute of limitations defense in a motion for summary judgment. While it is true that the discovery rule is inapplicable when defamatory material was published via mass-media publication, where the defamatory material is not readily available to the general public, the discovery rule should apply consistent with the binding precedent of this Court. Ekl fails to provide any logical basis or authority for abandoning this sensible rule.

A. Plaintiff's Defamation and False Light Claims Arising from MIP Accrued When the Film Was Mass-Published on Showtime on February 17, 2016, Or At the Very Earliest, When It First Screened to an Invited Audience in Chicago on July 15, 2015.

The statute of limitations to file a defamation claim is one year. 735 ILCS 5/13-201 (West 2018). In defamation cases the cause of action 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, 132-33 (1975). Whereas here the defamatory material was not mass-published or readily accessible to the general public until February 17, 2016, the discovery rule applies. *Id.* at 138 (distinguishing between defamatory material published through mass-media that is generally available to the public and defamatory material that is available to only to a small subset of people and generally inaccessible to the public).

It is undisputed that MIP was mass-published on February 17, 2016 when it aired on Showtime and became readily available to the general public. (Deft. A.42, ¶147; R. C 53) In an effort to sell MIP to a large distributor like Showtime, the filmmakers screened the film on three prior occasions. The first screening was on November 17, 2014 at a small, independent film festival in New York City. (R. C.1056) The second screening was held in Cleveland, Ohio in March 2015 at another local film festival. (R. C. 1058) And the third screening was in Chicago on July 15, 2015 at the Gene Siskel Film Center. (Deft. A.42, ¶146; R. C.53) None of the screenings were advertised to a general audience and the contents of film were not reported in any media publications. (R. C.1056-1079) Other than the three isolated showings, the film was not available or accessible to the general public, including Plaintiff, until it began airing on Showtime in February 2016.

Plaintiff, who did not attend any of the early screenings, only became aware of the defamatory nature of the film and the injuries it caused when MIP started airing on Showtime. It was at that time that he started receiving hate mail and death threats from people outraged by the false narrative MIP peddled. (Deft. A.59, ¶192; R. C. 70) As such, Plaintiff contends that his defamation claims accrued on the date of their mass-publication on February 17, 2016. Alternatively, the very earliest his claims accrued was on July 15, 2015 – the date on which MIP premiered in Chicago to an invited audience at the Gene Siskel Film a Center. Although Plaintiff was not invited to and did not attend the screening, the Chicago screening was the very first opportunity he might have had to learn of the defamatory nature of the film. Whichever date this Court uses, Plaintiff's defamation claims were timely filed.

1. Defendant Ekl's Reliance on "Affirmative Evidence" Demonstrates that Material Facts Are in Dispute As to Whether Plaintiff Could Have Brought His Complaint Prior to MIP's Mass-Publication.

On one hand, Ekl urges this Court to hold that the discovery rule has no applicability in this case, but nonetheless argues hotly-disputed *facts* relevant to the question that the discovery rule asks – that is – did or should plaintiff have known about the defamatory nature of MIP prior to its mass-publication. Without expressly acknowledging it, Defendant Ekl relies heavily on "affirmative evidence," namely an affidavit from Shawn Rech (Defendant Hale's partner) that he falsely claims is "undisputed."

Defendant Ekl's arguments are brought pursuant to 735 ILCS 5/2-619(a)(9) wherein defendant contends that "affirmative matters" are raised by supporting documents that defeat Plaintiff's claims. To prevail on a motion to dismiss brought pursuant to 2-619(a)(9), the "affirmative matter" must be apparent on the face of the complaint or supported by affidavits or certain other evidentiary materials. *Doe*, 2015 IL App (1st) at ¶37. The defendant has the initial burden of establishing that the affirmative matter defeats the plaintiff's claims. *Id*. Once the defendant satisfies that burden of putting forward this "affirmative matter," the burden shifts to the plaintiff to demonstrate that the proffered defense is unfounded or requires the resolution of a material fact. *Id*.

In *Smith v. Waukegan Park Dist.*, 231 Ill. 2d 111, 120-21 (2008), this Court described the "affirmative matter" a defendant must present under section 2-619(a)(9), to satisfy its initial burden, as:

> A type of defense that either negates an alleged cause of action completely or refutes crucial conclusions of law or conclusion of material fact unsupported by allegations of specific fact contained or inferred from the complaint . . . [not] merely evidence upon which a defendant expects to contest an ultimate fact stated in the complaint. *Doe*, 2015 IL App (1st) at ¶38.

Because the allegations of the complaint are taken as true, the "affirmative matter" presented by the movant must do more than refute a well-pleaded fact in the complaint. *Id*. at ¶39. If a defendant's evidence in support of a section 2-19(a)(9) motion does nothing more than refute the well-pleaded allegations of the complaint, the complaint trumps that evidence, and

dismissal is improper. *Id*. at ¶43. *See also, Smith,* 213 Ill. 2d at 121. Section 2-619(a)(9) is not a proper vehicle to contest factual allegations, nor does it authorize a fact-based 'mini-trial' on whether plaintiff can support his allegations. *Doe*, 2015 IL App (1st) at ¶43.

Relying on Rech's affidavit and attached internet materials, Ekl contends that the New York film festival where MIP premiered was "America's largest documentary film festival." (Deft. Br. 6) This assertion is vague and strongly contested to the extent that Ekl relies on this *fact* to suggest that Plaintiff would have known about this film festival. It is conceivable that DOC NYC is the "largest" documentary film festival in some sense of the word (*e.g.,* it accepts and screens the largest number of documentary films every year), it is most certainly *not* a well-known film festival among the 3000 film festivals that are held world-wide every year. It doesn't even make the top ten. https://www.projectcasting.com/tips-and-advice/what-is-the-biggest-film-festival. DOC NYC is neither a prestigious nor a well-attended film festival of which Plaintiff would be expected to have independent knowledge – even if Plaintiff was an avid documentary film buff.

Similarly, Ekl points to three news articles published at the end of October and early November 2014 that generally discuss Simon's release from prison and briefly mentions that his case will be the subject of a film. The articles offered no specifics about where or when the film would air and gave no hint of its defamatory content. Thus, even if Plaintiff had seen these

publications, the mere mention of a future film about the Porter/Simon case could not have put Plaintiff on notice that MIP was airing in New York City at a little known film festival in November and further that it contained actionable defamatory statements.

Ekl also contends that both the New York and Ohio screenings were "advertised;" another hotly-disputed point. Ekl's evidence of advertisement consists of three "tweets" by individuals allegedly associated with the movie who were strangers to Plaintiffs, unknown to the general public, and had no significant twitter following. The "tweets" of random people with no public notoriety or significant twitter following has no ability to call the general public's attention to an event. Regardless, even *if* Plaintiff had somehow seen or become aware of these "tweets," the tweets did not put Plaintiff on notice of the defamatory nature of the film. Without actually seeing the film, Plaintiff would have no way to learn of its contents. In fact, given the heightened pleading standard for bringing defamation claims, Plaintiff was *required* to actually see the film and identify with specificity the defamatory statements that formed the basis of his claims. Ekl fails to explain how Plaintiff could have possibly brought a defamation claim if he was unaware of and did not (and could not) attend the early screenings in New York City and Cleveland. As the appellate court observed, "[A]s far as we can tell from the record, even if Ciolino wanted to see "A Murder in the Park" before it

premiered in Chicago, he would have had no reasonable way to do so." *Ciolino,* 2020 IL App (1st) 190181, ¶61.

By arguing the relevance of these facts, Ekl seems to concede that genuine and material issues of fact are raised regarding when Plaintiff possessed adequate information concerning the alleged damage and its cause so as to require inquiry to determine whether actionable conduct was involved. Because these "affirmative matters" on which Ekl relies are disputed and do little more than refute well-pleaded claims in Plaintiff's Complaint, they do not resolve the factual question necessary to determine whether Plaintiff's Complaint was timely-filed. *See, e.g., County of DuPage v. Graham, Anderson, Probst & White, Inc.,* 109 Ill. 2d 143, 153 (1985); *Doe v. BSA,* 2016 1st (App) 152406. ¶68; *Wisniewski v. Diocess of Belleville,* 406 Ill. App. 3d 1119, 1165 (5th Dist. 2011).

2. No Authority Supports Ekl's View that the Discovery Rule Should Only Apply in a Defamation Case When Plaintiff Can Demonstrate that the Defamer Hid the Defamatory Material from Plaintiff.

This Court has long recognized that mechanical application of a statute of limitations could bar a plaintiff from bringing suit before the plaintiff was even aware that he or she was injured. *Gollay v. General Motors Corp.,* 167 Ill. 2d 353, 360 (1995). The discovery rule serves to postpone the commencement of the relevant statute of limitations until the plaintiff knows or reasonably should know that he has been injured and that his injury was

wrongfully caused. *Id. See also*, *Henderson Square Condo. Ass'n v. LAB Townhomes, LLC,* 2015 IL 118139, ¶P57; *County of Du Page v. Graham, Anderson, Probst & White, Inc.,* 109 Ill. 2d 143, 153-54 (1985); *La Salle National Bank v. Skidmore, Owings & Merrill*, 262 Ill. App. 3d 899, 906 (1994); *Knox College v. Celotex Corp.,* 88 Ill. 2d 407, 415 (1981); *Nolan v. Johns-Manville Asbestos,* 85 Ill. 2d 161, 169 (1981); *Witherell v. Weimer,* 85 Ill. 2d 146, 156 (1981). Ordinarily this is a question of fact. *Id.*

In *Tom Olesker,* this Court sanctioned the application of the discovery rule in defamation cases when the defamatory material is not mass published. *Tom Olesker's Exciting World of Fashion, Inc. v. Dun & Bradstreet, Inc.,* 61 Ill. 2d 129, 136 (1975). Although Defendant Ekl suggests that the absence of the discovery rule language in the applicable statute of limitations statute has some significance, this Court has observed that the discovery rule is generally treated the same whether created by common law or by statute. *See Hermitage Corp. v. Contractors Adjustment Co.,* 166 Ill. 2d 72, 78 (1995).

Ekl argues that the discovery rule has no applicability to this case, because he did not hide MIP from Plaintiff when it screened on a single occasion in New York City on November 17, 2015. Ekl claims that the appellate court's decision in this case "is a drastic departure from what had been a well-settled general rule adopted by this Court" that in defamation cases the discovery rule applies in the very limited circumstance of when a

publication is "concealed, inherently unknowable or inherently undiscoverable." (Ekl's Br. at pg. 12)

Notably, Ekl fails to actually cite any decisions from this Court to back up his contention that it is "well-settled" that the discovery rule applies only when a publication is "concealed, inherently unknowable or inherently undiscoverable." In reality, the language on which Ekl's entire argument rests derives from a completely distinguishable case from a California appellate court, not this Court.

This "inherently undiscoverable" language made its way into Illinois appellate court jurisprudence in *Blair v. Nevada Landing P'ship,* 369 Ill. App. 3d 318 (2d Dist. 2006), a case where the appellate court determined whether a plaintiff's appropriation-of-likeness claim was timely-filed. There, the plaintiff participated in a photo shoot one month after he was hired by a casino restaurant in 1994. The plaintiff's photo later appeared on various restaurant flyers, brochures, signs and billboards, casino restaurant menus, calendars, and postcards that were sold in the casino gift shop. The image was displayed for nearly 10 years between 1995 and 2004 during which time the plaintiff was fully aware of its use. The plaintiff testified that he complained about use of the photo while still working at the restaurant in 1999 and again after he left the employ of the defendant in 2000. In September 2004, the plaintiff filed his complaint. *Id*. at 321.

The *Blair* court found that there was no republication of the photo that would trigger a new cause of action and retrigger the statute of limitations because the purpose of the photo was the same. *Id*. at 326. Plaintiff urged application of the discovery rule but the appellate court found it inapplicable. Citing *Long v. Walt Disney Co.,* 116. App. 4th 868, 872 (Cal. App. Div. 2004), the appellate court stated "the discovery rule is inapplicable in light of the single-publication rule unless the publication was hidden, inherently undiscoverable, or inherently unknowable." *Blair,* 369 Ill. App. 3d at 326.

Relying on this single wayward quote, Ekl insists that because MIP was not "hidden" from Plaintiff when it aired on two occasions in other states, the discovery rule is inapplicable. Consistent with ample authority from this Court, the question is not whether the film was actively concealed or hidden, the question is whether plaintiff could have known about the defamatory content of the film at any point prior to its mass-publication. This is a classic fact question. Indeed, even in *Blair* and *Peal,* the plaintiffs were afforded discovery on the statute of limitations question. In both of these cases, the appellate court had a fully-developed record on which to determine whether the discovery rule was applicable to the plaintiff's claims.

Defendant Ekl seeks to deprive Plaintiff of discovery on the statute of limitations question altogether, making the exaggerated claim that the appellate court's decision "eroded" the general limitation on application of the discovery rule. To be clear, the appellate court made no findings about

whether Plaintiff had timely filed his claims; the court merely observed that factual questions existed on the question of whether Plaintiff knew or should have known about the defamatory content prior to MIP's screening in Chicago which at this juncture required allowing the case to move forward. The appellate court's analysis was consistent with this Court's seminal decision in *Tom Olesker*.

In *Tom Olesker*, the plaintiff filed a complaint on March 3, 1970 against the defendant, Dun & Bradsheet, a national credit reporting agency. *Tom Olesker*, 61 Ill. 2d at 130. The complaint charged that the defendant on January 23, 1969, published a business information sheet or credit report, which falsely reported the financial state of the plaintiff's business, causing injury to its general and business reputation. *Id.*

The defendant moved to dismiss the complaint on a number of grounds, including on the ground that the cause of action was barred by the one-year statute of limitations. *Id* at 131. The circuit court granted the motion, finding that the publication of the false credit report to the reporting agencies subscribers on January 23, 1969 marked the start of statute of limitations. The appellate court affirmed, but this Court reversed finding that the cause of action did not accrue until plaintiff *knew* or should have known of the defamatory report. *Id.* at 136. The court wrote, "[t]o hold here that the plaintiff's cause of action accrued, if at all, at the time the credit report was received by defendant's subscribers would be to follow an abstract and

mechanical reasoning in deciding when the cause of action accrued. The purpose of the statute of limitations is certainly not to shield a wrongdoer; rather it is to discourage the presentation of stale claims and to encourage diligence in the bringing of actions. There is no claim of any want of diligence on the part of the plaintiff, nor is there anything to suggest any increased problems of proof so far as the defendant is concerned." *Id*. at 137.

Like the plaintiff in *Tom Olesker*, Plaintiff was only able to access the film and learn of its defamatory contents when it became available for viewing on Showtime on February 17, 2016 *or* at the very earliest when it screened in Chicago on July 15, 2015. Prior to airing on Showtime, MIP was distributed to a limited number of people (like *Tom Olesker's* credit report) and was not accessible to Plaintiff. Until the film premiered in Chicago where Plaintiff could have possibly been expected to know about the screening and had the physical ability to attend, he had no means by which to learn of the film's defamatory content. Furthermore, Plaintiff only suffered injuries once MIP was broadcast in Chicago and then on national streaming services. If MIP never aired anywhere apart from two independent film houses in New York City and Ohio, it is doubtful that Plaintiff would have suffered any significant injuries to his reputation. Thus, MIP's premiere in Chicago is the first opportunity Plaintiff could have discovered the defamatory statements and recognized an injury associated with them.

To hold that Plaintiff's claims accrued at the time the film premiered to a small audience in New York City unbeknownst to the Plaintiff would be to follow an abstract and mechanical reasoning in deciding when the cause accrued. Plaintiff did not sit on his rights or fail to show diligence in pursing his claims. He brought his claims two months after the film started airing to the general public on Showtime. Moreover, there are no issues as it relates to proofs as far as defendants are concerned. As in *Tom Olesker,* the appellate court was right to apply the discovery rule and hold that resolving all factual inferences in favor of Plaintiff at this juncture in the proceedings, Plaintiff's claims accrued when the film premiered in Chicago on July 15, 2015.

Ekl argues that this Court held in *Tom Olesker* that the discovery rule cannot apply in defamation cases if there is any theoretical scenario under which a plaintiff *could* have discovered the defamatory material. Not so. In *Tom Olesker,* the defamatory material was theoretically available to plaintiff in that it existed and had been published to third parties; it was just not readily accessible *to him*. Even if this Court were to adopt the "inherently undiscoverable" language of the California appellate court in *Long, supra,* the result is the same, because the defamatory nature of film *was* "inherently unknowable" to Plaintiff until he had the ability to actually see the film which occurred at the earliest in July 2015 when it premiered in Chicago. Ekl fails to acknowledge that the screening in New York City was isolated and even if Ciolino had caught wind that the documentary premiered in New

York City and contained potentially defamatory statements about him, he had no ability to see the film since it was only available to the film makers.

Ekl inexplicably points this Court to the Seventh Circuit's decision in *Schwehs v. Burdick,* 96 F. 3d 917 (7th Cir. 1996) which merely underscores the sound reasoning of *Tom Olesker* and supports application of the discovery rule in this case. There, the plaintiff, a Wisconsin state prisoner read a book, *Blue Thunder*, that was mass-published by Simon and Shuster in October 1990. The plaintiff alleged that the book defamed him, but he did not bring a defamation lawsuit against the author of the book until October 23, 1992 – outside the applicable one-year statute of limitations. *Id.* at 918. Plaintiff attempted unsuccessfully to invoke the Illinois discovery rule claiming that although the book was mass-published in October 1990, because he was a prisoner he was not effectively a "member of the public." *Id*. at 921. The Seventh Circuit observed that Illinois does not make such a distinction and therefore plaintiff's claims were untimely.

Unlike *Schweihs,* Plaintiff here does not attempt to avoid the mass-publication rule. Indeed, Plaintiff brought his defamation claims against Ekl only *two months* after MIP was mass-published. Rather, it is Ekl who claims that Plaintiff's claims accrued at a date *prior* to mass-publication. As such, the discovery rule as set forth in *Tom Olesker* is applicable here. Although *Tom Olesker* addressed credit reports specifically, it contemplated any scenario where the defamatory material may have been published in the

technical sense but is not accessible to the Plaintiff and the injuries associated with that private publication are not immediately known to the plaintiff.

Lastly, Ekl claims that application of the discovery rule here undermines the Single Publication Rule set forth at 740 ILCS 165/1. The Single Publication Rule is designed to prevent plaintiffs from bringing multiple lawsuits not to prevent them from bringing a lawsuit altogether. The traditional common law rule with respect to libel held that each communication of a defamatory statement created a separate cause of action. *Wahan v. Equitable Life Assurance Soc.,* 636 F. Supp. 1530, 1532 (C.D. Ill. 1986). This rule became outdated with the development of mass media because it created the possibility that a single defamatory statement contained in newspaper or magazine could give rise to countless causes of action. *Id.* To alleviate the problem of multiplicity of causes of actions, Illinois adopted the Uniform Single Publication Act. The central purpose of the legislation was to protect publishers from undue harassment by preventing a multitude of lawsuits based on one tortious act. *Id*. "Because multiple lawsuits arising out of a single sale of some publication would unnecessarily burden the courts and harass the defendants, the plaintiff is allowed, against a single defendant, only one suit on which to recover for all completed distributions of a single edition of a periodical or book." *Id*.

As the District Court in *Wahan* explains, the Single Publication Rule is not meant to deprive a plaintiff from bringing an action altogether. Its purpose was to prevent subjecting a single defendant to multiple lawsuits arising from a single tortious act and overburdening the courts. Whereas here, Plaintiff does not attempt to bring multiple lawsuits against Defendant Ekl for each time MIP was broadcast, but rather a single lawsuit, Ekl's argument that application of the discovery rule renders the Single Publication Rule meaningless is without merit.

In sum, because MIP was not mass-published until February 17, 2016 when it first aired on Showtime, genuine issues of material fact exist on the question of whether Plaintiff could have known about the defamatory contents of the film prior to that date. Ekl essentially asks this Court to overrule *Tom Olesker* and find that the discovery rule does not apply unless the publisher has purposefully concealed the defamatory statements. This approach finds no support in the authority of this Court and would create a scenario where a plaintiff might be expected to bring a claim before he even knew or should have known he was injured. This approach would not be confined to defamation cases but would limit application of the discovery rule in any number of contexts, calling into question decades of jurisprudence from this Court. Accordingly, this Court should affirm the holding of the appellate court and remand the cause to the circuit court for discovery on Ciolino's defamation and false light claims against Ekl.

B. Plaintiff's IIED Was Timely Filed.

Intentional infliction of emotional distress is a personal injury tort, and the applicable statute of limitations is two years. 735 ILCS 3/13-202. Even accepting Ekl's proposed accrual date, Plaintiff's IIED claim was timely filed. Furthermore, because Plaintiff's IIED claim is not entirely derivative of Plaintiff's defamation and false light claims, the two-year statute of limitations applies. Indeed, Defendant concedes that Plaintiff's IIED claim stems in part from Ekl's conduct inducing Simon to falsely accuse Plaintiff of misconduct and feeding a false narrative to Ekl premised on Plaintiff's alleged misconduct. Thus, the two-year statute of limitations is applicable. But even if Plaintiff's IIED is derivative of his defamation and false light claims, the IIED claim is timely-filed because his defamation and false light claims were timely-filed.

II. Where Ekl Never Filed a Notice of Appeal As to the Circuit Court's Judgment Denying His Motion to Dismiss Pursuant to 735 ILCS 5/2-615, this Court Lacks Jurisdiction to Review this Claim. Jurisdictional Problems Aside, Plaintiff's Claims Are Actionable.

A. Neither the Appellate Court Nor this Court Has Jurisdiction to Review the Circuit Court's Judgment Denying Ekl's 2-615 Motion where Ekl Never Cross-Appealed as to that Judgment.

A litigant perfects an action on review by filing a timely notice of appeal in the circuit court. Ill. Sup. Ct. R. 301, 303, 606. The notice of appeal

must specify both "the judgment appealed from and the relief sought from the reviewing court." Ill. Sup. Ct. R. 303(b)(2). *See also, In re Marriage of Micheli,* 2014 IL App (2d) 121245 (2d Dist. 2014). "The filing of a notice of appeal is the jurisdictional step that initiates appellate review. Unless there is a properly filed notice of appeal, the appellate court lacks jurisdiction over the matter and is obliged to dismiss the appeal." *Id*. "The notice of appeal confers jurisdiction on a court of review to consider *only* the judgments or parts of judgments specified in the notice of appeal" *Id.* (emphasis added). *See also, GMC v. Pappas,* 242 Ill. 2d 163, 176 (2011).

There is no way for an appellee to appeal from an order of the trial court other than by cross-appeal. *Greco v. Coleman,* 176 Ill. App. 3d 394, 400 (5th Dist. 1988). The filing of a notice of cross-appeal within the period set forth in Supreme Court Rule 303(a)(3) is mandatory and jurisdictional. *Id*. at 401.

Here, Defendant Ekl did not cross-appeal or file any notice of appeal as it related to the Circuit Court's judgment denying his 2-615 motion. Plaintiff's notice of appeal identified *only* the circuit court's judgment allowing the defendants' 2-619 motion, mentioning nothing of the court's judgment as to Ekl's 2-615 motion. Defendant Ekl, who was the appellee in the appellate court, never properly invoked the jurisdiction of the appellate court by filing a notice of cross-appeal, challenging the circuit court's judgment denying his 2-615 motion. Because the appellate lacked jurisdiction

to consider Ekl's cross-appeal, this Court also lacks jurisdiction to consider Ekl's claim that the trial court improperly denied his 2-615 motion.

B. Construed in the Light Most Favorable to Plaintiff, Plaintiff's Defamation, False Light, and IIED Claims Against Defendant Ekl Are Actionable.

Defendant Ekl raised a number of challenges to Plaintiff's complaint pursuant to 2-615. The circuit court dismissed Ekl's 2-615 motion finding that Plaintiff had sufficiently alleged defamation, false light, and IIED claims against Ekl.[5] (Deft. A.4) A section 2-615 motion attacks the legal sufficiency of a complaint. *Bryson v. News Am. Publs.,* 174 Ill. 2d 77, 86 (1996). Such a motion does not raise affirmative factual defenses but alleges only defects on the face of the complaint. *Id.* In ruling on a section 2-615 motion to dismiss, the court must accept as true all well-pleaded facts in the complaint and all reasonable inferences which can be drawn from them. *Id.* In making this determination, the court is to interpret the allegations of the complaint in the light most favorable to the plaintiff. *Id.* The question presented by a motion to dismiss a complaint for failure to state a cause of action is whether sufficient facts are contained in the pleadings which if established, could entitle the plaintiff to relief. *Id.* A cause of action should not be dismissed on the pleadings unless it clearly appears that no set of facts can be proved under the pleadings which will entitle the plaintiff to recover. *Id.*

[5] For unexplained reasons, the trial court never ruled on Ekl's motion to dismiss Plaintiff's Conspiracy claim.

1. A Reasonable Juror Could Find that Ekl's Statements that Plaintiff Framed an Innocent Man by Coercing and Paying Off Witnesses and Arranging for his Attorney To Have Him Plead Guilty Are Offensive to a Reasonable Person.

Defendant Ekl contends that the statements attributed to him from MIP are not actionable under a false-light theory, because they are not "highly offensive to a reasonable person." Ekl argues that because Plaintiff is a "long-time investigator" and frequent public commentator on criminal investigations, Ekl's statements accusing Plaintiff of committing illegal and unethical conduct for the purpose of framing an innocent man so a guilty one could go free is not, as a matter of law, "highly offensive."

At the outset, this question is a purely factual one and not the proper subject of a motion to dismiss. The fact that Plaintiff was a well-respected investigator whose expertise was sought by a variety of highly-regarded associations and institutions of higher learning makes Ekl's statement more highly offensive.

This Court has cautioned that "minor mistakes in reporting, even if made deliberately, or false facts that offend a hypersensitive individual will not satisfy the "highly offense" element. *Lovgren v. Citizens First National Bank,* 126 Ill. 2d 411,420 (1989). But Ekl's statements were hardly "minor mistakes" offensive only to a hyper-sensitive individual. Ekl's statements were made in the context of a film that advanced the tale that Plaintiff committed a home invasion and forced Simon to confess at gunpoint to a

double murder he did not commit, all so Plaintiff could put a guilty and dangerous man back on the streets. In this context, Ekl claimed that Plaintiff paid and coerced witnesses, mostly poor people, so they would recant their prior testimony; and that Plaintiff engineered the legal representation of Simon by Jack Rimland and arranged for Rimland to force Simon to plead guilty. If these statements were, in fact, true – Plaintiff would be guilty of a number of felony offenses. Viewing the evidence in the light most favorable to Plaintiff, Plaintiff has surely alleged sufficient facts from which a jury could conclude that defendant Ekl's conduct was highly offensive. Accordingly, defendants' 2-615 motion was properly denied.

2. Whether Plaintiff Is a "Public Figure" Such That His Claims Are Not Actionable Is A Disputed Material Fact.

Relying on incomplete statements from Plaintiff's website, Defendant Ekl makes the claim that because Plaintiff touts himself as a "nationally recognized" speaker, he qualifies as a "limited purpose" public figure. Ekl then reasons that Plaintiff's false light claim is not actionable since a public figure has no right to privacy in connection with his investigative work.

First, contrary to Ekl's argument, it is not necessary to distinguish between private and public figures in false light claims. *Lovgren v. Citizens First Nat'l Bank*, 126 Ill. 2d 411, 422 (1989). Second, the question of whether Plaintiff qualifies as a "limited purpose" public figure is a hotly contested one. At this juncture this Court must accept as true all well-pleaded facts in

Plaintiff's complaint. Nothing in Plaintiff's Complaint suggests that he would qualify as a "public figure." Moreover, other than quoting from portions of Plaintiff's website, Ekl has attached no affidavits or support to his motion to demonstrate that Plaintiff is unequivocally a "public figure." Lastly, even if this Court were to assume that Plaintiff is a "public figure," Plaintiff's complaint *does* allege actual malice on the part of defendant Ekl, that is, Plaintiff's complaint sufficiently alleges that Ekl uttered the defamatory statements with knowledge of or reckless disregard of whether they were false.

Plaintiff's complaint lays out in excruciating detail how defendant Ekl, along with others, conceived of a plan to defame David Protess and then dispatched his investigators defendant Delorto and Mazzola to induce Simon to falsely accuse Plaintiff of coercing his video-taped confession. Plaintiff alleges:

> Defendants DELORTO, EKL, and SOTOS acted with malice when they supplied SIMON a false narrative describing Ciolino's conduct in obtaining his confession. As set out more fully, *supra*, the Defendants *knew* the narrative was false, because SIMON had made multiple confessions to the murder which were corroborated by statements from his family and other circumstances; and until Defendant DELORTO and Mazzola visited with SIMON and fed a false narrative to him did SIMON claim to be innocent or claim that his confession and guilty plea were coerced. (Deft. A.57, ¶183.)

In sum, the trial court correctly concluded that the question of whether Plaintiff qualifies as a "public figure" is a question for the jury. Even if Plaintiff was a "public figure," his claims should survive summary dismissal

since: (1) with respect to false light cases it is unnecessary to distinguish between public and private figures; and (2) Plaintiff actually pled "actual malice" when he alleged that Ekl helped supply Simon with a false narrative describing Plaintiff's conduct in obtaining his confession while knowing full well that the narrative was false.

3. Defendant Ekl's Statements Are Not Expressions of Opinion But Rather Factual Statements Pertaining to Plaintiff's Character and Professional Conduct.

Defendant Ekl argues that the following statement are not actionable under a defamation or false light theory because they are statements of opinion:

- They stay on people to try to finally get something out of them that fits their theory of who they think did the case.
- So that seems to me to be part of their M.O. They'd go to impoverished people who don't have a lot of money, make them promises and get them to recant. (Deft. Br. at 31-32)

Specifically, defendant Ekl contends that these statements are pure opinion statements entitled to First Amendment protection. As set out below, defendant Ekl's defamatory statements do not amount to pure opinions, but rather, refer to and/or are based on verifiable facts. Accordingly, they are not protected by the First Amendment as expressions of opinion.

Statements of fact usually concern the defamation of plaintiff's character or conduct. *Barakat v. Matz,* 271 Ill. App. 3d 662 (1st Dist. 1995). The First Amendment prohibits defamation actions based on loose, figurative

language that no reasonable person would believe presented facts. *Coghlan v. Beck*, 2013 IL App (1st) 120891, ¶40. The United States Supreme Court has rejected what it called "the creation of an artificial dichotomy between 'opinion' and fact. *Bryson v. News Am. Publs.,* 174 Ill. 2d 77, 99 (1996) *citing Milkovich v. Lorain Journal Co.,* 497 U.S. 1, 19. The *Milkovich* court held that there is no *separate* first amendment privilege for statements of opinion and that a false assertion of fact can be libelous even though couched in terms of opinion. *Id*. at 99-100. *Milkovich,* 497 U.S. at 18 (simply couching the statement "Jones is a liar" in terms of opinion - "In my opinion Jones is a liar" does not dispel the factual implications contained in the statement.) Thus, the test to determine whether a defamatory statement is constitutionally protected is a restrictive one. Under *Milkovich*, a statement is constitutionally protected under the First Amendment only if it cannot be "reasonably interpreted as to state actual facts." Statements of fact usually concern the defamation of plaintiff's character or conduct. *Barakat,* 271 Ill. App. 3d at 671. On the other hand, rhetorical hyperbole cannot reasonably be construed as stating and fact and thus is not actionable as defamation. *Id*.

A pure opinion is one in which the maker states the facts upon which the opinion is based. Mixed opinions are those which, while opinion in form or content, are apparently based on facts which have not been stated or are assumed to exists. *Imperial Apparel, Ltd. v. Cosmo's Designer Direct, Inc.,* 367 Ill. App. 3d 48, 52 (1st Dist. 2006). Relying on *Olliman v. Evans,* 750 F.

2d 970, (D.C. Cir. 1984), the *Imperial Apparel* court articulated four issues which a court should consider in determining whether a particular statement is one of fact or opinion, namely: (1) whether the statement has a precise core of meaning; (2) whether the statement is objectively verifiable; (3) whether the literary context in which the statement appears implies that it has factual content; and (4) whether the broader social context in which the statement appears implies fact or opinion. *Imperial Apparel,* 367 Ill. App. 3d at 53 c*iting Olliman*, 750 F.2d at 979. Although this test considers the content in which the statement appears, its emphasis is on whether the statement contains objectively verifiable assertions. *Id*. *See also Coghlan*, 2013 IL App (1st) at ¶40.

Both of the statements identified above relate to Plaintiff's conduct and are not vague or general characterizations about Plaintiff. Because these statements *can* be "reasonably interpreted as to state actual facts" they are not protected by the First Amendment. Put another way, a reasonable fact finder *could* conclude that the statements are an assertion of facts. To be specific, Defendant Ekl's allegation that Plaintiff's M.O. was to "go to impoverished people who don't have a lot of money, make them promises and basically get them to recant" does not involve loose or figurative language but has a precise core meaning, namely that Plaintiff promises to pay poor people money to induce recantations. You don't get more factual than that.

Moreover, these statements are susceptible to being proven true or false. Presumably there are witnesses out there who would be able to verify that Plaintiff promises to pay witnesses money to induce recantations. Finally, the context in which these statements appear implies factual content. In MIP, the defendants expressly accuse Plaintiff of inducing false statements from Inez Jackson and Alstory Simon through promises of money. Defendant is hard-pressed to credibly argue that his statements are mere expressions of opinion when they clearly reference specific conduct on the part of Plaintiff.

Similarly, Defendant Ekl's statement that "they stay on people" "until they get them to say something that fits their theory" is likewise a statement that clearly implies a factual basis. Defendant Ekl does not merely express his opinion that Plaintiff's investigative tactics are questionable, he claims that Plaintiff "stays on them" and "gets them" to say "something" that fits their theory. Again, this is not a vague or loose statement but asserts that Plaintiff pressures or harasses witnesses to make statements to fit their theory irrespective of whether those statements are true or not. The implication in the context of the film is that Plaintiff "gets them" to say things that aren't true to fit Plaintiff's narrative. Indeed, shortly before Defendant Ekl uttered this defamatory statement in the film, Defendant Hale states that "it [Plaintiff's investigation] wasn't about finding truth, it was about freeing Anthony Porter."

This statement is also susceptible to being verified. Again, witnesses presumably would be able to testify on the question of whether Plaintiff pressures, harasses, coerces or otherwise "stays on" witnesses until they change their testimony.

In *Barakat v. Matz,* 271 Ill. App. 3d 662, a highly instructive case, the plaintiff, a doctor, sued defendant, another doctor, for defamation based on statements in two reports prepared by defendant that were shared with two insurance companies. The reports contained statements by the defendant that defendant "had [treated] patients from [plaintiff] before;" that defendant "found nothing wrong with his patients;" that plaintiff's "practice was a joke;" that plaintiff was not "any good as a doctor;" and that plaintiff's "opinion was not any good." *Id.* at 672. The appellate court rejected defendant's contention that the defamatory statements were expressions of opinion.

The court found that the challenged statements constituted statements or, at the very least, mixed expressions of fact and opinion which are actionable. Defendant's comments clearly and directly concern plaintiff's professional conduct and character and as such can be viewed as statements of fact. Moreover, the statements obviously imply an underlying factual basis which could be verified, *i.e.,* previous patients from plaintiff who were examined by defendant. *Id.*

Similarly, Ekl's statements clearly and directly concern Plaintiff's professional conduct and character and as such can be viewed as statements

of fact. Furthermore, the statements obviously imply an underlying factual basis which could be verified, *i.e.,* witnesses who were interviewed by Plaintiff. Accordingly, the challenged statements are actionable and Defendant Ekl's motion to dismiss on these grounds was appropriately rejected.

4. Ekl's Statement that "They Stay On People" "To Get Something Out Of Them That Fits Their Theory" When Taken in Context Clearly Refers to Plaintiff and David Protess, But In Any Event, Whether An Alleged Defamatory Statement Refers to the Plaintiff Is a Question for the Jury and Not a Proper Basis for Dismissal.

Defendant also argues that his statement "[t]hey stay on people to try to finally get something out of them that fits their theory of who they think did the case" is not actionable as either a defamation or false light claim because the statement makes no direct reference to Plaintiff.

Preliminarily whether the statements in question refer to the Plaintiff is a question for the jury and not a proper basis for dismissal. *Tuite v. Corbitt,* 224 Ill. 2d 490, 501 (2006). Notwithstanding, there is no question that the "they" in defendant Ekl's statement is meant to reference both Plaintiff and David Protess - the only two villains in the documentary. *Missner v. Clifford*, 393 Ill. App. 3d 751 (1st Dist, 2009), is directly on point. In *Missner,* the plaintiff [Missner] brought an action for defamation against defendant Clifford, an attorney, after Clifford issued a press statement asserting that "one or more" of the defendants named in a civil legal complaint engaged in

forgery and extortion. *Missner,* 393 Ill. App. 3d at 767. The civil complaint in question named a total of six defendants, and Missner was one of them. In moving to dismiss the defamation suit, Clifford argued that Missner could not demonstrate that the statements in the press statement referred to him rather than one of the other defendants named in the civil complaint. The appellate court disagreed holding, "[A]lthough the press statement accuses three individuals of forgery and extortion, we conclude that all of them were adequately identified such that any one of them may claim to have been defamed by the press statement." *Id.* at 768. The court wrote:

> We again rely on the Restatement (Second) torts in support of this conclusion. Section 564A of the Restatement provides that a publisher of defamatory material may be liable to an individual member of a group defamed "if, but only if, the circumstances of publication reasonably give rise to the conclusion that there is particular reference" to a member of that group. Restatement (Second) of Torts §564A(b), at 167-68. Specifically, when the defamed group is sufficiently and the words may reasonably be understood to have personal reference and application to any member of the group, that group member is defamed as an individual. Restatement (Second) of Torts §564A, Comment b at 168 (1977). For example, where a newspaper accused the officers of a corporation with embezzlement and there are only four officers, any of the of officer may have been defamed. Restatement (Second) of Torts §564A, Illustration 3, at 169 (1977). *Id.*

Here the defamatory statement cannot reasonably be interpreted as referring to anyone other than Plaintiff and Protess. Accordingly, Defendant Ekl's argument is meritless. Significantly, even if Ekl raised a viable defense on this claim, dismissal would be inappropriate because whether a statement

refers to the plaintiff in question is a question for the jury. *Tuite v. Corbitt,* 224 Ill. 2d 490, 501 (2006).

5. Reasonable Jurors Could Find that Defendant Ekl's Statements that Plaintiff Engaged In Illegal and Unscrupulous Conduct for the Purpose of Framing Simon Is Both Extreme and Outrageous.

The entire premise of MIP is that Plaintiff and David Protess framed Simon to secure the release of death-row inmate Anthony Porter – all to put an end to the death penalty in Illinois. Ekl's statements do not merely suggest that Plaintiff was a "dogged" investigator who pursued his objective vigorously, but rather, his statements accused Plaintiff of engaging in professional conduct that was, at a minimum, unethical and sanctionable (*e.g.,* paying witnesses money, arranging for Simon to be represented by his "personal attorney" "to get him" to plead guilty). These statements were not mere insults, annoyances, or petty oppressions, they were claims of arguably unlawful conduct designed to release a convicted murderer and frame an innocent man by arranging his own lawyer to persuade Simon to plead guilty.

Plaintiff's Complaint further accused Ekl of inducing Simon with money and promises of freedom (Ekl successfully achieved both) to falsely accuse Plaintiff of additional criminal acts. Defendant's scheme was designed to ruin the careers and reputations of Plaintiff and his colleague, David Protess and undermine the work of wrongful conviction crusaders in Illinois. Perhaps most astounding is that according to Plaintiff's Complaint, Ekl knew that Simon was guilty (based on his repeated admissions of guilt long after

his guilty plea, including to an attorney other than Jack Rimland) and nonetheless arranged for his release on "actual innocence" grounds with the assistance of Alvarez who released Simon for the sole purpose of dismantling Protess' career – notwithstanding the recommendation of her own Conviction Integrity Unit which concluded that Simon was, in fact, likely guilty and should not be released. Accepting Plaintiff's allegations as true, as this Court must, there is no question that a jury could find defendant's conduct to be extreme outrageous. Plaintiff sufficiently pled his IIED claim, and the circuit court's denial of his motion to dismiss was proper.

CONCLUSION

For the foregoing reasons, this Court must affirm the judgment of the appellate court.

Respectfully Submitted,

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SUPREME COURT RULE 341(c) CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rule 341(a) and (b). The length of this brief, excluding the pages contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service contains 40 pages.

/s/ JENNIFER A. BONJEAN
Jennifer A. Bonjean

No. 126024

In the Supreme Court of Illinois

PAUL J. CIOLINO, Plaintiff-Appellee, vs. TERRY A. EKL, Defendant-Appellant, ALSTORY SIMON, JAMES DELORTO, JAMES G. SOTOS, MARTIN PREIB, WILLIAM B, CRAWFORD, ANITA ALVAREZ, ANDREW M. HALE, and WHOLE TRUTH FILMS, LLC. Defendants.	)	On Review of the Opinion of the Illinois Appellate Court, First Judicial District, Case No. 1-19-0181 There on Appeal from the Circuit Court of Cook County, Illinois, County Department, Law Division, No. 2018 L 00044 The Honorable Christopher E. Lawler, Judge Presiding

NOTICE OF FILING AND PROOF OF SERVICE

The undersigned, being first duly sworn, deposes and states that on December 9, 2020, there was electronically filed and served upon the Clerk of the above court the Brief of Appellee Paul J. Ciolino's. Service of the Brief will be accomplished by email as well as electronically through the filing manager, Odyssey EfileIL, to the following counsel of record:

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Within five days of acceptance by the Court, the undersigned states that 13 paper copies of the Brief bearing the court's file-stamp will be sent to the above court.

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

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