2023 IL App (1st) 221658

SECOND DIVISION
September 29, 2023

No. 1-22-1658

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

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ZESHAN HYDER and SPINE HYDER, P.C. d/b/a NWI SPINE,	)	Appeal from the Circuit Court of Cook County.
Petitioners/Appellants,	)	
v.	)	No. 22 L 06386
KENNETH J. HAM, JAMES HONG, and SCOTT A. ANDREWS,	)	Honorable Mary Colleen Roberts,
Respondents/Appellees.	)	Judge Presiding.

PRESIDING JUSTICE HOWSE delivered the judgment of the court.
Justices McBride and Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: The judgment of the circuit court of Cook County is reversed; the trial court erroneously granted with prejudice a motion to dismiss a petition for discovery pursuant to Illinois Supreme Court Rule 224; the petition sought information to identify unknown defendants and did not seek evidence of culpability of known defendants, and it was not apparent the petition could not be amended to state causes of action against unknown defendants sufficiently to survive a 2-615 motion to dismiss.

¶ 2 Petitioners, Dr. Zeshan Hyder and Spine Hyder P.C., d/b/a NWI Spine (hereinafter, “petitioners” or Hyder), filed a petition for discovery pursuant to Illinois Supreme Court Rule

224 (eff. Jan. 1, 2018) naming as respondents Dr. Kenneth J. Ham, Dr. James Hong, and Dr. Scott A. Andrews. From September 2011 until October 2019 Hyder and respondents practiced medicine together in Bone & Joint Specialists, P.C. (Bone & Joint) in Indiana. Hyder separated from Bone & Joint in October 2019 and began NWI Spine. Respondents filed a motion to dismiss the petition pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2020)). Following a hearing, the trial court granted respondents' motion to dismiss with prejudice. Petitioners participated in the hearing but never filed a written response to the motion to dismiss.

¶ 3 For the following reasons, we reverse and remand.

¶ 4 BACKGROUND

¶ 5 The following is taken from the petition at issue. On July 15, 2022, petitioners filed a petition pursuant to Illinois Supreme Court Rule 224 (eff. Jan. 1, 2018) to engage in discovery "to discover the identity of parties potentially liable to one or both Petitioners for possible claims of unfair competition, false light invasion of privacy, and related torts, and possibly other claims." The petition named Drs. Ham, Hong, and Andrews as respondents. Hyder and respondents formerly practiced medicine together in Bone & Joint. During the first eight years of Hyder's medical career, while at Bone & Joint, Hyder had seven medical malpractice claims brought against him. Those malpractice claims also named Bone & Joint as a party. None of those claims resulted in liability.

¶ 6 On August 28, 2019, NWI Spine was incorporated. In October 2019, Hyder left Bone & Joint and joined NWI Spine. In less than three years since leaving Bone & Joint, Hyder and NWI Spine were the subject of 21 medical malpractice claims. None of those claims have resulted in liability. Some of the post-separation (from Bone & Joint) claims arose from acts occurring

before Hyder separated from Bone & Joint but did not name Bone & Joint as a party, whereas the seven pre-separation claims had named Hyder and Bone & Joint. The petition specifically alleges as follows:

> "10. Petitioners, upon information and belief, suspect that representatives of Bone & Joint, including the Respondents, may have knowledge regarding the recent explosion of claims against Petitioners based on the nature of some of the information alleged in some of the claims and the other circumstances alleged herein.
>
> 11. Petitioners believe that the recent explosion of claims against them is the result of a calculated attack designed to put Petitioners out of business. Petitioners also believe that this unwarranted attack will continue unless and until they can ascertain the identity of the person or entities involved in this attack. Petitioners, however, cannot ascertain the identity of those persons or entities behind this attack based on publicly-available information.
>
> 12. Likewise, Petitioners have been unable to ascertain such information through any discovery process in the pending actions."

¶ 7 The petition alleged that petitioners had claims against potentially liable unknown parties for unfair competition, false light, tortious interference with business relationships, and possible claims arising out of the unauthorized disclosure of information. The petition described generally the conduct that has occurred that petitioners believe may give rise to the various claims stated in the petition. The petition does not allege specific facts as to conduct by any individual known or unknown defendant or defendants. For example, concerning unfair competition claims, the petition alleges, in part, that: "As to unfair competition claims under the Lanham Act (15 U.S.C.

§ 1125(a)(1)) potentially responsible parties have falsely or misleadingly described and represented facts about the circumstances of Dr. Hyder's departure from Bone & Joint, in connection with goods or services, quite possibly through interstate commerce, and in commercial advertising and/or promotion." The petition does not allege what the false or misleading descriptions were, or what the unknown defendants allegedly represented the facts about the circumstances of Dr. Hyder's separation from Bone & Joint to be.

¶ 8 Finally, the petition states that to pursue their potential claims, petitioners "require the discovery sought herein from the Respondents. Specifically, Petitioners seek entry of an Order issued by this Court allowing Petitioners to issue interrogatories, requests for production, and notices of depositions to the Respondents as to any and all information that they have regarding the recent litigation filed against Petitioners."

¶ 9 On September 20, 2022, respondents filed a motion to dismiss the petition pursuant to section 2-615 of the Code. The motion alleged, in pertinent part, that in response to the petition counsel for respondents contacted petitioners' counsel "to determine the scope of discovery Petitioners desired to conduct" and that petitioners provided respondents with "drafts of proposed Interrogatories and Documents Requests." Respondents purported to have attached petitioners' proposed discovery to their motion to dismiss as a group exhibit. (The record in this case includes respondents' motion to dismiss and printouts of *some*[1] of the email correspondence between the parties' attorneys discussing the proposed discovery but, apparently by agreement of

[1] Petitioners filed a motion in this court to supplement the record with additional email correspondence concerning the proposed discovery. This court denied petitioners' motion.

the parties[2], does not include the discovery petitioners actually proposed to submit to respondents.)

¶ 10 The motion to dismiss alleged that the parties agreed that respondents would be allowed to advise petitioners of any potential issues respondents had with the proposed discovery, which respondents did on September 15, 2022. According to the motion, respondents informed petitioners they believed:

> "that the Petition *** violates the express purpose of *** Rule 224, that the Petition fails to state with particularity any facts giving rise to a cause of action for unfair competition, false light, tortious interference, or unauthorized disclosure of information, and that the proposed written discovery itself improperly attempts to seek information beyond the identification 'of one who may be responsible in damages.' "

¶ 11 Regarding the purpose of Rule 224 and the identification of those who may be responsible in damages to petitioners, respondents' motion to dismiss argued that the petition should be dismissed because petitioners already know the identity of respondents. Respondents asserted that "*if* the Petitioners suspect the Respondents are responsible for damages to the Petitioners *as stated*, this Petition is inappropriate under Rule 224 on its face." (Emphases added.) Respondents, citing *Low Cost Movers, Inc. v. Craigslist, Inc.*, 2015 IL App (1st) 143955, also argued that the petition may be dismissed where a petitioner identifies one potential defendant. Respondents argued that petitioners "do not need to know all possible defendants and only need to know of one, and it is clear that they do so here."

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[2] At the hearing on the motion to dismiss, respondents alluded to an agreement between the parties that the proposed discovery was provided for discussion and settlement purposes only and should not be used in any court proceedings. The proposed supplement to the record included correspondence concerning that alleged agreement.

¶ 12 Respondents claimed that the language in the petition "*seems to suggest* that the Petitioners are seeking to build a case against the Respondents individually and against representatives of *** Bone & Joint ***, which is impermissible through *** Rule 224 as [their] identities *** are already known to the Petitioners." Respondents argued that petitioners are improperly seeking "Respondents' knowledge and what information they possess, rather than seeking to identify individuals against whom they may have a cause of action" (emphasis omitted), and that the draft discovery propounded by petitioners bears out this intention. Respondents' motion cites an example from the alleged proposed discovery in which petitioners seek a description of communications on various topics rather than the identity of any individuals, respondents' knowledge of any complaints against petitioners and why Bone & Joint was not named, and whether respondents treated patients with post-separation claims against petitioners. Respondents argued that petitioners' inquiries "are better suited for a discovery process in a filed lawsuit *** or should be directed to [Bone & Joint] rather than to these Respondents."

¶ 13 Finally, respondents argued the petition should be dismissed with prejudice because petitioners "failed to state any facts with particularity to set forth a cause of action." Respondents argued that because petitioners failed to set forth facts supporting any cause of action against any potential defendant, petitioners failed to satisfy Rule 224's requirement that the petitioner establish why the discovery sought is necessary and, therefore, the petition should be dismissed pursuant to section 2-615.

¶ 14 Following a continuance to permit the trial court to further review the motion to dismiss, on October 20, 2022, the trial court held a hearing on respondents' motion to dismiss. The trial judge opened the hearing by stating that "after looking at it, I am going to grant the respondent's

motion." The court found the petition "seeks to get substantive discovery, not identification of defendants." Petitioners' attorney stated that at the last court hearing petitioners had asked "whether or not there would be any opportunity for petitioners to amend the petition to possibly cure some of the present defects formulating the foundation of the motion." The trial court responded by asking petitioners' attorney to state what the amendments are. The court stated: "It seems as if the petition did what it was supposed to do and that was to identify a cause of action against a potential defendant. What else are you trying to do because really that is all that it is?" Petitioners' attorney responded: "The purpose of the petition is to discover the identity of an individual or perhaps group of individuals that we believe have been facilitating, aiding and abetting in the explosion of claims against our clients."

¶ 15 Petitioners' attorney stated that petitioners had not been able to get any information from respondents about whether petitioners' position is supported and that petitioners were "trying to uncover the identities" but there was no lawsuit to serve discovery against these respondents. Counsel concluded: "So the basis of our motion for leave to amend *** would be for us to *** bolster our petition *** adding additional facts as to why we think discovery should be allowed to proceed against these particular respondents ***."

¶ 16 In response, respondents' counsel argued that counsel did not believe that amending the petition would cure the issue that "if you suspect that the respondents are parties to conversations which seem to be somewhat the underpinning of this petition, then you already know who they are. And Rule 224 is solely to identify potential responsible parties, not to establish liability." Respondents' counsel added that she asked whether petitioners would stipulate petitioners were not going to sue respondents (they would not so stipulate) and that the petition is impermissible in that situation (that they would sue respondents) because petitioners already know who

respondents are. Later, respondents' counsel argued: "So if [petitioners are] even thinking that they might have a cause of action against [respondents,] then the Rule 224 petition is not permissible because they know who they are."

¶ 17 Petitioners' attorney stated that if petitioners had information that respondents were potentially liable, petitioners would have filed a lawsuit against them, but petitioners "don't really know exactly what has transpired." Counsel stated: "So the purpose of the petition is to find out *** who the parties are in this case ***."

¶ 18 Respondents' attorney then stated she "would have attached the discovery that was served or proposed to be served, but we did agree that we wouldn't attach it to the pleading." Counsel then proceeded to explain that "the discovery my office received is clearly directed at Bone & Joint *** and seems to be fishing for information from the respondents about what they know specifically about things that have nothing to do with identifying people." Respondents' counsel opined the proposed discovery "seems to be asking about patients of the practice and about other people's claims and whether they have claims against the petitioner [*sic*]." Respondents argued that petitioners can ask those persons who have filed claims against them whether they are patients of Bone & Joint and "where they got their information from" without filing a Rule 224 petition against respondents. Respondents' counsel concluded: "The petition is not to allow them to determine whether a party is responsible or whether the party is liable to the petitioner. It's solely to identify potential parties."

¶ 19 The trial court granted the motion to dismiss with prejudice. On October 20, 2022, the trial court entered a written order granting respondents' motion to dismiss with prejudice "as set forth in the transcript of the proceedings on October 20, 2022, incorporated herein by reference."

The order also denied petitioners' "previous request to file a written response" to Respondents' motion to dismiss and petitioners' oral motion for leave file an amended petition.

¶ 20 This appeal followed.

¶ 21 ANALYSIS

¶ 22 This is an appeal from a judgment granting a motion to dismiss a petition pursuant to Illinois Supreme Court Rule 224 as legally insufficient on its face. *Prate Roofing & Installations, LLC v. Liberty Mutual Insurance Corp.*, 2022 IL App (1st) 191842-B, ¶ 45 ("A section 2-615 motion allows for the dismissal of the complaint (or portion thereof) where the pleading is legally insufficient based on defects apparent on its face."). A section 2-615 motion is the proper mechanism to test the facial legal sufficiency of a Rule 224 petition. *Stone v. Paddock Publications, Inc.*, 2011 IL App (1st) 093386, ¶ 17 (citing *Maxon v. Ottawa Publishing Co.*, 402 Ill. App. 3d 704, 711-12 (2010)). "A section 2-615 motion to dismiss [a Rule 224 petition] tests the legal sufficiency of [the petition]. *** All facts apparent from the face of the [petition], including any attached exhibits, must be considered." *Hadley v. Doe*, 2015 IL 118000, ¶ 29.

¶ 23 "Section 2-615 does not permit the dismissal of a claim unless no set of facts can possibly be proved that would entitle the plaintiff to relief." *Stone*, 2011 IL App (1st) 093386, ¶ 18. "A dismissal under section 2-615 of the Code should be made with prejudice only where it is clearly apparent that the plaintiffs can prove no set of facts entitling recovery. *** If a plaintiff can state a cause of action by amending his complaint, dismissal with prejudice should not be granted. [Citation.]" *Levine v. UL LLC*, 2023 IL App (1st) 221845, ¶ 41.

¶ 24 "A court considering whether to grant or deny a motion to dismiss pursuant to section 2-615 must determine whether the complaint *alone* has stated sufficient facts to establish a cause of action upon which relief may be granted. [Citations.]" (Emphasis added.) *Maxon*, 402 Ill. App.

3d at 712 (citing *Bryson v. News America Publications, Inc.*, 174 Ill. 2d 77, 91 (1996)). "In ruling upon a 2-615 motion, a trial court may consider *only the allegations of the complaint* [citation] and may not consider other supporting material [citation.]" *Bryson*, 174 Ill. 2d at 91.

> "When ruling on a section 2-615 motion to dismiss, a court may not consider affidavits, the results of discovery, or other documentary evidence that was not included with the pleadings as exhibits or other supporting evidence. [Citation.] The court may not consider evidence outside the pleading when ruling on the motion. [Citation.] In contrast, a section 2-619 motion asserts defects or defenses outside the pleadings that defeat the claims. [Citation.]" *In re Marriage of Lewin*, 2018 IL App (3d) 170175, ¶ 12.

¶ 25 "The mislabeling of a motion to dismiss is not always fatal and the court will consider the motion where no prejudice resulted from the improper designation. [Citation.] However, where the mislabeling prejudices the nonmoving party, the court's grant of the dismissal must be reversed. [Citation.]" *Id.* ¶ 11. The standard of review of a section 2-615 motion to dismiss is *de novo*." *Hadley*, 2015 IL 118000, ¶ 29.

¶ 26 "Rule 224 is not intended to permit a party to engage in a wide-ranging, vague, and speculative quest to determine whether a cause of action actually exists." *Ingram v. Angela Intili, M.D., Ltd.*, 2022 IL App (1st) 210656, ¶ 13 (citing *Low Cost Movers, Inc. v. Craigslist, Inc.*, 2015 IL App (1st) 143955, ¶ 17.) "[T]he language of the rule itself prohibits seeking any discovery pertaining to the merits of the petitioner's cause of action." *Stone*, 2011 IL App (1st) 093386, ¶ 20. "Once the identity of such a person or entity has been ascertained, the purpose of Rule 224 has been achieved and the action should be dismissed. [Citation.]" (Internal quotation marks omitted.) *Low Cost Movers, Inc.*, 2015 IL App (1st) 143955, ¶ 12. "A petition under Rule

224 *** is inapplicable to any case where the identity of *any* potential defendant is already known." (Emphasis added.) *Maxon*, 402 Ill. App. 3d at 710; *Ingram*, 2022 IL App (1st) 210656, ¶ 13 (citing *Maxon*).

¶ 27 However,

> "[e]mphasis should not be placed on the word 'identity' alone but, rather, on the entire phrase 'identity of one who may be responsible.' In order to determine 'who may be responsible,' one must be able to identify those individuals or entities who stand in the universe of potential defendants. Where the petitioner is apprised of a sufficient *connection to the injury* by an individual or entity so as to place such individual or entity within the universe of potential defendants, the petitioner may not seek further discovery of facts pertaining to any actual wrongdoing. [Citations.] *** However, where the known connection to the injury is remote and does little or nothing to limit or define the universe of potential defendants, the petitioner should not be precluded from ascertaining additional connecting facts to further refine the universe of defendants having potential liability so long as the attempted discovery does not seek to delve into any actual details of wrongdoing. The extent of this permissible inquiry must be determined by the trial judge on a case-by-case basis and in consideration of the cause of action alleged." (Emphasis added.) *Beale v. EdgeMark Financial Corp.*, 279 Ill. App. 3d 242, 252-53 (1996).

¶ 28 The court has explained:

> "Ascertaining identity is the only use for a Rule 224 action. Though *Beale* may have expanded the discovery available under Rule 224 somewhat, that expansion is not unlimited.
>
> *Beale* held that, on occasion, the identification of a defendant may require more than simply a name and that, on those occasions, discovery under Rule 224 is not limited to the petitioner's ascertainment of a name only. However, even under *Beale,* knowledge of *the connection of an individual to the injury* involved will preclude further discovery under the rule." *Gaynor v. Burlington Northern & Santa Fe Ry.*, 322 Ill. App. 3d 288, 294 (2001).

Once a potential defendant has been identified, "a petitioner can then file a case and use the discovery provisions of the rules or the Code to conduct full discovery." See *Ingram*, 2022 IL App (1st) 210656, ¶ 13.

¶ 29 To survive a 2-615 motion to dismiss a Rule 224 petition must satisfy certain criteria including, relevant to this appeal, that the petition must state "with particularity facts that would establish a cause of action," seek "only the identity of the potential defendant and no other information necessary to establish the cause of action," and the petition must be "subjected to a hearing at which the [trial] court determines that the petition sufficiently states a cause of action *** against the unnamed potential defendant, *i.e.*, *the unidentified person is one who is responsible in damages to the petitioner*." (Emphasis added.) See *Maxon*, 402 Ill. App. 3d at 711 (discussing the "significant" protections offered potential defendants by Rule 224). See also *Tirio v. Dalton*, 2019 IL App (2d) 181019, ¶ 26 ("The action for discovery shall be initiated by the filing of a verified petition in the circuit court and shall name as respondents the persons or entities from whom discovery is sought. [Citation.] The petition must set forth the reason the

proposed discovery is necessary and limit discovery to the identification of the responsible persons and entities.").

¶ 30 While a Rule 224 petition must limit itself to the discovery of "responsible persons," Illinois Supreme Court "Rule 137 [eff. Jan. 1, 2018] imposes an affirmative duty on attorneys and litigants alike to conduct an investigation of the facts and the law before filing an action, pleading, or other paper." *O'Brien & Associates, P.C. v. Tim Thompson, Inc.*, 274 Ill. App. 3d 472, 482 (1995).

¶ 31 These requirements are not limited to speech-based claims. See *Stone*, 2011 IL App (1st) 093386, ¶ 18 ("While the *Maxon* court correctly found that this standard [to show that the discovery is necessary] protects an anonymous individual's constitutional rights in the context of a defamation claim, *** the appropriateness of this standard is not limited to speech-based claims.").

¶ 32 In this appeal, petitioners argue that they "do not know the identity of any potential defendants" to the causes of action stated in the petition and the trial court erred in dismissing their petition with prejudice on the basis that petitioners already know the identity of potential defendants to those claims. Petitioners argue that the fact they know the identities of the parties who have filed malpractice claims against them does not mean those claimants are potentially liable to plaintiffs for the claims alleged in the petition, "and Respondents have not identified any claims [in the Rule 224 petition] that the Petitioners could actually bring against the malpractice claimants." Petitioners assert the potential defendant(s) they seek to identify are the "instigator(s) of the [malpractice] Claims and the apparent scheme to drive the Petitioners out of business."

¶ 33 Petitioners argue that reliance on the assumption that respondents and/or Bone & Joint *might* represent at least one potential defendant to the claims stated in the petition, to defeat the

petition, is misguided. Petitioners attempt to distinguish this case from the situation presented in *Low Cost Movers, Inc.* by asserting that, unlike the situation in *Low Cost Movers, Inc.*, where the publication identified itself as a responsible party, neither respondents nor Bone & Joint have identified themselves as involved in the attack against petitioners. Rather, in this case, no one has identified themself as a potential defendant to the claims in the petition, and petitioners maintain that respondents "may have information relevant to" identifying potential defendants to those claims. Petitioners also argue that the universe of allegedly potential defendants who are representatives of Bone & Joint is currently over broad and does not permit petitioners to file a complaint.

¶ 34 Respondents argue that the allegations in the petition and the allegations in support of the potential claims against the allegedly unknown defendants "suggest" petitioners know specific facts that connect respondents to those claims and, as such, petitioners "were improperly using Rule 224 to find evidence against the respondents *** without having to sue them for damages." Respondents rely on specific language in the petition in support of this argument. First, in the petition, respondents point to petitioners' allegation that respondents "may have knowledge regarding the recent explosion of claims against Petitioners based on the nature of some of the information alleged in some of the claims and other circumstances alleged herein," and petitioners' allegations of "claims against potentially liable parties." Respondents rely on petitioners' allegations that the malpractice claims against them involve information about Hyder's separation from Bone & Joint and "confidential" information that presumably respondents would possess to support their argument that respondents and Bone & Joint are at least one potential defendant petitioners are allegedly seeking to identify. Respondents specifically rely on:

(1) Petitioners' allegation, in support of its unfair competition and false light claims, that the allegedly unknown responsible parties "falsely or misleadingly described and represented facts about the circumstances of Dr. Hyder's departure from Bone & Joint;" and

(2) Petitioners' allegation that the claims that have been filed against them alleged specific facts that petitioners considered confidential.

Respondents argue these allegations "take this case out of the purview of Rule 224," and petitioners' "true motive behind their Rule 224 petition was to find evidence to build a case against the [respondents.]"

¶ 35 We first look at the allegations of various causes of action against unknown defendants in support of the petition. To state a claim based in unfair competition, generally a plaintiff would have to allege that "the means of competition are otherwise tortious with respect to the injured party" or were "likely to interfere in a substantial manner with the ability of prospective purchasers to choose on the merits of the competing products." Restatement (Third) of Unfair Competition § 1 (1995). However, in Illinois, the Uniform Deceptive Trade Practices Act is the codification of the common law tort of unfair competition. *Custom Business Systems, Inc. v. Boise Cascade Corp.*, 68 Ill. App. 3d 50, 52–53 (1979). Further,

> "Except for one notable difference, *i.e.*, that a claim under the Lanham Act applies to violations in interstate commerce as opposed to purely local activity, claims under state common-law unfair competition and the Lanham Act are often quite similar. The most significant similarity is that, in general, a prerequisite to sustaining each of these claims is proof that a defendant's conduct has created confusion, or a likelihood of confusion, with the plaintiff's activities. Because of the similarities between common-law

> unfair competition and the Lanham Act, courts often decide a case under one of these theories, usually the Lanham Act claim, and refer only summarily to the same result under the other theory pleaded." § 18:2. Introduction, 4 Entertainment Law 3d: Legal Concepts and Business Practices § 18:2.

¶ 36 Moreover, under the Consumer Fraud and Deceptive Practices Act, the plaintiff must prove the defendant engaged in "unfair methods of competition," which includes but is not limited to "misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact," or used or employed "any practice described in Section 2 of the Uniform Deceptive Trade Practices Act." 815 ILCS 505/2 (West 2020); see also *Aliano v. Ferriss*, 2013 IL App (1st) 120242, ¶ 22. Furthermore,

> "[t]o establish a claim under the false or deceptive advertising prong of § 43(a) of the Lanham Act, a plaintiff must prove: (1) a false statement of fact by the defendant in a commercial advertisement about its own or another's product; (2) the statement actually deceived or has the tendency to deceive a substantial segment of its audience; (3) the deception is material, in that it is likely to influence the purchasing decision; (4) the defendant caused its false statement to enter interstate commerce; and (5) the plaintiff has been or is likely to be injured as a result of the false statement, either by direct diversion of sales from itself to defendant or by a loss of goodwill associated with its products." *Hot Wax, Inc. v. Turtle Wax, Inc.*, 191 F.3d 813, 819 (7th Cir. 1999).

¶ 37 The Lanham Act requires that the defendant made a false statement of *material* fact that deceived or had the tendency to deceive. *Id*. The Consumer Fraud and Deceptive Business

Practices Act requires the defendant use or employ misrepresentation with the intent of reliance—not with the intent of subsequent use in a separate claim. See 815 ILCS 505/2 (West 2020).

¶ 38 In this case, the petition only alleges that the unknown defendants "falsely or misleadingly described and represented facts about the circumstances of Dr. Hyder's departure from Bone & Joint," and that this was "possibly" done through interstate commerce and in commercial advertising. The petition does *not* allege respondents made false or misleading representations that had the tendency to deceive, were "material," or that respondents did so with the intent that others rely on them. The petition does not allege that the representations had a tendency to deceive a substantial segment of the audience, were likely to influence patients, or were likely to divert patients or cause petitioners to lose goodwill. The petition does not allege that respondents did anything with the intent that others rely on them. The petition only alleges that given the nature of the information in the malpractice claims respondents may have some knowledge about the claims against petitioners (including, possibly, the identity of the person who supplied information to the malpractice claimants which, we note, would not necessarily make those persons supplying the information to those third parties liable). The petition does not identify respondents as defendants to the unfair competition claims.

¶ 39 Next, "to state a claim for false light, the plaintiff must allege '(1) he was placed in a false light before the public as a result of the defendant's actions; (2) the false light would be highly offensive to a reasonable person; and (3) the defendant acted with actual malice.' [Citation.]" *Rivera v. Allstate Insurance Co.*, 2021 IL App (1st) 200735, ¶ 28.

¶ 40 In this case, the petition does not allege that respondents acted with malice or that respondents' own actions placed petitioners in a false light before the public—only that the

malpractice claims against Hyder do so and that, given the nature of the false information, respondents may have information relative to those claims. The petition does not identify respondents as defendants to the false light claims.

¶ 41 Finally, to succeed on a claim for tortious interference, a plaintiff would have to prove "(1) his reasonable expectation of entering into a valid business relationship; (2) the defendant's knowledge of the plaintiff's expectancy; (3) purposeful interference by the defendant that prevents the plaintiff's legitimate expectancy from ripening into a valid business relationship; and (4) damages to the plaintiff resulting from such interference." *Midwest REM Enterprises, Inc. v. Noonan*, 2015 IL App (1st) 132488, ¶ 70.

¶ 42 The petition contains no allegations of petitioners' expectations, respondents' knowledge thereof, or that respondents or anyone else acted purposely. Similarly, the petition vaguely references "other claims arising out of the unauthorized disclosure of information" without further elucidation of anyone's conduct toward that end. The petition does not identify respondents as defendants to the tortious interference or disclosure of confidential information claims.

¶ 43 We find that the allegations in the petition do not "take this case out of the purview of Rule 224" because the allegations, on their face, do not identify respondents as potential defendants in the claims stated in the petition. The petition alleges claims in false light, disclosure of confidential information, and tortious interference. The inference may be that respondents are the source of the offending information and that it is Bone & Joint that is engaging in unfair competition; but the face of the complaint does not allege how respondents may have published any information, that they did so in a way that makes them culpable, or that

respondents in any way instigated the malpractice claims. The petition alleges only that the circumstances dictate that respondents may know something about it.

¶ 44 We concede the rational inference from the allegations against the purportedly unknown defendants is that respondents are, at minimum, the source of the offending information and that it is reasonable to assume that petitioners have inferred that their former colleagues are the persons and entities that want to force petitioners, newly competitors, out of business. Even were this court to accept the assumption that petitioners believe it is respondents who are "instigating" these "attacks" against petitioners, we could not find petitioners' Rule 224 petition invalid on its face. First, any inferences aside, no matter how reasonable under the circumstances, petitioners are still required to "conduct an investigation of the facts and the law" to determine the proper parties and avoid filing a frivolous lawsuit. See Ill. S. Ct. R. 137(a) (eff. Jan. 1, 2018); *Ingram*, 2022 IL App (1st) 210656, ¶ 9 ("The rule is designed to prohibit the abuse of the judicial process by claimants who make vexatious and harassing claims based on unsupported allegations of fact or law but not to penalize attorneys or litigants who were zealous but unsuccessful."); *O'Brien & Associates, P.C.*, 274 Ill. App. 3d at 482.

¶ 45 Second, even taking the allegations in the petition to their extreme, respondents have not established that serving as the source of information that is used to commit any of the culpable actions alleged in the petition, without any allegations of culpable conduct, is enough to become a defendant in a cause of action raising these claims. The allegations in this petition cannot be reasonably read to say any more than that about respondents. The allegations in the petition indicate that petitioners do not know respondents' role in the spate of malpractice claims against them.

¶ 46 The decision in *Low Cost Movers, Inc.*, while not directly analogous, is instructive. In *Low Cost Movers, Inc.*, the petitioners sought the identity of anyone who had "flagged" their ads on Craigslist. *Low Cost Movers, Inc.*, 2015 IL App (1st) 143955, ¶ 4. The opinion in *Low Cost Movers, Inc.* does not state that the petitioners in that case alleged that *Craigslist* had improperly flagged its ads; the petition asked Craigslist to identify information that may be used to *identify* " 'any John Doe' who had flagged its ads." *Id.* Craigslist disclosed that it, "on its own initiative *** had removed all of Low Cost's ads that had been pulled for violating Craigslist's terms of use." *Id*. ¶ 5. After a status hearing, the trial court *sua sponte* dismissed the petition. In a hearing on a motion to vacate the dismissal, "Low Cost conceded that Craigslist had identified itself as one party that had removed its ads *** but argued it should be allowed to find out if others might have flagged its ads." *Id*. ¶ 7. The trial court found Craigslist "had provided sufficient information to satisfy Low Cost's petition." *Id.*

¶ 47 On appeal, Low Cost argued that "even if Craigslist was a potential defendant, its petition should have been permitted to proceed to ascertain the identifies of other potential defendants." *Id*. ¶ 9. The *Low Cost* court rejected Low Cost's argument that the petition should be allowed to proceed on the ground Low Cost could not sue Craigslist under all of Low Cost's espoused claims. *Id*. ¶ 17 ("we reject the notion that discovery may continue until the identity of the party that engaged in the 'wrongdoing' coincides with [the] petitioner's causes of action"). The court held that the identification of Craigslist as one party that may be responsible satisfied the purpose of Rule 224 despite the fact Low Cost had no basis sue Craigslist for two of its espoused claims. *Id*.

¶ 48 In *Low Cost Movers, Inc.*, the alleged wrongdoing occurred on the respondent's website. In this case, arguably the alleged wronging occurred as the result of information possessed by

respondents. In *Low Cost*, the petition was allowed to proceed until the respondent identified itself as having engaged in the alleged wrongdoing. Notably, the *Low Cost* court did *not* invalidate the petition based on naming the owner of the website where the alleged wrongdoing occurred as the respondent. However, in this case, the trial court dismissed the petition based on respondents' possession of the information necessary to carry out the alleged wrongdoing—said possession of the information being similar to Craigslist's operation of their website. Possession of that knowledge—and even some level of sharing of that information in a non-culpable way, like operation of a website, is not sufficient to identify respondents as "a party that may be responsible" for any of petitioners' espoused claims in the petition. See *id*. ¶ 17. The trial court's judgment in this case was erroneous.

¶ 49 We find that petitioners are seeking discovery only to discover who is potentially liable for filing those claims and not to establish actual liability for those claims. See *Mazrim v. Decatur Memorial Hospital*, 2022 IL App (4th) 210474, ¶ 28 ("petitioner did not know the potential connection between the named clinicians and what role, if any, the named clinicians may have played in relation to G.M.'s birth injures. Petitioner sought connecting factors through discovery of the medical records to find potential liability, not actual details of wrongdoing."). Respondents' status in this case is not sufficient to identify respondents as potential defendants to petitioners' claims. *Beale*, 279 Ill. App. 3d at 252-53 ("Petitioner should not be precluded from ascertaining additional connecting facts to further refine the universe of defendants having potential liability"). Contrary to respondents' argument, petitioners have not alleged sufficient connecting facts to refine the universe of potential defendants to respondents to the Rule 224 petition. Petitioners allege they believe they are the victim of a "calculated attack" but that they "cannot ascertain he identity of those persons or entities behind this attack." Petitioners may

subjectively believe or suspect that respondents are responsible; but we find that nothing on the face of the petition identifies respondents as unknown defendants for the claims in the petition. See also *Ingram*, 2022 IL App (1st) 210656, ¶ 16 (despite respondent to Rule 224 petition later being determined to be a potential defendant based on subsequent disclosure that the respondent was the doctor that inserted a medical device, the Rule 224 petition was held invalid from the outset on ground the petitioner was aware of at least two other proper defendants for the potential action when he filed the petition).

¶ 50 Nor do the allegations in support of the specific claims so identify respondents. The petition alleges petitioners have claims against unknown defendants for (1) unfair competition and the Lanham Act, (2) false light, (3) tortious interference with business relationships, and (4) disclosure of confidential information. We find that the language respondents cite as "suggestive" that a respondent or respondents are at least one potential defendant to those claims does not identify respondents as defendants. The petition, on its face, only alleges that, given the nature of these claims, respondents "may have knowledge regarding" the claims and the persons or entities who did perform the potentially culpable acts.

¶ 51 We find that none of the allegations in the petition are sufficient to identify respondents as potential defendants and that the use of the petition pursuant to Rule 224 was proper in this case. See *Beale*, 279 Ill. App. 3d at 253 ("a reasonable interpretation of Rule 224 would permit the trial judge some latitude of discretion under its provisions to allow discovery of certain additional facts pertaining to the relationship between, [in this case, respondents,] and the [culpable parties] to further define and narrow the universe of potential defendants. The rule would not allow, however, further discovery of specific facts of wrongdoing.").

¶ 52 We expressly refuse and admonish against any consideration of respondents' counsel's representations concerning the content of the proposed discovery. We note here that, in their reply brief to this court, petitioners argued that respondents' "brief *** makes certain assertions regarding their use of the proposed discovery that violates the spirit and letter of Rule of Evidence 408 because it uses the substance of the parties' settlement discussions to argue that the Petition failed under Rule 224." Ill. R. Evid. 408(a)(2) (eff. Jan. 1, 2011) (statements made in compromise negotiations regarding a claim are not admissible on behalf of any party to prove the invalidity of a claim). Petitioners made that argument after first arguing in their reply brief that "the proposed discovery, including the Respondents' biased characterizations of it, could not be considered as to the Respondents' Section 2-615 motion to dismiss" because a court may not consider discovery that is not incorporated into the challenged pleading as an exhibit; thus, petitioners argued, respondents had "no justification for citing the proposed discovery in their motion to dismiss, in oral statements to the circuit court, or in their brief before this Court." After making both arguments noted above, petitioners argued, in sum, that respondents "not only improperly relied on their characterizations of material from outside the record to support their Section 2-615 motion; they also made clear that this material was from the parties' settlement discussions" and that "it is improper to use material provided by the Petitioners in attempting to reach a compromise as evidence that their Petition was noncompliant with Rule 224."

¶ 53 Respondents filed a motion to strike portions of petitioners' reply brief as violating Illinois Supreme Court Rule 341(h)(7) (eff. Oct. 1, 2020) prohibiting raising arguments for the first time in a reply brief because the reply allegedly "presents a new argument that respondents violated [Rule] 408" which, respondents argued, petitioners "never agued in their opening brief

or at the hearing in the trial court." Petitioners filed a response to the motion to strike, and we ordered the motion taken with the case. We now deny the motion.

¶ 54 We deny the motion because this court has consistently held that "striking an appellate brief, in whole or in part, is a harsh sanction that 'is ordinarily reserved for the most egregious failures to comply with the rules and those that hinder our review.' [Citation.]" *Battle v. Chicago Police Department*, 2022 IL App (1st) 200083, ¶ 9. In this case, our review is not hindered because we are easily able to discern new argument and disregard it. More importantly, our review is not hindered because of the second ground on which we deny the motion; we do not believe petitioners "egregiously" violated Rule 341(h)(7) if at all.

¶ 55 In response to respondents' motion to strike portions of petitioners' reply brief, petitioners argued that the allegedly "new" argument "expanded on their argument in their opening brief that relied upon Respondents' improper use of written discovery that was never presented to the circuit court." In their response to the motion to strike, petitioners noted that their opening brief argued that respondents and the trial court improperly relied upon discovery that was not within the "four corners" of the Rule 224 petition or the motion to dismiss, "and therefore was improperly considered *under [section] 2-615*." (Emphasis added.) Petitioners argued that this "new" argument merely provided "further support of their argument the Respondents relied on improper material that was outside the record in their section 2-615 motion to dismiss."

¶ 56 Despite the fact Rule 408 merely provides "further support" for the previous argument—an argument with which we agree—that argument must be forfeited because petitioners raised it for the first time in their reply brief. *Wynn v. Illinois Department of Human Services*, 2017 IL App (1st) 160344, ¶ 78. However, petitioners also argued this allegedly new argument was in

response to respondents' arguments in their response brief to this court that utilized material—the contents of petitioners' proposed discovery—that is prohibited by Rule 408. In their response brief, respondents did respond to petitioners' opening-brief argument, that respondents improperly referred to the proposed discovery in the trial court, by arguing that (1) the proposed discovery itself was not submitted to the trial court but, (2) "[i]n any event, *** [this court can affirm the trial court] on any grounds appearing of record regardless of whether the trial court relied on those grounds *or whether its reasoning was correct*." (Emphasis added.)

¶ 57 We could reasonably infer that respondents are referencing an "incorrect" reasoning that would have the trial court rely on respondents' characterization and arguments in the trial court concerning the proposed discovery. If so, then petitioners' argument that its Rule 408 argument is merely in response to respondents' implied argument in their response brief and therefore is not prohibited by Rule 341 would prevail. See *Oliveira v. Amoco Oil Co.*, 311 Ill. App. 3d 886, 891 (2000), judgment rev'd in part, vacated in part, on other grounds 201 Ill. 2d 134 (2002) ("Supreme Court Rule 341(g) provides an appellant may respond to arguments presented in the appellee's brief. 155 Ill. 2d R. 341(g). An appellee may argue any point supported by the record but an appellant is under no obligation to anticipate every argument an appellee might raise and address it in his opening brief."). For the reasons next explained, we have no need to reach that inference here. *Infra*, ¶ 58. Additionally, to any extent petitioners' arguments in their reply brief might be construed as asserting a new argument providing an independent ground for reversing the trial court, we may, and do, simply disregard it without striking portions of petitioners' reply brief. See *Keener v. City of Herrin*, 235 Ill. 2d 338, 346 (2009) ("Although the defendant's recollection appears to be more consistent with what took place below, in accord with applicable

principles of appellate review, we will disregard both assertions in our analysis and concern ourselves only with facts of record.") Respondents' motion to strike is denied.

¶ 58 On the merits of the claims involved, we place no reliance on Rule 408 but acknowledge that the rule, if invoked, would have prevented the trial court from considering arguments concerning the proposed discovery regardless of if and how it had been presented in the trial court. We make no determinations about that proposed discovery, including the veracity of respondents' counsel's assertions describing it. Our holding is based solely on the fact the proposed discovery was not attached as an exhibit to the Rule 224 petition, and a 2-615 motion to dismiss attacks only the legal sufficiency of the allegations in the complaint. *Bryson*, 174 Ill. 2d at 91. Furthermore, we refuse to construe respondents' motion to dismiss as filed under section 2-619 because to do so would prejudice petitioners who would be deprived of a meaningful opportunity to refute the meaning and intent of the proposed discovery, which was sent to respondents for the purpose of negotiating a resolution to this matter. See *In re Marriage of Lewin*, 2018 IL App (3d) 170175, ¶ 11.

¶ 59 Based on the foregoing we find that the petition is valid on its face because it seeks "only the identity of the potential defendants and no other information necessary to establish the cause of action." However, "to ascertain whether a petitioner has satisfied Rule 224's necessity requirement, the court must evaluate [the petitioner's proffered] complaint to determine whether it will withstand a section 2-615 motion to dismiss." *Hadley*, 2014 IL App (2d) 130489, ¶ 27; *Stone,* 2011 IL App (1st) 093386, ¶ 18. Again, this requirement is not limited to speech-based claims. See *Stone*, 2011 IL App (1st) 093386, ¶ 18 (citing *Maxon*, 402 Ill. App. 3d at 712). "To survive a motion to dismiss, the plaintiff must allege specific facts supporting *each element of his*

cause of action and the trial court will not admit conclusory allegations and conclusions of law that are not supported by specific facts." *Stone*, 2011 IL App (1st) 093386, ¶ 21.

¶ 60 As demonstrated above, petitioners have failed to allege specific facts supporting several elements of their proffered claims. Nonetheless, it is not clearly apparent that the petition could not be amended to cure the defects and, therefore, dismissal with prejudice was not warranted. *Levine*, 2023 IL App (1st) 221845, ¶ 41 (quoting *Mayle*, 2022 IL App (1st) 210470, ¶ 81). "Illinois has a liberal policy of allowing the amendment of pleadings." *1515 N. Wells, L.P. v. 1513 N. Wells, L.L.C.*, 392 Ill. App. 3d 863, 870 (2009). Respondents argue petitioners never made their proposed amended petition part of the record; therefore, neither the trial court nor this court can determine whether the proposed amendment would cure the defective pleading and petitioners have not demonstrated that the trial court abused its discretion.

¶ 61 This court has stated that "failure to offer a proposed amendment is generally fatal for review of the trial court's ruling." *Brown v. Kidd*, 217 Ill. App. 3d 860, 869 (1991). However, in this case this court can determine that the trial court abused its discretion in denying petitioners request to amend. The trial court denied the request and dismissed the petition on the basis of its belief that the purpose of Rule 224 had been satisfied and petitioners had no right to proceed further under that rule. The trial court's conclusion was based on an erroneous application of the law, which is always an abuse of discretion. *North Spaulding Condominium Ass'n v. Cavanaugh*, 2017 IL App (1st) 160870, ¶ 46 ("If a trial court's decision rests on an error of law, then it is clear that an abuse of discretion has occurred, as it is always an abuse of discretion to base a decision on an incorrect view of the law.").

¶ 62 We are cognizant of the fact our supreme court has held that the failure to make a proposed amended pleading part of the record results in forfeiture of the right to have this court

review the trial court's denial of a motion for leave to amend. See *Kirk v. Michael Reese Hospital & Medical Center*, 117 Ill. 2d 507, 521 (1987). However, "forfeiture is a limitation on the parties and not the court." *Oshana v. FCL Builders, Inc.*, 2013 IL App (1st) 120851, ¶ 18. Our supreme court also recognizes that "the doctrine of waiver serves as a warning to the parties rather than a limitation on the appellate court's jurisdiction. *American Federation of State, County & Municipal Employees, Council 31 v. County of Cook,* 145 Ill. 2d 475, 480 (1991). We may relax the harsh mandates of the waiver doctrine *** if the interests of justice require the issue's consideration." *Skidmore v. Throgmorton*, 323 Ill. App. 3d 417, 420 (2001).

¶ 63 We find that in this case petitioners have not forfeited their right to amend the petition. Here, justice requires consideration of petitioners' request to amend their petition, which was denied in the trial court, where the trial court abused its discretion in denying petitioners leave to amend the petition by erroneously applying the law; the petition was not defective on its face and can be amended to cure any defects without prejudice to the opposing parties; the amendment would be timely, the request was made at the first (and only) hearing on the matter; and allowing amendment would not result in surprise or prejudice to respondents, the respondents having a meaningful opportunity to respond to the amended petition. *Miller v. Pinnacle Door Co., Inc.*, 301 Ill. App. 3d 257, 261 (1998) ("For a delay to prejudice a party, it must operate to hinder his ability to present his case on the merits. [Citation.] Prejudice may be shown where delay before seeking an amendment leaves a party unprepared to respond to a new theory at trial."). See *1515 N. Wells, L.P.*, 392 Ill. App. 3d at 870 (listing factors in deciding whether a trial court abused its discretion on a motion to amend a pleading).

¶ 64 Respondents also complained that "[w]ithout setting forth further details regarding their previous attempts at discovery, [petitioners] fell woefully short in pleading facts *** supporting

their allegations that they cannot obtain discovery other than by a Rule 224 petition." Respondents also allude to a proposed amended complaint petitioners sought leave to file in this court, which we denied.

¶ 65 Respondents are correct that petitioners must satisfy the necessity requirement of Rule 224. *Stone*, 2011 IL App (1st) 093386, ¶ 14 ("the plain language of the rule also requires a petitioner to demonstrate the reason why the proposed discovery seeking the individual's identity is 'necessary' "). Because petitioners sought leave to amend the petition, which the trial court erroneously denied, we make no findings concerning the sufficiency of the current allegations in the petition. The trial court should make the initial determination of whether the amended petition satisfies the requirements of the rule. "A court of review also ordinarily will not consider issues where they are not essential to the disposition of the cause." (Internal quotation marks omitted.) *People v. Campa*, 217 Ill. 2d 243, 270 (2005). Because certain allegations may or may not be raised in an amended pleading, any consideration in this order on the topic would amount to an improper advisory opinion.

¶ 66 The trial court committed a clear abuse of discretion in denying petitioners' request to amend and dismissing the petition with prejudice; it is not apparent that, in this case, amendment could not cure the defects; and granting leave to amend would be proper in this case. In light of our findings, we have no need to further address petitioners' alterative due process argument.

¶ 67 We reverse the judgment of the trial court granting respondents' motion to dismiss the Rule 224 petition with prejudice and denying petitioners' motion for leave to amend. Nothing herein should be construed as a finding concerning the sufficiency of the petition. The trial court is directed to grant petitioners' motion for leave to amend the petition and to conduct further proceedings thereon, including a determination of whether the amended petition states with

particularity facts that would demonstrate a cause of action [and]; seeks only the identity of a potential defendant, rather than information necessary to demonstrate a cause of action." *Stone*, 2011 IL App (1st) 093386, ¶ 17.

¶ 68 CONCLUSION

¶ 69 For the foregoing reasons, the judgment of the circuit court of Cook County is reversed and the cause remanded for further proceedings.

¶ 70 Reversed and remanded.