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.

REPLY BRIEF OF APPELLANT TERRY A. EKL

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ARGUMENT

I. CIOLINO'S DEFAMATION AND FALSE LIGHT CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS.

A. Ciolino misconstrues Ekl's position. Ekl does not advocate for the discovery rule to apply only where the defendant has actively concealed the allegedly-defamatory publication.

Ciolino premises his rebuttal argument on a misconstruction of Ekl's own argument. Ciolino incorrectly asserts that Ekl has advocated for a rule such that a determination whether the discovery rule should apply in any given case would "turn on the intent of the defamer." (Pl. Br. 10.)[1] Ciolino likewise incorrectly asserts that Ekl espouses the "view that the discovery rule should only apply in a defamation case when [the] plaintiff can demonstrate that the defamer hid the defamatory material from [the] plaintiff." (Pl. Br. 16.)

In both of the aforementioned instances, Ciolino implies that Ekl advocates for a rule that would have the discovery rule apply only if the defendant actively concealed the allegedly defamatory material from the plaintiff, and only if the plaintiff can demonstrate that such concealment occurred. Ekl has never advocated for such a rule and has never argued that such a rule has been the law in this state. Rather, this Court should continue to follow the rule as articulated by the appellate court in *Blair v. Nevada Landing Partnership*, 369 Ill. App. 3d 318, 326 (2d Dist. 2006), and *Peal v. Lee*, 403 Ill. App.

[1] References to Ciolino's Brief are in the following format: "(Pl. Br. [page number within Ciolino's Brief].)."

3d 197, 207 (1st Dist. 2010) (quoting *Blair*): ***The discovery rule applies only where the allegedly-defamatory publication is "hidden, inherently undiscoverable, or inherently unknowable."*** The question whether the discovery rule will apply is dependent upon the inherent nature of the publication, not the defendant's subjective intent or the plaintiff's particular circumstances.

B. The discovery rule applies only where the complained-of publication was hidden, inherently undiscoverable, or inherently unknowable, and does not apply where, as here, the publication was accessible to the general public.

Ciolino urges this Court to conclude that it would be premature to reach a conclusion as to whether Ciolino's claim is time-barred because there exists a question of fact. However, it is unclear what rule Ciolino is asking this Court to apply in order to reach such a conclusion, as Ciolino seems to advocate for vastly different rules throughout his brief.

At one point, Ciolino asserts that the discovery rule should apply unless the allegedly-defamatory publication was "readily accessible to the general public." (Pl. Br. 10-11.) At another point, he asserts that the discovery rule should apply unless the publication was "readily accessible *to him*." (Pl. Br. 22, emphasis in original.) At still other points, Ciolino seems to argue that the discovery rule should apply unless he knew or should have known of the publication, thereby echoing the Appellate Court's unworkable conclusion that the discovery rule should be utilized to determine whether the discovery rule applies. (Pl. Br. 25.) Ciolino concludes by arguing that the statute of limitations did not begin

running until he not only discovered the allegedly-defamatory statements, but until he also "recognized an injury associated with them." (Pl. Br. 21.) None of Ciolino's assertions has a basis in the law.

Ciolino first argues, purportedly based on the *Tom Olesker* decision, that the discovery rule applies whenever "the defamatory material was not mass-published or readily accessible to the general public." (Pl. Br. 11.) Here, Ciolino states a rule similar to the one expressed in *Tom Olesker*, but Ciolino subtly misstates the conclusion reached in that case.

Tom Olesker involved a plaintiff who claimed to have been defamed via a communication sent by a credit reporting agency to its paying subscribers. *Tom Olesker's Exciting World of Fashion, Inc. v. Dun & Bradstreet, Inc.*, 61 Ill. 2d 129, 130 (1975). This Court applied the discovery rule to toll the running of the statute of limitations until the plaintiff knew or should have known of the allegedly defamatory credit report. *Id.* at 136. This Court did not, however, conclude that the discovery rule will apply in every defamation case. This Court highlighted that, in the case before it, the publication was not only made to a select group of subscribers, the defendant credit reporting agency also "prohibit[ed] distribution of the information in its reports to any person who is not a subscriber to its service." *Id.* at 132. This Court found that situation to be readily distinguishable from cases in which an allegedly-defamatory statement is communicated via "so-called mass-media publication" such as "for example, magazines, books, newspapers, and radio and television programs, [where] the publication has

been for public attention and the person commented on, if only in his role as a member of the public, has had access to such published information." *Id.* at 137-38.

If a bright-line rule can be taken from *Tom Olesker*, it is that the discovery rule applies where, as was the case with the credit report at issue there, the allegedly-defamatory publication was hidden from and therefore inaccessible to and undiscoverable by the general public. On the other hand, the discovery rule will not apply where, as in cases of so-called mass-media publications and otherwise, the publication is accessible to the general public.

Contrary to Ciolino's assertion, *Tom Olesker* does not stand for the proposition that the discovery rule applies whenever the "the defamatory material was not mass-published or readily accessible to the general public." (Pl. Br. 11.) Rather, as noted above, *Tom Olesker* stands for the proposition that the discovery rule will not apply if the publication is *accessible* to the general public, including in the case of traditional mass-media publications. *Tom Olesker* does not stand for the proposition, as Ciolino argues here, that the discovery rule is inapplicable only if the publication at issue is *readily* or *easily* accessible to the general public.

In *Tom Olesker*, the discovery rule applied not because the credit report was not easily accessible to the general public. Most credit reports are not easily accessible to the general public. Rather, in Tom Olesker, the discovery rule applied because the credit report was *inaccessible* to the general public, as it was

available only to paying subscribers and was hidden from the public due to the fact that the subscribers were prohibited from sharing it with members of the general public. *Id.* at 130, 137-38.

The rule set forth in *Tom Olesker* is entirely consistent with the articulation of that rule as later set forth in *Blair*. In *Blair*, the appellate court phrased the rule as follows: The discovery rule will apply only where the allegedly-defamatory publication was "hidden, inherently undiscoverable, or inherently unknowable." *Blair*, 369 Ill. App. 3d at 326.

In *Blair*, the court addressed the timeliness of an invasion of privacy tort claim subject to the one-year statute of limitations contained within 735 ILCS 5/12-201 and also applicable to defamation and false light claims. *Id.* at 322. The plaintiff claimed that the defendant had used his likeness without his permission over the course of a number of years. *Id.* at 319-21. The trial court entered summary judgment for the defendant on the basis that the plaintiff's claim as barred by the one-year statute of limitations. *Id.* at 321. The appellate court affirmed, holding that the statute of limitations began running "when the objectionable material was first published." *Id.* at 323.

The *Blair* court rejected the plaintiff's call for the application of the discovery rule to toll the statute of limitations. *Id.* at 326. The court, noting that "[o]ther jurisdictions adopting the uniform single-publication rule or a variation thereof have found that the single-publication rule is inherently at odds with and would undermine the discovery rule," held that a cause of action generally

accrues "regardless of when the plaintiff secured a copy or became aware of the publication." *Id.* The *Blair* court concluded that, in light of the foregoing, the "discovery rule is inapplicable … unless the publication was hidden, inherently undiscoverable, or inherently unknowable." *Id.*

In using the term "hidden, inherently undiscoverable or inherently unknowable," the *Blair* court used language from a California decision, *Long v. Walt Disney Co.*, 116 Cal. App. 4th 868, 872 (2004), but it ruled in a manner entirely consistent with this Court's prior decision in *Tom Olesker*. *Id.* The *Tom Olesker* and *Blair* decisions are not only consistent, they set forth a single, consistent rule of objective application. In both cases, the courts held that the discovery rule should be applied where the allegedly defamatory publication is unavailable to the general public. Neither *Tom Olesker* nor *Blair* stands for the proposition, asserted by Ciolino, that the discovery rule is the rule of general application and applies unless the allegedly defamatory publication is *easily* accessible.

Nor do *Blair* or *Tom Olesker*, or any other decision or legal authority, stand for the proposition, also asserted by Ciolino, that a determination whether the discovery rule applies should be based on the "question … whether the plaintiff could have known about the defamatory content of the film at any point prior to its mass-publication." (Pl. Br. 19.) Here, Ciolino urges this Court to adopt a rule, much like the one adopted by the Appellate Court, wherein a determination as to whether the discovery rule will apply will be based on a question of fact as to

whether the publication was accessible *to the plaintiff*, rather than the question, as applied in *Blair* and *Tom Olesker*, whether the publication was accessible *to the general public*.

No Illinois decision prior to the Appellate Court's decision in this case has ever held that a determination whether the discovery rule would apply would turn on the plaintiff's own particular ability to access the publication. Indeed, such a rule would mean that even a so-called mass-media publication might not commence the running of the statute of limitations, as even a mass-media publication could be inaccessible to a certain class of plaintiffs.

The Seventh Circuit Court of Appeals addressed this very issue in *Schweihs v. Burdick*, 96 F.3d 917, 920-21 (7th Cir. 1996), which Ciolino himself acknowledges "underscores the sound reasoning of *Tom Olesker*." (Pl. Br. 23.) In *Schweihs*, the court held that the plaintiff's particular circumstances—the plaintiff was imprisoned and did not have access to the allegedly-defamatory book—should not be taken into consideration in determining whether the discovery rule would be applied. *Id.* at 921.

For the foregoing reasons, Ciolino's focus on his *own* ability to view *A Murder in the Park* is misplaced. So too is his emphasis on whether *he* could have been expected to know about the content of the documentary when it was first shown. Ciolino's ability to view *A Murder in the Park* and his ability to know of its content is relevant to the question whether Ciolino knew or should have known of the allegedly defamatory publication. But these are questions posed by the

discovery rule itself. As discussed above, this case does not involve an application of the discovery rule; it involves the question whether the discovery rule has any application to a film shown in theaters open to the public on multiple occasions.

C. There are no issues of fact that should preclude affirmance of Ekl's dismissal where the uncontradicted affidavits demonstrate that *A Murder in the Park* was not hidden, inherently unknowable, or inherently undiscoverable.

Ciolino disputes the accessibility of the allegedly defamatory material, but he offers nothing to demonstrate that there exists a legitimate, material issue of fact on that point.

There is no dispute that the documentary was shown on multiple occasions in New York City and Cleveland more than a year before Ciolino filed suit. The affidavits of Terry A. Ekl and Christopher Rech submitted to the circuit court in connection with motions to dismiss establish that the documentary was premiered at DOC NYC on November 17, 2014, (R. C1056), and subsequently played to sold-out theaters at the Cleveland International Film Festival from March 24-26, 2015, (R. C1058). Ciolino did not submit a counter-affidavit addressing any of the foregoing.

There is likewise no legitimate dispute that the screenings were advertised, open to the public, and extensively reported on in the media. (R. C1056-C1058, C1060-1070.) Here, the operative word is "legitimate," because

Ciolino purports to create factual issues by making repeated assertions that are either unsupported or contradicted by the factual record.

Ciolino asserts that "[p]rior to its mass-publication, the filmmakers screened the documentary 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." (Pl. Br. 5). Neither of the foregoing assertions is supported by a citation to the record. For this reason, this Court should disregard both of the foregoing statements. *See*, *e.g., Centro Medico Panamericano, Ltd v. Benefits Mgmt. Grp., Inc.*, 2016 IL App (1st) 151081, ¶ 21 (holding that a reviewing court should ignore "any fact or claim not supported by the record); *Hurlbert v. Brewer*, 386 Ill. App. 3d 1096, 1101 (4th Dist. 2008) ("[A] reviewing court will not consider any facts [outside of] the record and any claims based on such facts.").

Ciolino's claim that the documentary was shown only two times in New York City and Cleveland is not only unsupported by the record, it is contrary to the record. The documentary premiered in New York City in November, 2014. (R. C1056, ¶¶ 2, 5.) It was then shown about four months later on three occasions from March 24-26, 2015, in Cleveland. (R. C1058, C1114.)

Ciolino's claim that the documentary was shown only to "local" audiences is likewise unsupported by the record. The record contains no indication as to the origin of the audience members, with the exception of Wheaton, Illinois, resident, Ekl, who attended the New York City screening. (R. C26.)

Ciolino's assertion that the documentary was shown only at "small film festivals" is likewise unsupported and is actually contradicted by the record. As one of the filmmakers, Christopher Rech, stated in a sworn affidavit, DOC NYC was "America's largest documentary film festival." (R. C1056, ¶ 5.) The screenings at the Cleveland International Film Festival were shown to sold out audiences. (R. C1059, ¶ 16.)

Ciolino also provides no citation to the record in support of his assertion that "[t]he dates and locations of the screenings were not advertised to the general public." (Pl. Br. 5). In fact, the record belies this statement, as well. As Rech stated in his affidavit filed in the circuit court, "[p]rior to its premiere, the Documentary was advertised and mentioned in several different media outlets." (R. C1056, ¶6.) The film production company, co-defendant Whole Truth Films, "actively advertised the Documentary so people would go see it." (R. C1059, ¶ 17.)

Attached to Rech's affidavit and referenced therein are a number of articles and other materials advertising and publicizing the documentary, including the dates, times and locations that it was being shown in each city. (R. C1057-C1058, ¶¶7-14.) Brandon Kimber tweeted, on October 15, 2014, that "Our documentary will premiere at DOC NYC this November!" (R. C1058, ¶11; C1075.) Tweets from Brent Richert on October 15 and 17, 2014, make clear reference to *A Murder in the Park* having been selected for showing at the 2014 DOC NYC film festival and identifying the date of the showing ("November 17th

2014"), the time of the showing ("930P"), and the location of the showing (IFC Center, NYC). (R. C1058, ¶11; C1075-1076.)

An October 31, 2014, article in the Chicago Tribune stated that "the video 'Murder in the Park" will be released Nov. 17." (R. C1057, ¶8; C1066.) On November 12, 2014, the Movies with Abe website posted an article describing the premise of the documentary and stating that it was to be shown at "DOC NYC, America's largest documentary festival," in New York City, with a "screening [on] November 17 at 9:30pm." (R. C1058, ¶12; C1077.)

An IndieWIRE article dated November 13, 2014, summarized a number of documentary films set to have been shown at the DOC NYC film festival, including a brief writeup on *A Murder in the Park*, in which it was stated that the documentary would be shown at 9:30 PM, Mon. Nov. 17, 2014 [at] IFC Center." (R. C1058, ¶11; C1090.) A November 13, 2014, article in the Villager likewise briefly summarized the premise for the documentary and explained that it would be shown at DOC NYC on "Nov. 17, 9:30 p.m. at IFC Center." (R. C1058, ¶11; C1091.)

A Fox News article from November 14, 2014, explained that the matter "will be the subject of a film 'A Murder in the Park' which premieres in New York next week." (R. C1057-1058, ¶ 10; C1073.) A PopMatters article dated November 17, 2014—the date of the initial showing—also discusses the premise for the documentary and identifies that it would be shown on "2014-11-17" at "DOC NYC 2014." (R. C1058, ¶11; C1081, C1083-C1085.)

The documentary was shown again in Cleveland, Ohio, also more than one year before Ciolino filed suit. (C1059, ¶16.) The Cleveland showings were also publicized. For instance, an article by Clint O'Connor of the Cleveland Plain Dealer, posted on March 24, 2015, discussed the movie and identified that it was being shown on three occasions at the Cleveland festival: "2:15 p.m. Tuesday, 9:15 pm. Wednesday and 2:35 p.m. Thursday at Tower City Cinemas." (R. C1058, ¶12; C1114.)

Although Ciolino implies that the 2014 showing of the documentary at the DOC NYC film festival was private, the unrebutted affidavit of Terry A. Ekl establishes, for the purpose of this appeal, that "the 2014 DOC NYC film festival was open to the public." (C. 842, ¶ 6.)

Ciolino makes an improper attempt to dispute that the DOC NYC film festival was America's largest documentary film festival by citing to a website that purports to list the "top ten" film festivals in the world. (Pl. Br. 14.) Ciolino did not cite to the website in the trial court and the material contained on the website is not otherwise contained within the record on appeal. As such, this Court should ignore it. If Ciolino wished to attempt to rebut the factual statement that DOC NYC was America's largest documentary film festival, and if Ciolino could have done so in good faith, Ciolino should have filed a counteraffidavit in the trial court.

Ciolino filed no counter-affidavit or other proof in the trial court in rebuttal to the Ekl and Rech's affidavits establishing the aforementioned details

about the advertising and publicity surrounding the showing of the documentary in New York City and Cleveland. Because Ciolino failed to file counter-affidavits in the trial court, Ciolino cannot now assert new facts in an effort to dispute those factual matters properly identified by the defendants in the trial court.

Pursuant to Section 2-619(c), a plaintiff has the opportunity to present "affidavits or other proof" refuting facts asserted by a defendant-movant in a motion to dismiss. 735 ILCS 5/2-619(c). "The plaintiff must establish that the defense is unfounded or requires the resolution of an essential element of material fact before it is proven. The plaintiff may do so by 'affidavit[ ] or other proof.'" *Kedzie & 103rd Currency Exch., Inc. v. Hodge*, 156 Ill. 2d 112, 116 (1993). "A counteraffidavit is necessary … to refute evidentiary facts properly asserted by affidavit supporting the motion else the facts are deemed admitted." *Id.* Here, Ciolino's failure to refute any of the evidentiary facts adduced by the defendants means that all such facts are conclusively established for the purpose of the defendants' motions to dismiss and, thereby, this appeal.

Ciolino misapplies the law on this point. Ciolino is correct when he asserts that Section 2-619 is not a proper vehicle to contest well-pled factual allegations, nor do Section 2-619 motions present a "mini trial" in which allegations of the complaint are weighed against factual assertions contained in a defendant's affidavit. (Pl. Br. 14.) But Ciolino fails to recognize that none of the foregoing has any application where, as here, the factual matters set forth in the affidavits of

Ekl and Rech and the exhibits thereto do not rebut or contradict any well-pled allegations of Ciolino's complaint. Ciolino made no allegations whatsoever regarding the showings of *A Murder in the Park* in New York City and Cleveland. (R. C22-C51.)

Despite the uncontested, unrebutted facts surrounding the public nature of the New York City and Cleveland showings, including the publicity that it received beforehand, Ciolino asserts that "the [allegedly] defamatory nature of the documentary *was* 'inherently unknowable' to Ciolino until he had the ability to actually see the documentary which occurred at the earliest in July 2015 when it premiered in Chicago." (Pl. Br. 22, emphasis in original.)

Ciolino fails to recognize the contradiction in his assertion. The term "inherently" implies a characteristic of the thing itself. According to the Merriam-Webster dictionary, the term "inherent" means "involved in the constitution or essential character of something : belonging by nature or habit : intrinsic." "Inherent." *Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/inherent. Accessed 21 Dec. 2020.* The documentary was either inherently unknowable or it was not. Ciolino's own ability to have seen or discovered the documentary does not affect its inherent characteristics.

In fact, nothing about the way that the documentary was shown in New York City of Cleveland made it inherently unknowable or inherently undiscoverable. Rather, the undisputed facts establish that *A Murder in the Park*

was advertised and accessible to the general public when it was shown in New York City and Cleveland.

The undisputed facts establish that the documentary was open to the public, shown on at least four occasions, at least three of which were to sold-out audiences and the other at the world's largest documentary film festival, and was advertised, publicized, and reported on. There was nothing hidden or inherently undiscoverable or unknowable about the New York City or Cleveland showings of *A Murder in the Park*. Ciolino may not have actually known about the documentary until after its run of showings in Cleveland concluded, but Ciolino's actual knowledge is immaterial. The fact that the plaintiff has not seen or heard the allegedly-defamatory material until long after the initial publication does not, under Illinois law, affect the application of the statute of limitations.

Ciolino asserts that "even if [he] 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 documentary since it was only available to the film makers." (Pl. Br. 22-23.) Here, Ciolino seems to argue that if the statute of limitations were to start running on the date of first publication (the DOC NYC showing), he would not have been able to pursue a defamation claim because he would not have been able to access the documentary before the deadline to file suit expired.

There are three problems with Ciolino's assertion. First, statutes of limitations are "by definition arbitrary, and their operation does not discriminate

between the just and unjust claim, or the voidable or unavoidable delay." *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314, 65 S. Ct. 1137, 1142, 89 L. Ed. 1628 (1945). The application of a statute of limitations is the consequence of a legislative assessment of the relative interests of the parties in administering and receiving justice. *People v. Chenoweth*, 2015 IL 116898, ¶ 22. Statutes of limitations sometimes yield harsh results, but those results are no less valid merely because they may seem unfair.

Second, Ciolino ignores that four months after *A Murder in the Park* was shown in New York City, it was shown three more times in Cleveland. (R. C1058.) If Ciolino learned of the allegedly defamatory statements within four months after the initial showing, he could have arranged to see one of the Cleveland screenings.

Third, if Ciolino learned of the purportedly defamatory statements without having seen the documentary, he could have filed suit in a timely manner and submitted an affidavit, pursuant to 735 ILCS 5/2-606, stating that the allegedly-defamatory material was not available to him.

Ciolino seems to argue that although the documentary was shown to the public in New York City and Cleveland, it was not a "mass" publication until it was first shown on Showtime, which is well-known as a subscription-only cable television network. Here, Ciolino shifts from a discussion as to whether the documentary was accessible (or, in Ciolino's terms, "readily accessible"), to a discussion about whether Ciolino knew or should have known of the

documentary. As discussed above, the question whether a plaintiff knew or should have known of an allegedly defamatory statement cannot determine whether the discovery rule applies. The discovery rule, which itself tolls the running of the statute of limitations until the plaintiff knows or reasonably should know of the injurious statement, would thereby become the rule of universal application in defamation and false light cases. Had the legislature intended the discovery rule to apply in every case, it would have incorporated the discovery rule into Section 13-201.

II. CIOLINO'S CIVIL CONSPIRACY CLAIM IS DERIVATIVE OF HIS DEFAMATION AND FALSE-LIGHT CLAIMS AND, THEREFORE, IS ALSO BARRED BY THE STATUTE OF LIMITATIONS.

Ciolino does not dispute that if his defamation and false-light claims are barred by the statute of limitations, so too is his civil conspiracy claim.

III. CIOLINO'S IIED CLAIM IS BARRED BY THE ONE-YEAR STATUTE OF LIMITATIONS.

Ciolino cites to 735 ILCS 3/13-202 for the proposition that "[IIED] is a personal injury tort, and the applicable statute of limitations is two years." (Pl. Br. 26.) 735 ILCS 3/13-202 does not exist. Assuming that Ciolino intended to cite to 735 ILCS 5/13-202—the statute of limitations for personal injury actions—Ciolino's citation is still incorrect, as nothing in Section 13-202 states that IIED claims are subject to the two-year limitations period proscribed by that section.

IV. THE CIRCUIT COURT PROPERLY DISMISSED ALL OF CIOLINO'S CLAIMS AGAINST EKL BECAUSE THE CLAIMS ARE BASED ON CONDUCT THAT IS NOT ACTIONABLE UNDER ILLINOIS LAW.

A. Ekl need not have filed a notice of appeal from a judgment entered in his favor in order to preserve his right to seek affirmance on alternative grounds.

Ciolino contends, in both the Standard of Review, (Pl. Br. 8), and Argument, (Pl. Br. 26), sections of his brief, that this Court lacks jurisdiction to hear Ekl's arguments that there exist alternative grounds upon which to affirm the circuit court's dismissal of Ciolino's claims against Ekl. Ciolino contends that this Court would only have jurisdiction to hear Ekl's alternative arguments if Ekl had filed a cross-appeal from the judgment in his favor, yet none of the legal authorities to which Ciolino cites provides any support for his contention. Moreover, Ciolino completely ignores the multiple legal authorities—*Keck v. Keck,* 56 Ill. 2d 508 (1974), *Material Service Corp. v. Department of Revenue,* 98 Ill. 2d 382 (1983), and *Bell v. Louisville & Nashville R.R. Co.,* 106 Ill. 2d 135, 148 (1985)—to which Ekl previously cited and which directly contradict Ciolino's position.

B. The three statements attributed to Ekl are not actionable under a false-light theory because they are not "highly offensive to a reasonable person."

Ciolino contends that each of the three statements that he attributes to Ekl would be highly offensive to a reasonable person when considering the context within which the foregoing statements were used in *A Murder in the Park*. But the context within which the filmmakers presented the foregoing cannot reasonably be used against Ekl, who was not alleged to have played any role in creating that

context. It would be fundamentally unfair to potentially hold Ekl liable for false light invasion of privacy based on a context that Ekl played no part in.

C. The statements attributed to Ekl are not actionable under a false-light theory because Ciolino has no right to privacy in connection with his work as an investigator.

Ciolino contends that his status as a public figure has no bearing on his ability to pursue a false light claim. Ciolino cites to *Lovgren v. Citizens First Nat. Bank of Princeton*, 126 Ill. 2d 411, 421 (1989), for the proposition that "it is not necessary to distinguish between private and public figures in false light claims." *Lovgren* stands for the quoted proposition, but Ciolino has taken that quote out of context to make it fit his argument.

Lovgren did not involve a public figure. *Id.* (stating "ours is not a case involving a public figure or a matter of public interest.") On that issue, the *Lovgren* court actively distinguished the facts at issue in that case from the situation presented in *Leopold v. Levin*, 45 Ill. 2d 434 (1970). In *Leopold*, the court had held that, as here, a public figure possesses no claim to false light invasion of privacy for matters upon which that figure has sought public attention. *Id.* at 442-43.

In *Lovgren*, on the other hand, the court concluded only that it is not necessary to distinguish between private and public figures for the purpose of determining whether the plaintiff has to prove actual malice in a false light claim. *Lovgren*, 126 Ill. 2d at 422. The court concluded that the plaintiff had to prove actual malice even though he was not a public figure. *Id.* So, the statement that

Ciolino attributes to the *Lovgren* case is accurate, but it concerns an issue not involved in this appeal.

Ciolino also disputes that he is a public figure, but his own complaint belies his argument. There, Ciolino professed to be a well-known investigator and speaker who "used to give lectures all over the world at a rate of approximately 25 a year." (R. C70, ¶ 191.) Under *Leopold*, Ciolino cannot trade on his public name generated through his work as an investigator and yet possess an actionable claim that his privacy was invaded when he was (allegedly) portrayed in a false light in connection therewith. Ciolino possesses no right to privacy in connection with his work as an investigator.

D. Two of the statements attributed to Ekl are not actionable under a defamation or false light theory as they are statements of opinion.

Ciolino contends that the statement that, "[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," cannot be one of opinion because it refers to or is based on objectively verifiable facts. However, Ciolino's explanation as to how the foregoing statement is one of fact is premised on Ciolino's having implied something neither contained nor suggested in the foregoing statement itself: that Ciolino convinces people to lie. Nothing in the foregoing statement states or implies that Ciolino gets anyone to lie. The statement is vague in every sense. The subjects of the sentence ("they") are not identified. The objects of the sentence ("people") are not identified. The action imputed to the subject ("try to finally get something

out of them") is vague and unverifiable. The foregoing statement cannot be reasonably interpreted to state actual facts, much less defamatory facts.

Ciolino likewise contends that the statement "[s]o 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," is one of fact, not opinion. Ciolino is correct that merely prefacing an otherwise defamatory statement by stating "in my opinion…" does not convert a defamatory statement of fact into an unactionable statement of opinion. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19, 110 S. Ct. 2695, 2706, 111 L. Ed. 2d 1 (1990). However, as expressed in *Milkovich*, when similar language is used to express a conclusion about facts identified in the statement, it is one of opinion. *Id*. at 20 (holding that "unlike the statement, 'In my opinion Mayor Jones is a liar,' the statement, 'In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin,' would not be actionable.").

Here, the complained-of statement begins "So that seems to me to be part of their M.O." and then concludes with a statement of purported fact. The statement is one of opinion about what the speaker believed to be a part of the *modus operandi* of the object of the sentence. As such, under *Milkovich*, it is an unactionable opinion.

E. The statement that "[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 because it is vague as to whom is being referred to as "they."

Ciolino contends that the statement "they stay on people …" clearly refers to Ciolino and David Protess, but Ciolino offers no explanation for this conclusion other than to say that he and Protess are "the only two villains in the documentary." (Pl. Br. 37.) As discussed above, the context within which the statement was presented in the documentary cannot properly be used to explain what Ekl meant, because the context was created by the filmmakers, not Ekl. Moreover, Plaintiff offers no explanation for his conclusion that the aforementioned statement refers in any way to "villains."

F. Ciolino's IIED claim against Ekl is premised on conduct not actionable under an IIED theory.

Ciolino, in his brief, makes clear that his IIED claim is nothing more than a claim that he sustained emotional distress as a purported result of statements that Ciolino claims to have constituted defamation and/or a false light invasion of Ciolino's privacy. Absent the context created by the filmmakers, none of the statements, either alone or in conjunction, could be considered "extreme and outrageous," even if proven to be false.

CONCLUSION

For all of the foregoing reasons, defendant-appellant Terry A. Ekl respectfully requests that this Court reverse the opinion and judgment of the Appellate Court and affirm the order of the trial court entered on January 22, 2019, or, in the exercise of supervisory authority, vacate the opinion and judgment and remand to the Appellate Court for further proceedings.

Respectfully submitted,

By: /s/ Jeremy N. Boeder
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SUPREME COURT RULE 341(c) CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this reply brief, excluding the words containing the Rule 341(d) cover, the Rule 341(c) certificate of compliance and the certificate of service, is 5,676 words.

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NOTICE OF FILING and PROOF OF SERVICE

In the Illinois Supreme Court

PAUL J. CIOLINO,	)	
	)	
Plaintiff-Respondent,	)	
	)	
v.	)	No. 126024
	)	
TERRY A. EKL,	)	
	)	
Defendant-Petitioner,	)	
	)	
ALSTORY SIMON, et al.,	)	
	)	
Defendants.	)	

The undersigned, being first duly sworn, deposes and states that on December 23, 2020, there was electronically filed and served upon the Clerk of the above court the Reply Brief of Appellant. 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:

SEE ATTACHED SERVICE LIST

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

/s/ Jeremy N. Boeder
Jeremy N. Boeder

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.

/s/ Jeremy N. Boeder
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