No. 09-1683

IN THE APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

Thomas E. Klocek, Plaintiff/Appellant, v. DePaul University, Reverend Dennis Holtschneider, individually and in his capacity as President of DePaul University, Susanne Dumbleton, individually and in her capacity as Dean of the DePaul School For New Learning, Robin Florzak, Michael DeAngelis, and other unknown employees of DePaul University, Defendants/Appellees.	Appeal from Cook County Circuit Number 05 L 09989 Trial Judge Charles R. Winkler Date of Notice of Appeal: 6/26/2009 Date of Final Order: 6/4/2009 No Post-Judgment Motion

OPENING BRIEF OF APPELLANT THOMAS E. KLOCEK

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ORAL ARGUMENT IS REQUESTED

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NATURE OF THE CASE

Professor Thomas E. Klocek filed this action on June 14, 2005 for damages occasioned by the defamatory statements published in 2004-05 by his former employer DePaul University. Klocek also seeks damages for false light invasion of privacy. R. Vol. 1 C3. Motions to dismiss these claims were denied in 2006 by Judge Nudelman, R. Vol. 3 C605, and again in 2007 by Judge Nudelman's replacement Judge Kelley. A7. In 2008, Judge Kelley was replaced by Judge Winkler. In several orders just 21 days and less before the jury trial was to start on March 16, 2009, the Circuit Court dismissed Prof. Klocek's entire case. A27-49. The bulk of the dismissal came on motions under §735 ILCS 5/2-615, as to which the Court denied Prof. Klocek leave to respond. Nine days after the trial date was vacated, Prof. Klocek moved for leave to amend the complaint. The Court denied leave to amend on June 4, 2009, and then Klocek appealed. A49.

ISSUES PRESENTED

I. Whether the Circuit Court erred in finding as a matter of law that there are no defamatory and false light statements in Klocek's entire case.

II. Whether Dismissal of Dean Dumbleton's October 4th and 5th e-mails on the basis of qualified privilege was improper.

III. Whether the Court erred in finding, as a matter of law, that Klocek's efforts to counter the defamation rendered him a limited public figure.

IV. Whether material facts exist to show Defendants published with actual malice.

STATEMENT OF JURISDICTION

This is an appeal as of right from a final judgment of the Circuit Court entered on June 4, 2009, as contemplated by Supreme Court Rule 301. Klocek filed his notice of appeal on June 26, 2009, within the required thirty days. A2.

STATUTES INVOLVED

§735 ILCS 5/2-615(a) (2010): Motions with Respect to Pleadings

> (a) All objections to pleadings shall be raised by motion. The motion shall point out specifically the defects complained of, and shall ask for appropriate relief, such as: that a pleading or portion thereof be stricken because substantially insufficient in law, or that the action be dismissed, or that a pleading be made more definite and certain in a specified particular, or that designated immaterial matter be stricken out, or that necessary parties be added, or that designated misjoined parties be dismissed, and so forth.

§735 ILCS 5/2-616(b) (2010): Amendments

> (b) The cause of action, cross claim or defense set up in any amended pleading shall not be barred by lapse of time under any statute or contract prescribing or limiting the time within which an action may be brought or right asserted, if the time prescribed or limited had not expired when the original pleading was filed, and if it shall appear from the original and amended pleadings that the cause of action asserted, or the defense or cross claim interposed in the amended pleading grew out of the same transaction or occurrence set up in the original pleading, even though the original pleading was defective in that it failed to allege the performance of some act or the existence of some fact or some other matter which is a necessary condition precedent to the right of recovery or defense asserted, if the condition precedent has in fact been performed, and for the purpose of preserving the cause of action, cross claim or defense set up in the amended pleading, and for that purpose only, an amendment to any pleading shall be held to relate back to the date of the filing of the original pleading so amended.

§735 ILCS 5/2-1005(g) (2010): Summary Judgments

> (g) Amendment of pleading. Before or after the entry of a summary judgment, the court shall permit pleadings to be amended upon just and reasonable terms.

STATEMENT OF FACTS

Thomas Klocek taught part time at DePaul University's School For New Learning ("SNL"), a school for the working adult, from 1991 to 1997. R. Vol. 17 C4025. During that time he created and taught several courses for SNL including a diversity course "Languages & Cultures of the World" (which he taught at least six times) and "Russian and American Founding Documents" (which he taught at least four times). Supp. R. Vol. 3 C636-7. In 1998, DePaul promoted Prof. Klocek to a full time professor and from 1998-2004 Prof. Klocek generally taught two courses per academic quarter for three quarters and one course in the remaining quarter. *Id*.

After each quarter, for every course, his students were encouraged to evaluate him. R. Vol. 16 C3773. By DePaul's own calculations his student evaluations were consistently, overwhelmingly positive. Supp. R. Vol. 3 C633. Former Klocek student Sean Bush said he was a teacher who helped students think outside the box of conventional thought, emphasized the importance of critical thinking, encouraged active and appropriate student participation, and treated students as partners in learning. *Id*. at C598-600. He treated college students as adults not children and engaged in positive interactions and discussions with them *Id*. He conveyed the value of new viewpoints to students, *Id*. at C600, stretched their thinking capacities, *Id.* at C602, and treated students, their ideas, and opinions with respect. *Id*. at C601. According to his former student Gil Raske, he made himself available to students outside of class. *Id*. at C608.

By DePaul's own estimation, Professor Klocek had an unblemished record; never during fourteen years at the SNL did DePaul experience a situation with Klocek in which he lacked judgment, abused his position as a teacher to force his ideas on students, or

treated students with disrespect. R. Vol. 16 C3926. He often attended the Loop Campus' noon masses. R. Vol. 17 C4031. As Father Kevin Collins, the priest who conducted the noon mass, shared with Jim Doyle, Vice President of Student Affairs, in an e-mail the evening of September 15, 2004, Klocek was "more likely to talk an ear off about religious and historical fine points than mean to offend" and was "as gentle as he was opinionated and on the erudite side." Supp. R. Vol. 3 C612.

On September 15, 2004, this "gentle" and "erudite" man with a 14-year, unblemished record of teaching diversity and culture courses to working adults at SNL, went to get coffee at the Loop Campus. R. Vol. 17 C4033. The Loop Student Fair was being held in an adjoining space. *Id*. at C4633. The Fair allowed undergraduate student organizations to set up tables, promote their causes, provide passers-by with literature, and converse with people about their organizations. R. Vol. 18 C4290-4291. Among the many groups there were the Students for Justice in Palestine ("SJP") and the United Muslims Moving Ahead ("UMMA"). R. Vol. 17 C4025.

Prof. Klocek's curiosity led him to the SJP and UMMA tables. R. Vol. 17 C4033. At the SJP table, he found literature which he took up and read. *Id*. at C4034. The material concerned the Palestinian conflict, human rights, and the death of an American woman, Rachel Corrie. *Id*., R. Vol. 1 C37. He approached the students in a nice manner, Supp. R. Vol. 1 C148, asked questions about their organizations, *Id.* at C146, and their materials. R. Vol. 17 C4034. He then listened to the students. Supp. R. Vol. 1 C146. He discussed the Palestinian conflict with the students, explaining that he was knowledgeable on the issues. *Id*. He asked for the students' opinions and shared his. *Id*.

At this point, the evidence diverges. What actually occurred at the activities fair is a matter of much debate and the facts in the record are widely disputed.

According to Klocek

Klocek says he did not identify himself as a professor until after the exchange. R. Vol. 17 C4058. Knowing information contrary to that portrayed in the handout and being concerned the organizations were presenting false and one-sided information, he voiced his concerns about the materials. *Id*. at C4034. He dialogued with the students about the complexity of Israeli-Palestinian relations, the term "Palestinian," and a Neil Steinberg article he had read in the *Chicago Sun Times* quoting the Arab newspaper, *Al Arabiya*. *Id*. at C4034-36, *Sun Times* article at A96, *Al Arabiya* article at 98. He viewed the interaction not as an argument but a five to six minute dialogue. R. Vol. 17 C4037.

Things escalated when Salma Nassar, head of SJP, raised her voice to challenge Professor Klocek on his statement that the word, "Palestinian" was "a generic term that could be used to describe variously a number of ethnic and religious groups prior to 1948 and the formation of the State of Israel." R. Vol. 17 C4036. According to Klocek, Salma Nassar was upset because she felt he denied the existence of her grandparents as Palestinian. *Id*. at C4035. She compared Israel's treatment of the Palestinians to Hitler's treatment of the Jews. *Id*. Klocek then responded by saying that was untrue and called her attention to the *Al Arabiya* article which stated "most terrorists in the world today happen to be Muslim." *Id.* at C4036-37. He did so with the intent of talking "about the record in the world today in terms of negative things." *Id*. at 4037.

When Prof. Klocek realized that the debate was generating more heated emotion than helpful dialogue, he left the tables. *Id*. at C4037. He then spoke with Cindy

Summers, Associate Vice President of Student Affairs, who asked him for his business card because she had heard an account of his interaction with the students. *Id*. at C4040-41. She told him that she would handle everything from there. *Id*. at C4041. He returned to the tables about five minutes later to return the literature he had taken. *Id*. at C4037, C4039. He did not throw pamphlets at the students but placed them back on the stack. *Id*. at C4040. He then told the students "I'm out of here" and made the corresponding dismissive, not obscene, Italian gesture of cupping his hand under his chin and flicking his fingers out. *Id*. at C4039-40. He then left the Fair. *Id*. at C4044.

Prof. Klocek says he acted in a respectful manner towards the students at all times. *Id*. at C4042. He believed they did not respect him as they were unwilling to dialogue about the issues he raised. *Id*. at C4041. He believes college students ought to be treated as adults rather than children, and that as adults, they ought to be able to converse about subjects with which they may disagree and topics as to which they may take umbrage. *Id*. at C4042. His comments and questions for the students were an exercise in academic freedom.

Father Holtschneider, DePaul President, claims that DePaul has adopted the 1940 Statement on Academic Freedom of the American Association of University Professors (AAUP). R. Vol. 18 C4454; see 1940 AAUP Statement at A199. These principles apply to adjunct faculty, R. Vol. 18 C4454, and during student activity fairs. R. Vol. 16 C3768. DePaul claims to be a "free and open environment where vigorous debate is encouraged." R. Vol. 12 C2865, *see also* R. Vol. 16 C3901. Dean Dumbleton understood the policy of academic freedom to protect faculty members from discipline for opinions they express at a student activities fair. R. Vol. 16 C3770.

After DePaul published articles in the *DePaulia*, e-mails, and other documents describing its view of the activities fair (including what Klocek said or did not say, and did or did not do to students), Professor Klocek wrote a letter to the editor in the *DePaulia* denying DePaul's false publications about his statements and conduct. A511. He also responded to what he considered DePaul's serial defamations and disregard of academic freedom at a press conference on March 1, 2005.

The Students' Actions

After the Fair, two of the student activists, Mike Gallo and Ahmed Zahdan, went across the street from DePaul to the Chicago office of the Council on American-Islamic Relations (CAIR) to M. Yaser Tabarra, Executive Director of CAIR Chicago, for advice. Supp. R. Vol. 1 C150. Tabarra recommended formal action. *Id*. He told them to meet, write down their recollections, and complain to DePaul. *Id*. Tabarra's letter to DePaul shows CAIR's intent was to have Klocek fired. R. Vol. 18 C4477.

Still on September 15, the students collaborated on two demand letters, one from UMMA and the other from SJP. A507, A509. They sent both to Dean of Students Greg MacVarish. *Id*. The students stated their collective intent was to demand a public apology from Prof. Klocek. Supp. R. Vol. 1 C148. In the UMMA letter, the students state their intention "that formal action be taken by DePaul University against Professor Klocek," but acknowledge it should be at the "discretion of the university." A507.

Klocek denies: being hostile, R. Vol. 17 C4040, 4041, proclaiming at the start he held a DePaul position of authority, *Id*. at C4040, 4058, making two vulgar hand gestures at students, *Id*. at C4039, using profanity, flinging pamphlets at students, *Id*., interrupting the students, *Id*. at C4041, and needing to be escorted away. *Id*. at C4039-40.

Some of the students later testified contrary to the letter accounts. For example, Mike Gallo testified that Klocek gave the material back to Ben Meyer. Supp. R. Vol. 3 C519. Ben Meyer in turn testified that it was not Klocek but a second faculty member who allegedly threw pamphlets. *Id*. at C543. Salma Nassar and Ben Meyer testified that Klocek pointed, not in the students' faces, but at what was on the their tables. *Id*. C525-6, C517. Salma Nassar testified that she did not feel physically threatened by Klocek, and Assia Boundaoui testified that she and the other students did not feel under compulsion to accept Klocek's views. *Id*. at C581-2.

DePaul's Investigation

After the activities fair, Dean Susanne Dumbleton was authorized to investigate the matter and to take appropriate action regarding the students' assertions. R. Vol. 18 C4444, R. Vol. 17 C4204. She decided to make the matter public, without the permission of Professor Klocek. R. Vol. 16 3836. Neither Dean Dumbleton nor any other person at DePaul made an independent investigation of what took place before publishing. *Id*. at 3797, R. Vol. 18 C4444, R. Vol. 17 C4204. Other than the student letters, Dean Dumbleton relied on the testimony of Student Life officials Amalia Lopez, Jim Doyle, and Cindy Summers. R. Vol. 16 C3816. Their primary responsibility was to look out for the students. *Id*. at C3797. Jim Doyle was not an eyewitness, and learned of the events through, second, third, and fourth hand statements. R. Vol. 17 C4200. Cindy Summers was not a witness to Klocek's interaction with the students. S. R. Vol. 3 C534. Amalia Lopez asked her to have a conversation with Klocek, *Id*. at C533, but Summers admits never asking Klocek or the students what occurred between them. *Id*. at C534. Instead, she talked to Klocek about what Amalia Lopez alleged was his behavior. *Id*. at C534.

Lopez admits that she only witnessed about thirty-seconds of the interaction before she interjected herself into the dialogue after hearing something she, as someone with a Muslim fiancé living in a Muslim community, considered to be over the top. *Id*. at R. Vol. 18 C4302, C4309. Both Lopez and Summers offered to organize a different forum for the conversation Klocek was having with the students. Lopez, *Id*. at C4335, Summers at S. R. Vol. 3 C533. They considered it unnecessary to call security. R. Vol. 18. C4302.

Dumbleton did not contact student body president Wes Thompson, a third party eyewitness with whom she was familiar and who had observations favorable to Prof. Klocek, though she was aware that he had witnessed the incident. R. Vol. 16 C3798.

On the evening of the Student Activities Fair, Father Collins emailed the administration urging caution in evaluating the circumstances, so as not to overreact against Prof. Klocek. Supp. R. Vol. 3 C612. In the email, Rev. Collins informed DePaul that he had recently met with the group of Muslim students involved, and asked DePaul to "[l]et me know if I can be of help as [Prof. Klocek] knows me." *Id*. Nobody in the DePaul administration responded to Rev. Collins' offer to add a moderate perspective.

On September 17, 2004, Dean Dumbleton and Michael DeAngelis met with Professor Klocek and informed him that he was suspended as a result of the September 15 incident, without a hearing. R. Vol. 17 C4044. Dumbleton explained that she had received two documents from the student groups that detailed Klocek's conduct at the Fair and the students' charges against him. Dean Dumbleton, however, did not inform Klocek what those charges were and did not give Professor Klocek a copy of the student letters or even let him read them. R. Vol. 17 C4025. Leading up to the September 17, 2004 meeting, DePaul did not advise Klocek that suspension was a possible result of the

meeting, that he could or should bring counsel, or of any rights to which he was entitled. R. Vol. 17 C4044.

On September 23, 2004, Dean Dumbleton met with representatives from SJP and UMMA, along with their DePaul faculty sponsors, who demanded that Professor Klocek never teach at DePaul again. R. Vol. 16 C3832-3833.

DePaul Goes Public

On October 1, 2004, the *DePaulia*, the official school newspaper of DePaul, ran an article which Prof. Klocek asserts is false and defamatory regarding the September 15 incident. A101. The *DePaulia* attempted to contact Klocek for his side of the story about ten hours before publication, but the parties never connected. R. Vol. 17 C4047. The *DePaulia* published the article anyway.

Prior to going public DePaul did not warn Klocek, give him any sort of due process, a hearing of any kind, or a process for review of DePaul's decision to go public. After the fact, on November 3, 2004 and April 6, 2005, the DePaul Faculty Council expressly clarified that the Faculty Handbook section on discipline and separation entitled Prof. Klocek "to notice, due process, fair hearing and timely review." A516.

On October 8, 2004, the *DePaulia* published Dumbleton's letter about Klocek. A153. In the weeks following September 15, Dean Dumbleton sent emails to students, alumni, journalists, and others discussing the incident and Klocek's alleged conduct and statements. She e-mailed "Resident Faculty" on October 4, 2004, sent an email to Sumi Cho of the same date, a number of emails on October 5, 2004, and on March 30, 2005, drafted letters to Joseph and Ann Howard. A106, A108, A130, A161, A170, A173. President Holtschneider published an article in the *Rocky Mountain News* on April 19,

2005, which was sent to numerous people and appeared in various newspapers around the country, also discussing Klocek's alleged conduct and statements. A165. During this time, DePaul University also issued a press release about Klocek, A159, and on or about March 31, 2005, Robin Florzak submitted a story to the Post Online. A168.

Klocek never again taught at DePaul. R. Vol. 17 C4055. He suffered major depression as a result of DePaul's defamation of his character, and a significant drop in his income. R. Vol. 17 C4031, 4054-55. He claims his academic and professional reputation was seriously damaged, and that he suffered great embarrassment among family and friends. *Id.*

DePaul contends that Klocek had medical conditions which negatively affected him on September 15. *See, e.g.* R. Vol. 17 C4027-30. Klocek denies it, and the medical evidence is to the contrary. *See*, *e.g.* R. Vol. 17 C4053-54.

PROCEDURAL HISTORY

This action has spanned four and one-half years and four judges. Professor Klocek filed his Original Complaint on June 14, 2005. R. Vol. 1 C3. After receiving a small amount of discovery from DePaul, he filed his First Amended Complaint on October 11, 2005. Supp. R. Vol. 3 C653. The First Amended Complaint sought damages for defamation *per se* (Counts I-IV), false light invasion of privacy (V-VI), public disclosure of private information (VII-VIII), breach of contract (IX), declaratory judgment (X), and injunctive relief (XI). On January 30, 2006, Chancery Court Judge Donnersberger dismissed Klocek's contract and related equity claims (Counts IX-XI) and transferred the tort claims to Judge Nudelman of the Law Division. R. Vol. 3 C512-14.

Shortly after this DePaul provided Klocek with the bulk of its discovery. In all, DePaul produced about 7,000 pages of documents. More than 30 depositions were taken from Nov. 2006 to Jan. 2009. All documents which Prof. Klocek claims are defamatory are DePaul-created documents from 2004-05, produced to Prof. Klocek in discovery.

On May 31, 2006, Judge Nudelman denied Defendants' Motion to Dismiss Klocek's defamation per se claims but dismissed Klocek's false light and public disclosure of private information claims, with leave to replead. R. Vol. 3 C605. Klocek filed a Second Amended Complaint on July 20, 2006, which replead the false light claims as Counts V-VI. R. Vol. 3 C719. The defamation *per se* claims remained as Counts I-IV. Judge Kelley then replaced Judge Nudelman on the bench.

When Klocek filed his Second Amended Complaint in July 2006, A51, his attorneys did not have all the DePaul discovery documents organized or categorized as to which presented actionable defamation/false light invasion of privacy; and for those which were actionable they had not yet determined which specific statements in each document were actionable. Also, DePaul employee depositions did not begin until November 2006 and were not completed until 2008. So they focused their allegations in the Second Amended Complaint on the main publications, Exhibits D, J, L, O and P as illustrations of their claims in the 24 attached publications.

The 24 actionable publications were contained in Exhibits D, E, F, G, H, J, K, L, M, O, P, Q, R, S, T, U, V and W. Exhibits begin at A100. Klocek's attorneys also did not itemize the individual actionable statements in each exhibit, pending further analysis *after* the depositions. These 24 exhibits were used in a number of the more than 30 depositions. All parties knew as discovery proceeded that all 24 documents were alleged

as part of the case for defamation. The Defendants did not challenge the lack of specific allegations in these documents until presenting two §2-615 motions on March 11, 2009. A434, A445. Ultimately, Klocek's attorneys determined that the 24 actionable publications contained 119 defamatory/false light statements. They disclosed this to the Court and opposing counsel on January 30, 2009 in the briefing on summary judgment.

Defendants have admitted of record that they understood that all 24 exhibits were part of the causes of action. In their January 15, 2009 motion for partial summary judgment they admitted "Plaintiff's Second Amended Complaint includes [Exhibits E, F, G, H, Q, R, S, T, U, V and W] *containing allegedly defamatory statements*" (emphasis added) authored by various DePaul employees. A363-367. Likewise, in the two motions first presented to the Court on March 11, 2009, defendants moved to dismiss each of the 24 attachments to the Second Amended Complaint under Code § 2-615. A434, A445.

On April 10, 2007, in a 17-page memorandum opinion and order, Judge Kelley reaffirmed Judge Nudelman's denial of Defendants' motion to dismiss the defamation *per se* claims (Counts I-IV) as to 22 of the 24 DePaul publications attached to the Second Amended Complaint. A7. He rejected defendants' contentions that the publications were nonactionable opinion or subject to innocent construction. Judge Kelley also recognized that all the exhibits to the Second Amended Complaint were alleged to be actionable, and not just Exhibits D, J, L, O and P. For example, Judge Kelley specifically noted that Exhibits E, M, Q and R were alleged to be actionable. A11. Judge Kelley also upheld both of Klocek's false light counts as repled (V-VI) as to all 24 of the exhibits. A22. In January 2008, Judge Kelley left the bench and Judge Winkler replaced him. On May 29, 2008, Judge Winkler set the case for jury trial starting March 16, 2009.

On December 10, 2008, Prof. Klocek filed a motion for leave to file his Third Amended Complaint, with a copy of the proposed Third Amended Complaint attached. Supp. R. Vol. 3 C646. Discovery was scheduled to close on October 31, 2008 (it was later extended to January 31, 2009). Coming at the end of discovery, the Third Amended Complaint was presented to the Court as Prof. Klocek's best effort to state his case on the merits. As to the defamation and false light counts, it distilled from 7,000 pages of DePaul documents approximately 50 DePaul publications as grounds for Prof. Klocek's defamation/false light claims, some of which had not been attached to the Second Amended Complaint, and added two new DePaul defendants. R. Vol. 12 C2786. Perhaps most importantly, it individually itemized each defamatory statement in the 50 DePaul publications at issue. *Id*. On December 30, 2008, the Court denied leave to file the Third Amended Complaint. A27.

On December 11, 2008, defendants filed a motion for summary judgment challenging just 12 of the 119 defamatory/false light statements contained within just 9 of the 24 documents attached to the Second Amended Complaint. A217. On February 23, 2009, Judge Winkler dismissed three of the twelve statements as "substantially true." A30. Judge Winkler also dismissed the remaining 9 statements in Exhibit D (10/1/04 *DePaulia* article at A101), Exhibit M (Dumbleton 10/4/04 email at A161) and Exhibit P (Robin Florzak article of 3/31/05 at A168) as nonactionable opinion. A30. Further, Judge Winkler dismissed Exhibits D, M and P *in their entireties* as nonactionable opinion, notwithstanding the fact that Exhibits D, M and P contained many actionable statements upon which he had not ruled. A30.

On March 11, 2009, defendants first presented two § 2-615 motions to dismiss Exhibits D, E, F, G, H, J, L, M, P, Q, R, S, T, U, V, and W. A434, A445. The Court denied Prof. Klocek's oral request for an opportunity to respond in writing to the motions, and on March 11, 2009, just five days before trial, dismissed the exhibits in their entireties. A32. At Prof. Klocek's request, the trial date of March 16, 2009 was stricken.

On March 20, 2009, the Court entered its Memorandum Order and Opinion dismissing Klocek's entire case for defamation and false light invasion of privacy. A34.

Later on March 20, 2009, Klocek filed a motion for leave to file his Fourth Amended Complaint, with a copy of the Fourth Amended Complaint attached. This complaint was similar to the Third Amended Complaint in that it individually itemized each defamatory and false light statements in each of the DePaul publications at issue. The Court denied the motion on June 4, 2009. A49.

The case became final as to all parties and issues on June 4, 2009, when Prof. Klocek withdrew his pending motion for sanctions against one of defendants' attorneys. The motion for sanctions had been filed on March 21, 2008. It was continued generally on April 15, 2008, recognized on March 23, 2009 as "pending", set for status on May 18, 2009, and, as above, withdrawn on June 4, 2009. A50.

ARGUMENT

I. The Circuit Court erred in finding as a matter of law that there are no defamatory and false light statements in Klocek's entire case.

This appeal will first address the Court's error in denying leave to file an amended complaint and dismissing all the publications/statements attached as exhibits to the Second Amended Complaint but not set forth as independent counts therein. Because most were dismissed under Code § 2-615, it is axiomatic that Prof. Klocek should have

been allowed to amend. *Cordts v. Chicago Tribune Co.*, 369 Ill.App.3d 601, 612-13 (1st Dist. 2006). Second, this appeal will address the error of the Court's decisions of law which led to dismissal of the first six counts of Plaintiff's Second Amended Complaint.

Plaintiff seeks reversal and remand of the case; with leave to file his Third or Fourth Amended Complaint or, in the alternative, for a jury trial on the merits of his claims in the Second Amended Complaint and 24 attached exhibits.

A. The Circuit Court Erred in Denying Prof. Klocek Leave to File His Fourth Amended Complaint.

Until the ruling on February 23, 2009, Prof. Klocek understood that he was going to trial on March 16, 2009 with all six of his tort claims from the Second Amended Complaint intact. He had had this understanding as to the merits of his case from the time of Judge Nudelman's denial of defendants' motion to dismiss the defamation counts on May 31, 2006 and Judge Kelley's denial of the motion to dismiss all the defamation and false light counts on April 10, 2007. A7. Until February 23, 2009, he had no reason to believe that the Court would find any defects in his case as presented in the Second Amended Complaint and expected the jury to decide his claims.

Throughout oral discovery, from November 2006-January 2009, all parties understood that the 24 publications attached to the Second Amended Complaint were part of Klocek's cause of action. The 24 attachments were DePaul-created documents from 2004-05 produced in discovery, and used as exhibits in some of the 30-plus depositions taken in the case. The rulings of February 23 (A30), March 11 (A32), and 20, 2009 (A34), were the first-ever negative rulings on the defamation or false light claims and represented the first indication from the Court that the pleadings needed to be amended.

As noted above, the § 2-615 motions brought on March 11, 2009, resulting in the *first-time* dismissal of most of Prof. Klocek's case, should have triggered a right to amend. *Id.*

The Circuit Court's denial of leave to amend is to be reviewed for abuse of discretion based on the following four factors: "(1) whether the proposed amendment would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment is timely; and (4) whether previous opportunities to amend the pleading could be identified." *Loyola Acad. v. S & S Roof Maint., Inc.*, 146 Ill. 2d 263, 273 (Ill. 1992).

As to the third and fourth factors, the motion for leave to file the Fourth Amended Complaint was timely, because it was filed March 20, 2009. *Loyola Acad.*, 146 Ill.2d at 275 (1992); *Steadfast Insurance Co. v. Caremark RX, Inc.*, 373 Ill.App.3d 895, 901 (1st Dist. 2007); *Selcke v. Bove*, 258 Ill.App.3d 932, 939 (1st Dist. 1994). Each of these cases agrees that timeliness is measured by the event triggering the need for an amendment. Also, Klocek sought leave to file his Third Amended Complaint on December 10, 2008, as discovery was closing, but was denied. This adds force to the conclusion that his attempt to amend on March 20, 2009 was timely. See, *Selcke*, 258 Ill. App.3d at 939.

As to the second factor, there was no prejudice to defendants in filing the Fourth Amended Complaint, because it presented no new causes of action, parties or defamatory publications beyond the Second Amended Complaint filed on July 20, 2006. See, *Selcke*, Ill. App.3d at 938 ("The proposed amendment merely sought to provide a greater factual basis for the very same claim that we currently before the trial court.")

Accordingly, the factors of timeliness, previous opportunities to amend and prejudice or surprise to the defendants were in Klocek's favor. *Loyola Acad.*, 146 Ill.2d

at 275-76. The March 16, 2009 trial date was vacated, relieving the pressure of imminent trial, and no final order had been entered in the case when the motion to amend was presented, adding force to the conclusion that the amendment should have been allowed.

The final factor, whether the proposed amendment would cure the defective pleading, also favored Klocek. In February and March, 2009 the Court made first-time, adverse rulings in the case which included (rulings at A30, A32, A34): (1) Dismissing the 10/1/04 *DePaulia* article for want of proof of actual malice; even though the proper standard was negligence, because the article was written before March 1, 2005 (i.e. Klocek could not yet have been a public figure) and the Court found "The *DePaulia* article … is not subject to a qualified privilege."; (2) Dismissing on March 11, 2009, on defendants' 2-615 motions, Exhibits D, M, P, J, L, E, F, G, H, Q, R, S, T, U, V, and W to the Second Amended Complaint, in their entireties, and *refusing Prof. Klocek the opportunity even to brief the motions*, which were first presented on the morning of March 11 2009; (3) Dismissing in their entireties as non-actionable opinion Exhibits D, M, O and P, again with no briefing or argument, and the Court having considered only several of the large number of actionable statements contained in the exhibits; (4) finding that "the plaintiff have [sic] not adduced any evidence that the defendants acted at any time with actual malice."; (5) finding that "the defendant showed uncontested evidence that the *DePaulia* article, written by a student, was [not] published with actual malice."; and (6) finding that "The defendants … have shown uncontested evidence that the University conducted a reasonable investigation and provided opportunities for input."

As Klocek's summary judgment response brief demonstrated, A262, there is a plethora of evidence in the record demonstrating DePaul's actual malice and/or reckless

disregard for the truth or falsity of their published assertions; and demonstrated that DePaul's prepublication investigation was *not* reasonable. This is detailed below.

Leave to file the Fourth Amended Complaint should have been granted because it isolated each publication at issue, and *identified every statement* at issue in each publication. A471-490. It reorganized the evidence of malice and reckless disregard, and added significant detail, so that the evidence would not be missed. A463-68, 470-71.

It also added significant detail about the biased, one-sided nature of DePaul's investigation, and the facts favoring Prof. Klocek, which DePaul would have discovered had it done a reasonable investigation. A463-468. This included the failure to speak with Student Body President Wes Thompson, an eye-witness to the event who had observations favorable to Klocek; and with DePaul priest and employee, Father Kevin Collins, who knew Klocek and in writing offered DePaul cooperation in the investigation and a positive view of Prof. Klocek. A463-464. It also presented facts and evidence that the DePaul administration had in the past instructed its public relations department not to go public with internal disputes, which DePaul clearly could have done with Prof. Klocek. A467-468. Such a wise and deliberate approach would have allowed the matter to be resolved privately, without harm to Prof. Klocek's reputation.

As more evidence of DePaul's malice and reckless disregard, the Fourth Amended Complaint added evidence of the deliberations and decisions of the DePaul Faculty Council in favor of Prof. Klocek, and DePaul's refusal to abide by the Faculty Council's decisions. A470-471. (This evidence of the Council's actions in 2004-05 was *first disclosed to Prof. Klocek on October 24, 2008*). The Fourth Amended Complaint also provided more analysis of DePaul's commitment to academic freedom, which

provided the impetus for Klocek to engage the students on September 15, 2004; but which DePaul disregarded in railroading Klocek. In sum, the Fourth Amended Complaint added significant factual detail in this complex case, attached 51 exhibits, and reorganized the Second Amended Complaint so as to present the evidence more clearly.

Prof. Klocek disputes the Court's conclusion that he previously did not present valid claims for defamation/false light. But, the Fourth Amended Complaint presented the matters the Court concluded were missing in more detail. It rectified defendants' claimed deficiency in its 2-615 motions, first presented on March 11, 2009, that the Second Amended Complaint did not identify the specific actionable statements in Exhibits E, F, G, H, Q, R, S, T, U, V and W. The Fourth Amended Complaint was sufficient to cure any defects in the case before the Court. Prof. Klocek should have been allowed to file it. *Loyola Academy*, 146 Ill.2d at 274-75; *Selcke*, 258 Ill. App.3d at 938.

Even after summary judgment, amendments are to be allowed liberally: "Before or after the entry of a summary judgment, the court shall permit pleadings to be amended upon just and reasonable terms." 735 ILCS 5/2-1005(g). As held by the Court in *Ryan v. Mobile Oil Corp.*, 157 Ill.App.3d 1069, 1075 (1st Dist. 1987):

> … doubts should be resolved in favor of allowing amendments. 'The liberal policy of permitting amendments to pleadings is in accord with the salutary principle that controversies ought to be settled on their merits in accord with the substantive rights of the parties.'

In *Blazina v. Blazina*, 42 Ill.App.3d 159, 165 (2nd Dist. 1976) the court held "[T]he greatest liberality should be applied in allowing amendments." In sum, the court was "to remove obstructions which preclude the resolution of a case on its merits…." *Cvengros v. Liquid Carbonic Corp.*, 99 Ill.App.3d 376, 379 (1st Dist. 1981).

As detailed in *Blazina*, even when the proposed amendment is outside the usual, established rules for amendments (which is not so in our case) the trial court may be reversed for denying the amendment, if allowing it would be "in furtherance of justice". *Blazina*, 42 Ill. App.3d at 165-66. The Circuit Court should be reversed.

B. The Court Erred In Striking Exhibits D, M, P, and O to the Second Amended Complaint As Containing Only Non-Actionable Opinion.

Although Judges Nudelman and Kelley rejected the contention that these publications contained *any* nonactionable opinion, the Court reversed the previous rulings to find on summary judgment that Plaintiff's Exhibit D (October 1, 2004 *DePaulia* Article at A101), Exhibit M (Dumbleton's October 5, 2004 email at A161), and Exhibit P (Robin Florzak Article at A168) contained *only* non-actionable opinion. A30. The Court also found Exhibit O (Holtschneider's letter to the Rocky Mountain News at A165) to be identical to Exhibit P and "cannot reasonably be interpreted to state actual facts." A36. The Court's only cited reason for these conclusion was: "See Imperial Apparel [citation omitted] (Explaining that while there is no Constitutional protection for statements of opinion, if a statement cannot be reasonably interpreted as stating actual facts, it is not actionable)." *Id*

There was no basis for the Court's sudden change of course to accept arguments twice rejected (by Judges Nudelman and Kelley in upholding all of these publications as bases for Klocek's defamation *per se* claims). From the time of Judge Kelley's decision in April 2007 to the time of Judge Winkler's ruling in February 2009, and at all times relevant, the Illinois approach to non-actionable opinion was guided by the Restatement (Second) of Torts, the same reasoning Judge Kelley followed in his opinion. *Imperial Apparel v. Cosmo's Designer Direct, Inc.*, 227 Ill.2d 381, 400 (2008). Whether an

allegedly defamatory statement is entitled to an innocent construction in an action for defamation *per se* is a question of law, which should be reviewed *de novo*. *Missner v. Clifford*, 393 Ill. App.3d 751, 766 (1st Dist. 2009).

The test to determine whether a defamatory statement is a constitutionally protected opinion is a restrictive one. *Bryson v. News Am. Publs.*, 174 Ill.2d 77, 98 (1996). Statements capable of being proven true or false are actionable as defamation *per se*; opinions are not. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19 (1990). However, the fact that a statement is phrased in the form of an opinion does not cloak it with First Amendment protection. *Imperial Apparel*, 227 Ill. 2d at 397; *Solaia Tech., LLC v. Specialty Publ'g Co.,* 221 Ill. 2d 558, 581 (2006). Even when presented as apparent opinion or rhetorical hyperbole, a statement may still be actionable defamation. *Id*. Additionally, there is a stronger presumption for defamation against a school teacher; a publication could be found to disparage his teaching ability and integrity because it presented him as someone who would not be an acceptable role model for students. *Kumaran v. Brotman*, 247 Ill. App. 3d 216, 227 (1st Dist. 1993).

The Illinois Supreme Court has held that the court's initial determination whether a statement is one of fact or opinion asks if the average listener could have interpreted the remark as a statement of fact. *Kolegas v. Heftel Broadcasting Corp.,* 154 Ill.2d 1, 16 (1992). Once this determination is made, it is the jury's job to determine whether the statements were actually true or false. *Kumaran*, 247 Ill. App.3d at 228.

In determining whether an average listener could have interpreted a statement as fact, a court should consider the totality of the circumstances. *Kolegas,* 154 Ill.2d at 16; *Moriarty v. Greene*, 315 Ill.App.3d 225, 247 (1st Dist. 2000); *Kumaran*, 247 Ill.App.3d at

288. A statement of fact usually concerns the plaintiff's conduct or character. *Id.*; Restatement (Second) of Torts § 565, cmt. A (1977). Illinois courts look to three factors to separate fact from opinion: (1) whether the statement has a precise and readily understood meaning, (2) whether the statement is verifiable, and (3) the statement's literary or social context to see whether it signals it has factual content. *Solaia*, 221 Ill.2d at 581; *Rose v. Hollinger Int'l, Inc.*, 383 Ill. App.3d 8, 17-19 (1st Dist. 2008).

The literary and social contexts of a publication are of critical importance in determining whether the publication is factual in nature or opinion. *Solaia*, 221 Ill.2d at 581. All 24 DePaul publications at issue were created in literary and social contexts portrayed as literal, newsworthy, and factual in nature. Each publication purported to describe the encounter of September 15, 2004; sometimes blow by blow and sometimes more generally, but always in a factual sense. DePaul's writings reveal its intent to say that Prof. Klocek engaged in specific conduct and made specific statements.

Illinois Courts have determined that an average listener may interpret remarks as defamatory statements of fact, even though broad, general language is used. In *Solaia*, a letter claiming that plaintiffs' patent was "essentially worthless,*being used to generate settlement proceeds*filing claims 'to make a lot of money,' regardless of the means" was actionable fact. *Solaia* at 583-84. Though the phrase "essentially worthless" had no precise meaning in the abstract, it had a very precise meaning in context. *Id*. at 584. Although the letter "undoubtedly employs hyperbole," the Court held the statement was not an opinion, but fact. "Under its metaphorical chaff hides a kernel of fact: Solaia Technology secured a worthless patent and files infringement claims with the sole aim of extracting settlements." *Id*.

In *Moriarty*, the statement by a newspaper columnist that a child psychologist "has readily admitted that she sees her job as doing whatever the natural parents instruct her to do," was actionable because it was a factual assertion capable of being proved true or false. *Moriarty*, 315 Ill. App. 3d at 233. In *Kumaran*, the court found that the gist of the article-that plaintiff was "working a scam" by filing frequent, unwarranted lawsuits to procure pecuniary settlements – concerned plaintiff's conduct and his character, which suggests that it was factual. *Kumaran*, 247 Ill.App.3d at 228.

The First Amendment prohibits defamation actions based on loose, figurative language that no reasonable person would believe presented facts. *Imperial Apparel*, 227 Ill. 2d at 398 (where the text of an ad was artless, ungrammatical, sophomoric and sometimes nonsensical). In addition, the First Amendment prohibits defamation actions when courts find that the plaintiff has alleged only generalized statements. *See Green v. Rogers*, 234 Ill.2d 478, 498 (2009); *Green v. Trinity Int'l Univ.*, 344 Ill. App.3d 1079, 1093-94 (2d Dist. 2003). Although these are recent cases, they do not change the Restatement analysis of fact versus opinion. *Imperial Apparel*, 227 Ill.2d at 400.

Recently, the Supreme Court found that the remarks of a little league president could not be reasonably interpreted as stating actual facts when they were confined to the context of little league coaching, and did not impute a lack of integrity in the plaintiff's chosen professions (dentistry and law). *Green*, 234 Ill.2d at 501-2. Furthermore, because he allowed the plaintiff to be an assistant coach rather than a head coach, and did nothing to protect children from being in the plaintiff's presence, the Court found that the defendant was accusing the plaintiff of only the most innocuous forms of misconduct. *Id*.

These instances are very different in tone and nature from DePaul's 24 publications about Klocek. Objectively, DePaul's statements were intended as specific assertions of fact. The Circuit Court should have allowed a jury to determine whether the statements were actually true or false.

1. The Court erred in finding that the October 1, 2004, *DePaulia* Article (Ex. D to the Second Amended Complaint) contained only non-actionable opinion.

The literary context of the October 1 article is a description of the events that took place at the Student Fair, which implies factual content. A101. The social context is a front page newspaper article describing an event of interest to DePaul students, faculty and administrators, and those with a broader interest in the university; again implying a factual content. The following statements (illustrative, not exclusive) from the article describe Prof. Klocek's conduct and a jury could find them to be true or false. They have a precise and readily understood meaning, verifiable by a jury:

- whether Klocek was "making statements such as, 'there is no such thing as a moderate Muslim, you are all fanatics,"
- whether he "returned with our leaflets in his hand and threw the leaflets and information at our table and walked away," and
- whether he "turned to the students and made an obscene hand gesture."

Additionally, the following statements are objectively verifiable and describe Klocek's conduct and character:

- Klocek caused the students to "suffer" a "loss of intellectual empowerment," and
- Klocek was exerting "unfair use of faculty power over students."

The precise and readily understood meaning of the statements is that Klocek engaged in conduct and said things reflecting poorly on his abilities as a university professor, and that DePaul was required to remove him so as to protect the physical and academic well-being of its students. Like the phrases in *Solaia*, the allegations that the students "suffered a loss of intellectual empowerment" and that Prof. Klocek exerted "unfair use of faculty power over students" have a sufficiently precise meaning in the context of a university newspaper article to constitute defamation. The average jury is capable of deciding the truth or falsity of the claims. *Solaia*, 221 Ill.2d at 583-4.

Whether Prof. Klocek exerted "unfair use of faculty power over students" hinges partly on the factual issue of when he identified himself as a professor. According to the students' letter, Klocek identified himself as a professor immediately at the outset of the event. Klocek, however, stated in his deposition that he did not identify himself as a professor until he was leaving the Fair, and then only in response to a question from one of the students. R. Vol. 17 C4058. From Klocek's version of the facts, which must be credited on summary judgment, the students were not even aware that Klocek was a member of the faculty throughout the actual exchange. Beyond this, it is undisputed that none of the students had heard of or had a class with Klocek before or at the time of the fair. Thus, in keeping with the test in *Solaia*, 221 Ill.2d at 581, DePaul's accusation that Klocek asserted an "unfair use of faculty power over students" has a "precise and readily understood meaning," and its falsity is verifiable by the jury.

Similarly, some of the statements in the October 1st article are written as quotations attributed to Klocek, and present the quintessential "he said/she said" dilemma best left for a jury. These are pure fact questions. In sum, DePaul wrote everything as

though it actually happened as stated. Consistent with this is the fact that nowhere in this publication is displayed any efforts at hyperbole, joking, or the kinds of insults that arise between business competitors at issue in *Imperial Apparel*. This news story strikes a serious tone and is presented as fact-based and newsworthy in context. The Circuit Court erred in striking this article as containing only non-actionable opinion.

2. The Court erred in finding that Dumbleton's October 5 Email (Exh. M to Second Amended Complaint, A161) contained only non-actionable opinion.

The Court erred in finding Dumbleton's October 5 email to be non-actionable opinion in its entirety because it overlooked the core of fact contained in DePaul and Dumbleton's statements. They published that Klocek:

- "abused his position as a teacher to force his ideas upon students,"
- "lacked judgment,"
- "treated students with disrespect," and
- made an "*assault* on [students'] dignity, beliefs, and *individual selves*," (emphasis added.)

All of the above statements point to Prof. Klocek's conduct and/or character, and in context are linked to facts capable of being proven true or false. This is not loose hyperbolic language that would negate the impression that the writer was seriously maintaining that Klocek was an unfit professor. *Kumaran*, 247 Ill. App.3d at 288.

The literary and social context of these statements, an email from a college dean to a concerned individual plus DePaul employees, also indicates that a reasonable reader would understand the statements to be factual. Dumbleton replied to an inquiry regarding the incident, and made the statements as assertions of the events at the Student Fair.

The statement that he "abused his position as a teacher to force his ideas upon students" implied to a reasonable reader that Klocek's dialogue with the student activists was in a professor-student context. This factual implication was false for purposes of summary judgment. Not only was there a dispute as to when Klocek identified himself as a professor (and the related question whether the students even recognized they were dialoguing with a professor) there is no dispute as to the following facts:

- Klocek did not have any of these students in any of his classes at any time, nor was he likely to as none of the students were part of the School for New Learning.
- Klocek had no position of authority whatever over the students.

Therefore, the Circuit Court erred in finding Dumbleton's October 5 email contained only non-actionable opinion.

3. The Court erred in finding Florzak's article (Exh. P to Second Amended Complaint, A168) to be non-actionable opinion.

Klocek alleges that DePaul accused him of "inappropriate and threatening behavior directed at our students," that he "threw pamphlets at students, pointed his finger near their faces and made a gesture interpreted as obscene," and "acted in a belligerent and menacing manner toward students." Florzak's intent to state facts is clear in that the assertions are verifiable and have "a precise and readily understood meaning".

Florzak accuses a previous columnist of not calling DePaul to "check their facts," and then proceeds to supply the "facts" of what occurred. Given this literary and social context, the statements had a very precise meaning, that Klocek did not live up to the "highest professional standards of behavior" required of DePaul's faculty. Contrary to *Green v. Rogers*, these statements do impute a lack of integrity in Klocek's chosen profession, and the article asserts that the students needed protection from Klocek

("DePaul took action to protect our students and maintain a professional standard of conduct at the university."). *Green*, 234 Ill.2d at 501-2. Therefore, the Circuit Court erred in finding Florzak's article to be non-actionable opinion.

4. The Court erred in finding Holtschneider's article (Exh. O to the Second Amended Complaint, A165) to be non-actionable opinion.

The Circuit Court erred in finding Holtschneider's article to be non-actionable opinion. The factual allegations in this exhibit are similar to those in the preceding exhibit. The only support the Court gives to its holding is the citation to *Imperial Apparel*. However, *Imperial Apparel* supports the Restatement analysis of fact versus opinion, which requires a jury decision on the actionability of this article. *Imperial Apparel*, 227 Ill.2d at 400. The Court also stated that the sole differences between this article and Florzak's article (Exh. P) are where it was published and the author of the piece. A36. This is not the case.

Holtshneider adds one significant statement, "while he attended to personal health issues that we discovered were impacting his effectiveness in the classroom." A73. Whether Klocek had health issues and whether health issues impacted his effectiveness in the classroom are disputed issues. It is clear that an average reader could interpret this statement, as well as the statements Holtschneider repeats from Florzak's article above, as statements concerning the conduct of Prof. Klocek.

Also, Holtschneider reemphasizes the need to protect students from Klocek by stating that "the university has a responsibility to protect students, and we cannot maintain an academically free environment when students feel threatened or disrespected," and repeats Florzak's claim that DePaul "took action to protect our students and maintain a professional standard of conduct at the university," by

suspending Klocek. A165. This is a clear indication that Holtschneider was not accusing Klocek of the most innocuous forms of abuse and misconduct, but of the worst forms of abuse and misconduct from which he needed to protect students. *Green*, 234 Ill.2d at 501-2. These are statements of fact, not opinion.

C. The Court erred in dismissing Exhibits D, M, P, J, L, E, F, G, H, Q, R, S, T, U, V, and W to the Second Amended Complaint on § 2-615 motions without briefing and without allowing an amended complaint

These exhibits contain attacks on Klocek's conduct and character and constitute defamation *per se*, based upon the underlying facts detailed above. Exhibits begin at A101. For example, on October 5, 2004, Dean Dumbleton wrote to student Shakur "You are absolutely correct that no students should ever have to be concerned that they will be verbally attacked for their religious belief or ethnicity…. No one should ever use the role of teacher to demean the ideas of others or insist on the righteousness of an opinion…. I said I regretted the assault on their dignity, their beliefs, their individual selves and that I was sad that they were experiencing pain at the hands of a member of the faculty of my school." A133.

On October 4, 2004 Dean MacVarish wrote to a student "Please be sure that this behavior will not be tolerated." A120. On October 8, 2004 Dean Dumbleton wrote to a student, "As I noted when I met with students on Thursday, Sept. 23, this adjunct teacher has been at the School for New Learning for fourteen years. Never during that time have we experienced a situation in which he lacked judgment, abused his position as a teacher to force his ideas upon students, or treated students with disrespect." A123.

Most of the exhibits are DePaul responses to e-mails from students professing to have knowledge of the events of September 15, 2004. In context it is clear that the e-

mails are factual in nature. These publications should not have been dismissed. As to amending the complaint, Klocek reincorporates his arguments from §§ I. and I.A.

D. The Trial Court Erred In Striking Entire Articles Simply Because They Did Not Refer to Thomas E. Klocek By His Name.

On April 10, 2007, Judge Kelley ruled that all of the statements Klocek alleged were sufficiently plead as defamation *per se*, except he struck two articles because they did not specifically state Thomas E. Klocek's name in their description of the events of September 15. A10-11.

Rather than asking whether the statements could reasonably refer to someone else (innocent construction), the Court strained to find one reader who might not be able to connect the two. This was improper. *Bryson*, 174 Ill.2d at 94. (Courts should not strain to find an unnatural innocent construction.) The decision was a misapplication of Illinois law and should be reviewed *de novo*. *See Id*.

There is no automatic ban on recovery for defamation *per se* if the plaintiff is not named. *Muzikowski v. Paramount Pictures Corp.*, 322 F.3d 918, 925 (7th Cir. 1996); *Patlovich v. Rudd*, 949 F. Supp. 585, 591 (N.D. Ill. 1996). The First Dist. App. Court recently affirmed that *Bryson* is the leading case addressing the identity of the plaintiff in innocent construction analysis, and that the *Bryson* analysis applies when the plaintiff has not been named explicitly in the defamatory statement. *Missner*, 393 Ill. App.3d at 766; *Bryson*, 174 Ill. 2d at 96-97. *Bryson* states that where a libelous publication does not name the plaintiff, it should appear on the face of the complaint that 1) persons other than the plaintiff and the defendant must have reasonably understood that the article was about the plaintiff and 2) that the allegedly libelous expression related to her. *Bryson*, 174 Ill.2d at 96-97. The preliminary determination is properly a question of law to be

resolved by the court in the first instance; whether the publication was in fact understood to be defamatory or to refer to the plaintiff is a question for the jury. *Chapski*, 92 Ill.2d at 352. So, the only question for the Court was whether *any* reasonable person would understand the article was about Prof. Klocek. *Bryson*, 174 Ill.2d at 97; *Imperial Apparel v. Cosmo's Designer Direct*, 367 Ill. App.3d 48, 58 (1st Dist. 2006), *rev. on other grounds*, 227 Ill.2d 381 (2008); *Chapski v. Copley Press*, 92 Ill.2d 344, 352 (1982).

The *DePaulia* published an article on October 1, 2004 to DePaul students, faculty, alumni, and other Chicagoans which read: "Professor Thomas E. Klocek, a *part-time professor in the School of New Learning*, was *suspended* after a public display was created around inappropriate and offensive comments he made to the student organizations *Students for Justice in Palestine (SJP) and United Muslims Moving Ahead (UMMA)*," and that this occurred at the "*Sept. 15 Loop Campus involvement Fair*." A101. The article stated "A group of approximately 12 university faculty and staff members, not including Klocek, *met with the students on Thursday, September 23* to discuss the *incident*." A102 (Emphases added).

On October 8, 2004, the *DePaulia* printed Dumbleton's Letter to the Editor, one of the two exhibits Judge Kelley struck. A153. Dumbleton began the letter by referencing the October 1, 2004 *DePaulia* article: "I want to commend you for your coverage of the incident in which a part-time faculty member from my college offended members of Students for Justice in Palestine and United Muslims Moving Ahead." There is no question that the October 1st article prominently published Klocek's name in multiple places. Because the October 8 letter reincorporates the October 1 article, which names Klocek, extrinsic evidence is not necessary to demonstrate that the reference in the

October 8, 2004 letter is to Prof. Klocek. See, *Solaia*, 221 Ill.2d at 582 (reference in later article to the earlier article incorporates earlier defamatory statements into the later).

Moreover, the October 8 letter repeats much of the same language as the October 1 article: "coverage of the incident in which a *part-time faculty member from my college [School for New Learning]* offended members of *Students for Justice in Palestine and United Muslims Moving Ahead*." A153. Later, Dumbleton refers to the date and place of the "*incident*," stating that it was "on *September 15, at the Loop Student Involvement Fair*." Further, Dumbleton refers to her "*meeting with the students on September 23*," where she stated "this teacher had been *removed from class*." (emphasis added). By the time the letter was published on October 8, many people had read the October 1 article naming Klocek, the October 5 email naming Klocek, and read or heard other accounts of DePaul's version of the September 15 incident and Klocek's subsequent suspension.

DePaul also issued an undated press release which does not include Klocek's name. This press release was issued "relatively early" and sent to all of the DePaul faculty and staff, which constituted about 3,000 people. R. Vol. 18 C4460-61. It is possible that this press release was also sent to all students. *Id*. If so, the press release was sent to 28,000 people. A154. The press release describes Klocek's position and the event specifically. Specifically, DePaul states that "in *September of 2004* DePaul University held a *student organization fair at the Loop Campus*," and "a *part-time, adjunct instructor* passing by the fair made abusive statements and gestures to students staffing *two Muslim organization tables*." DePaul also states that the professor teaches "*college writing*," and that "he was given the *opportunity to withdraw*." (emphasis added). When this press release was published, the DePaul community and others were

aware of the October 1 and 8, *DePaulia* articles describing Klocek and the September 15 incident, as well as the October 5 email. Therefore, many people other than Klocek and the Defendants understood the October 8 letter and press release to refer to Klocek.

Besides the October 1 article and Dumbleton's emails to students, alumni, journalists, and others regarding Klocek, (including her October 5 e-mail), Klocek alleges that he was named in multiple additional defamatory publications. These include DePaul's letter A165, and article in the *Post Online*, A168.

Judge Kelley's Opinion states "it is possible that a reader, unaware of the events that occurred on September 15, 2004, would be required to refer to extrinsic evidence to identify Mr. Klocek as the party referenced in the [above] two publications." A10. This might be true. However, the Court erred in straining to find a reader somewhere who would not have understood the statements to be defamatory; it simply needed to determine whether someone other than the plaintiff or defendant could have reasonably understood them to refer to Klocek. *Bryson*, 174 Ill.2d at 77.

In addition, both of the publications include a very specific description, and Prof. Klocek is the only person in the history of DePaul to fit the description. Regarding the October 8 letter, Klocek is the only part time professor from Dumbleton's College, the School for New Learning, to have an "incident" with SJP and UMMA members at the Student Fair. Klocek is the only person removed from class regarding whom Dumbleton met with students on September 23, 2004. With respect to the press release, Klocek was the only part time adjunct teaching "college writing" to make statements to two Muslim organization tables in September of 2004 at the Student Fair, and who was given the opportunity to withdraw. Therefore, the statements could not reasonably refer to

someone other than Professor Klocek. *Bryson,* 174 Ill.2d at 100. Also, a reasonable reader would have been aware of the events that occurred at the September 15, 2004 Student Fair and could interpret the publications as defamatory without the need to refer to extrinsic evidence. *Chapski*, 92 Ill.2d at 352.

In this case, Klocek did not have to show extrinsic evidence that the statements referred to him because it was self-evident to anyone who had heard about the incident or read any of DePaul's publications naming Klocek, that DePaul referred to Klocek. Instead, Klocek follows the heightened pleading standard set out in *Bryson* and *Cody* by alleging that people other than the plaintiff and defendant reasonably understood the publications to refer to him and that the libelous expression referred to him. *Cody v. Harris*, 2004 U.S. Dist LEXIS 6934, *22 (N.D. Ill. 2004), A64-72.

The facts strongly suggest that someone on or outside DePaul's campus other than Klocek or the Defendants would have understood these publications to refer to Klocek. In the short period of three weeks, more than a dozen publications containing scores of allegations against Klocek were put out to all students, professors, staff and administrators. He was prominently named in almost all of them.

Dean Dumbleton admitted in her deposition that she was referring to Prof. Klocek in her October 8 letter to the *DePaulia*:

> Q: And although you didn't mention the name, you're referring to Thomas Klocek?
>
> A: Yes.
>
> Q. And from the context of the letter many people at DePaul would know you're referring to Thomas Klocek?

A: *Anyone* who had—was aware of the incident would know that it was Mr. Klocek. R. Vol. 16 C3851 (emphasis added).

Klocek is entitled to produce evidence showing there is no reasonable interpretation of the publications to support an innocent construction. *Muzikowski*, 322 F.3d at 927. Also, DePaul should not be able to shield itself from its defamatory publications simply because it did not use Klocek's name. DePaul published these to its entire university community, as part of its campaign to defame Klocek and demonstrate he was unfit to be a university professor. Each publication describes Klocek, and he is the only person in DePaul's history to fit each description. Klocek should be entitled to prove to a jury that people understood both publications to defame him. *Chapski*, 92 Ill.2d at 352. The Circuit Court erred in striking the publications.

II. Dismissal of Dean Dumbleton's October 4th and 5th e-mails on the basis of qualified privilege was improper.

Kuwik v. Starmark Star Mktg. and Admin., Inc., 156 Ill. 2d 16 (1993), is the seminal case on qualified privilege. In *Kuwik*, the Supreme Court adopted the Restatement (Second) of Torts approach providing that the court "looks *only* to the occasion itself for the communication and determines as a matter of law and general policy whether the occasion created some recognized duty or interest to make the communication so as to make it privileged." *Id.* at 27 (noting that the Defendant has the burden of proving the privilege exists). The remaining "factual inquiries, such as whether the defendants acted in good faith in making the statement, whether the scope of the statement was properly limited in its scope, and whether the statement was sent only to the proper parties" are for the jury to determine. *Id*.

The Court erred, both in finding privilege as a matter of law on summary judgment and by usurping the role of the jury, by dismissing Dumbleton's October 4 e-mail to the SNL's Resident Faculty, A106, and her October 5 e-mails to Greg MacVarish, Jim Doyle, and various individuals, A111-116. The Court disregarded the evidence to find that Plaintiff adduced no evidence of abuse. A40. This finding is to be reviewed *de novo*. *Parker v. House O'Lite Corp.*, 324 Ill. App.3d 1014, 1020 (1st Dist. 2001).

A. Dean Dumbleton's E-mails Should Not Enjoy a Qualified Privilege.

The only inquiry before the court was whether the Defendants met their burden on summary judgment: proving that the occasion for Dumbleton's October 4/5 e-mails created a recognized duty or interest to make the communications, so as to make them privileged. *See Id*. The Defendants did not meet the burden with respect to the e-mails.

As to the e-mail to resident faculty, Defendants alleged that she had "a legitimate interest in addressing the public allegations of unprofessional conduct by a faculty member to the resident faculty," and the "faculty members had a legitimate interest in learning that the Dean had undertaken a responsive investigation into a SNL faculty member's unprofessional behavior." A247. As to the e-mail to Greg MacVarish, Jim Doyle and what Defendants labeled "Concerned Individuals," Defendants argued "Dumbleton had a legitimate interest in responding to an individual's concerns regarding the conduct of one of her faculty members who admittedly verbally attacked DePaul students on the basis of their religion and race in violation of DePaul's Vincentian values." A247-248.

In support of both alleged interests (premised on strongly disputed factual claims), Defendants cited only to the New Jersey case of *Gallo v. Princeton University*, wherein a

qualified privilege was found based on the Princeton administration's interest in communicating with Princeton personnel to address rampant rumors of employee wrongdoing. 281 N.J. Super. 134, 144 (App. Div. 1995). The University community also was deemed to have an interest in obtaining information regarding Princeton's investigation of the rumored wrong doing. *Id*. at 145.

Gallo does not bind this Court, but even if it did it is distinguishable from our case. In *Gallo*, the University released its statement to address rampant rumors which *were not of its own creation*. *Id*. at 137. Its communications were *in response to*, not in creation or furtherance of, the rumors. *Id*. at 137 (emphasis added). Here, it was DePaul's October 1 newspaper article that made Klocek and the students a matter of campus and public interest. The Court correctly held that the October 1 article was not privileged. Likewise, the e-mails were not communicated to address foreign rumors but to further DePaul's own perspective, first conveyed on October 1, regarding the events of September 15. Dumbleton's e-mails were just two publications in DePaul's serial defamation of Klocek, and like the October 1 *DePaulia* article, should not be privileged.

Also, the Court failed to weigh these alleged interests, as the law required, against "the degree of damage to be expected from release of the type of defamatory matter involved." *Parker*, 324 Ill. App.3d at 1027-1028, *citing Kuwik*, 156 Ill.2d at 28. Even admitting Dumbleton's interests *arguendo*, the damage to Klocek's reputation to be expected from the release of these e-mails greatly outweighs the general interests cited by Dumbleton. They were sent to Klocek's colleagues and any inquiring party and charge him with among other things "seriously offending ... students all over DePaul,"

conducting himself in a "repugnant and hurtful" manner and abusing "his position as a teacher to force his ideas upon students."

The fact that Dumbleton did not respond to all the e-mails she received concerning the incident undercuts any claim she had an obligation to make the communication. The record also reveals that DePaul, after suspending another employee, refused public comment citing "privacy of personnel issues". R. Vol. 17 C4189. With no independent investigation having been completed, it would have been better course for DePaul to reserve public comment until such time an independent investigation and/or faculty hearing could be completed, and surely better for Klocek's rights and reputation.

Dumbleton's e-mails should not enjoy a qualified privilege, and if this Court agrees, it need go no further to reverse the Circuit Court dismissal of the October 4/5th e-mails on the basis of qualified privilege.

B. Material facts exist upon which a jury could find that Dean Dumbleton abused whatever privilege she may have enjoyed.

Even if the Court concludes that Dumbleton's e-mails were covered by a qualified privilege, whether Dumbleton abused that privilege should have been left for the jury as directed by the Supreme Court in *Kuwik*, 156 Ill. 2d at 27.

The *Kuwik* Court recognized the abuse standard includes "any reckless act which shows a disregard for the defamed party's rights, including the failure to properly investigate the truth of the matter, limit the scope of the material, or send the material to only the proper parties." *Id*. The Restatement adds that a privilege may also be abused when "the defamatory matter is published for some purpose not reasonably believed to be necessary for the accomplishment of the purpose of the particular privilege (§ 604); or because the publication is made to some person not reasonably believed to be necessary

for the accomplishment of the purpose of the particular privilege (§ 604); or because the publication includes defamatory matter not reasonably believed to be necessary to accomplish the purpose for which the occasion is privileged. (§§ 605, 605A)."

As to the October 4/5 e-mails, material facts exist whether Dumbleton displayed reckless disregard by not properly investigating whether Klocek used/abused his faculty position, assaulted the students, and actually said what the students alleged he said. The depositions make clear that Dumbleton knew the allegations did not fit Professor Klocek, a teacher she had known for years. R. Vol. 16 C3875. But she chose not to conduct an independent investigation or speak with the one eye witness she personally knew. She chose rather to rely solely on second and third hand information, from biased sources who had been tasked to look out for the students. And when she did speak with Klocek, she made it impossible for him to refute the accusations because, though she had the students' letters, she refused to share the contents of the letters with Klocek.

In fact, Dumbleton's deposition suggests she had already taken the position that Klocek was at fault even before she met with him. See, R. Vol. 16 C3803-3804. (Her response to Klocek's suggestion he speak with the students again reflects her already-formed position that he shouted the students down and abused them.) Even though she was not a witness to the events of September 15th, had only heard biased accounts from student activists, and relied on hearsay from Student life representatives, she refused to allow Klocek to address the allegations in the meeting on September 17th.

She also did not limit or qualify the scope of the material she published. A factual issue remains whether it was proper for her to publish the October 4th e-mail to *all* the resident faculty. The jury should also decide whether the "concerned individual" who

received the October 5th e-mail was a proper party to the publication. The Circuit Court's decision to dismiss Dumbleton's e-mails should be reversed.

III. As a matter of law, Klocek's efforts to counter the defamation cannot render him a limited public figure.

The issue before the Court, to be reviewed *de novo*, *Parker*, 324 Ill. App.3d at 1020, is whether Klocek, a private figure, forfeited his interest in the protection of his reputation when he went public to counter the defamatory statements. Klocek's status as a private, as opposed to a public, figure is important because it controls the standard of liability for his defamation claims. *Imperial Apparel*, 227 Ill. 2d at 395. Public figures are precluded by the First Amendment from "obtaining redress in a defamation action unless they can prove that the allegedly defamatory statements were made with actual malice." *Id*. Private figures need only prove negligence. *Id.*

Public figures fall into two categories: general public figures and limited public figures. *Kessler v. Zekman*, 250 Ill. App. 3d 172, 180 (1st Dist. 1993) *citing Gertz v. Robert Welch, Inc.,* 418 U.S. 323 (1974). Defendants contend that Klocek was a limited public figure either on September 15, 2004, the date of the student fair, or, on March 1, 2005 when he began to respond publicly to address DePaul's defamation. A248.

The Circuit Court correctly found there was "no evidence that Professor Klocek had inserted himself into an issue of public debate or actual controversy [on or before September 15, 2004]." A37. There is literally no evidence that Klocek inserted himself into a public controversy. Yet, even though the court recognized that "the controversy in this case centers on the [September 15, 2004] incident," it went on to accept Defendants' alternative argument that he became a limited public figure on March 1, 2005. The court

found that at that time Klocek inserted "himself into the controversy" and "invited the sort of comments that the [the Florzak and Holtschneider articles] contained." A38.

The comments at issue in both articles are simply a reiteration of the same defamatory statements DePaul had been making before March 1. They paint the same false picture of Klocek acting in "a belligerent and menacing manner," throwing pamphlets at students, pointing his finger in their faces, and making an obscene hand gesture. In finding that Klocek inserted himself into the controversy on March 1, 2005, the Court simply ignored the fact that *Klocek was already an inherent part of the controversy created by DePaul's defamatory publications* made in the days and weeks after September 15. The Court also ignored the critical fact that the sole purpose of Klocek's press conference and media communication was to counter the university's weeks-long defamation campaign against him. Instead, the Court found as a matter of law that his efforts to protect his name in the midst of the controversy caused him to be a limited public figure after March 1, 2005.

The Court's error is most readily apparent in the light of *Davis v. Keystone Printing Serv.*, 111 Ill. App. 3d 427, 438 (2d Dist. 1982). The *Davis* Court ruled "the focal point in assessing an individual's status is at the time prior to the defamatory publication, since *a defendant cannot construct his own defense by making a plaintiff a public figure through the same articles that defame him***."** *Id.* at 439 (emphasis added). The Court found that whether a plaintiff becomes a limited public figure by injecting himself into or being drawn into a controversy is *not material* when the plaintiff is already an inherent part of that controversy. *Id.* In *Davis*, there was no public controversy concerning Rev. Davis' homosexuality until the defendants published articles

about it. The same is true here. There was no public controversy concerning Klocek and the September 15 incident until DePaul went public. Before this Klocek was simply one indistinguishable DePaul adjunct professor among hundreds or thousands. He simply taught night classes at the School For New Learning.

Now an inherent part of the controversy and with his reputation already thoroughly shredded by DePaul's defamatory publications, Klocek sought on March 1, 2005 to defend his name. As the United States Supreme Court held in *Gertz v. Welch*, "the first remedy of any victim of defamation is self-help—using available opportunities to contradict the lie or correct the error and thereby minimize its adverse impact on reputation." 418 U.S. at 344. Klocek's press conference and related efforts were driven by that purpose. Public figures are those who, because of their office or assumed role in influencing the ordering of society, are presumed to have relinquished some of their interest in the protection of their own good name. *Id.* 345. Klocek had no office or public role. He only defended his name.

This Court has held that "[a] defendant cannot by its defamation make a plaintiff a limited purpose public figure for First Amendment purposes; rather, the, plaintiff must be a limited purpose public figure prior to the alleged defamation." *Imperial Apparel*, 367 Ill. App.3d at 55 (rev'd on other grounds). The United States Supreme Court has recognized that society has an interest "in protecting private individuals from being thrust into the public eye by the distorting light of defamation." *Rosenbloom v. Metromedia*, 403 U.S. 29, 80 (1971). DePaul thrust Klocek into the public eye by the distorting light of defamatory publications. The Circuit Court, however, effectively ruled as a matter of

law that DePaul could construct its own defense by making Klocek into a public figure with its own publications. This was error. *Davis*, 111 Ill. App. 3d at 438.

IV. An abundance of material facts exists to show that Defendants published with actual malice.

The trial court erred in finding that Klocek could not show that any of the Dumbleton emails, the Florzak article, or the Holtschneider article were published with actual malice. A40. The court found that "the plaintiff have [*sic*] not adduced any evidence that defendants acted at any time with actual malice." *Id*. Further, the court found that "the plaintiff's position is, essentially, that he strongly disagrees with the conclusion reached by the University and the article published by the *DePaulia*. This does not rise to the level of defamation." *Id*. To the contrary, Klocek clearly demonstrated that genuine issues of material fact exist as to whether Defendants' allegedly defamatory statements were published with actual malice. Since the circuit court dismissed this count on summary judgment, this Court's review of actual malice is *de novo*. *Parker*, 324 Ill. App.3d at 1020.

"Actual malice" is defined as publishing "with knowledge that . . .[the defamatory falsehood] was false or with reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964). The Court later refined the definition to include publishing statements with a high degree of awareness of their probable falsity, or publishing while entertaining serious doubts as to the truth of the statements. *See Garrison v. State of Louisiana*, 379 U.S. 64, 74 (1964); *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). Courts have found actual malice when the only source for a story does not contain statements supposedly derived from it. *Snitowsky v. NBC Subsidiary (WMAQ TV), Inc.*, 297 Ill. App. 3d 304, 316 (1st Dist. 1998); *referencing Zerangue v. TSP*

Newspapers, Inc., 814 F.2d 1066, 1071 (5th Cir. 1987). Therefore, if a defendant publishes a defamatory statement that goes beyond or is not supported by the source from which she derived the information, a fact-finder can infer that the defendant published with actual malice. *Id*. Also, the *Carson* court held that if a defendant fails to verify critical facts that form the "linchpin for a series of defamations," a fact-finder can make a finding of actual malice. *Carson v. Allied News Co.,* 529 F.2d 206, 211 (7th Cir. 1976). There are many material facts in this case upon which a jury can find actual malice.

A. There is evidence that Dean Dumbleton's publications were published with actual malice.

Dumbleton did not think it was her responsibility to carry out an independent investigation or a "primary source" investigation of the situation. R. Vol. 16 C3814, 3793, 3797, 3817. Her first source of information was Jim Doyle, who was not an eye witness, but who spoke with Amalia Lopez on the day of the Fair. R. Vol. 16 C3816. Lopez admits to only being at the table with Klocek and the students for about 30 seconds before the dialogue ended, and talked to Klocek about the possibility of having them **"**continue [the dialogue] in a more appropriate forum." R. Vol. 18 C4302, C4295.

Dumbleton's second source of information was a teleconference with Doyle and Cindy Summers, who also had not witnessed any part of the Fair. R. Vol. 17 C4085. Summers never asked Klocek his version of the events. *Id*. at C4084. All of these "witnesses" upon whom Dumbleton relied were part of the Student Life staff, whose job it was to be protective of the students, implying a built-in bias in their favor. Dumbleton's third source of information was the UMMA/SJP letters. She admitted that she read them before speaking with Klocek, and that the judgments she was making

about Klocek were informed by the accusations therein. R. Vol. 16 C3807. Already, Dumbleton's investigation is skewed.

Next, Dumbleton met with Michael DeAngelis and Tom Klocek on September 17, 2004. At this meeting, Dumbleton told Klocek they had received letters from the two student organizations. R. Vol. 16 C3800. However, she did not give Klocek a copy of these letters, or read them to him to give him a chance to refute the charges. R. Vol. 16 C3809. This prevented Klocek from providing a specific, accurate rebuttal. When Klocek suggested that the students had acted improperly, Dumbleton accused him of being unaware of his words and conduct at the event, and assumed he had no real sense of what had happened. R. Vol. 16 C3802-04. But, this was based on hearsay from her subordinates who spoke with the students, and received no specific input from Klocek. The Court ignored this evidence, ruling that DePaul showed uncontested evidence that it "conducted a reasonable investigation and provided opportunities for input." A40. The reality is Dumbleton never allowed Klocek to present to her his version of the facts.

Finally, Dumbleton met with the students and their faculty advisors on September 23, 2004. They demanded of Dumbleton that Klocek never teach again at DePaul. R. Vol. 16 C3833. The first thing she did was apologize to the students. She never inquired into whether *they* had exaggerated or demonstrated any improper conduct during the exchange, as she had with Klocek. In addition, Klocek presented evidence that Dumbleton knew the students were agenda-driven and influenced by the outside pressure group CAIR. Supp. Rec. Vol. 1 C150. Also, Dumbleton knew Wes Thompson, and was aware that he was an objective third-party witness to the incident, but she did not think it necessary or advisable to interview him. R. Vol. 16 C3798. Dumbleton did not do a

thorough investigation. Instead, she relied on hearsay statements from her subordinates, and the clearly biased student version of the facts, at the expense of a professor whom she knew to have a solid reputation. *Nobody at DePaul* undertook to determine the truth regarding Klocek's conduct, comments, or reputation. This disregard for the truth is a sufficient, indeed quite persuasive, basis upon which a jury could find actual malice.

Further, there is evidence that Dumbleton entertained serious doubt about the truth of the students' statements. She admitted that *she did not believe the charges* in the student letters! R. Vol. 16 C3789. She also testified that she did not believe Klocek would make racist statements. R. Vol. 16 C3789. She admitted being aware that Klocek had a spotless record, and that the allegations were unlike Klocek. R. Vol. 16 C3800. In this vein, Dumbleton thought Klocek should be suspended and not fired. R. Vol. 16 C3863. Thus, there is evidence that she knew it was improbable that Klocek had acted as he was being accused. Nevertheless, she publicly sided with the students and even *embellished* their claims at the expense of the truth and Klocek's reputation.

The publications themselves indicate that Dumbleton acted with actual malice. She did not publish anything that would make a reader think that Klocek was innocent of any of the accusations. For example, she did not correct or change the subject line of "racist incident" in her October 4, 2004, email response to Marwah Serag, A111; instead she wrote, "I share your outrage." R. Vol. 16 C3867. She testified that she never corrected anyone who couched this as a racist incident. R. Vol. 16 C3873-79. In her publications, she indicated she had spoken with Klocek but did not indicate whether he denied or disputed any of the claims against him. *See Dougherty v. Capitol Cities*, 631 F. Supp. 1566, 1573 (E.D. Mich. 1986). She did not clarify that Klocek had no opportunity

to respond to the allegations in the student letters (racist, obscene gesture, throwing pamphlets, waving arms, shouting) because he had never seen or heard the allegations therein. Klocek did speak to her about the gesture, and told her that it wasn't obscene. R. Vol. 16 C3802. Therefore, she was aware that at least that fact was in dispute, but never indicated publicly this was the case. Also, Dumbleton was quoted in the October 1 *DePaulia* article as saying that Klocek caused the students to "lose their intellectual empowerment" and abused his faculty position to force ideas upon the students. A103. These charges are fabricated and are belied by student testimony that they did not feel under compulsion to accept Klocek's views. Supp. R. Vol. 3 C 581.

B. There is evidence that Father Holtschneider's letter was published with actual malice.

Holtschneider's letter to the Rocky Mountain News was ghost written by Denise Mattson. R. Vol. 17 C4141. Mattson testified she spoke to Dumbleton, Doyle or Summers, and student Salma Nassar after the event. *Id*. at C4125, C4127. Later she spoke to Suzanne Kilgannon, Amalia Lopez, and students Ben Meyer, and Ahmed Al Zahdan. *Id*. She testified that she never spoke to Klocek, but the article was factually accurate since everyone she spoke to "said virtually the same thing." *Id*. at C4127, 4140.

Holtschneider never spoke to Klocek to get his version of the facts. R. Vol. 18 C4442. Holtschneider never asked Dumbleton the source of her information, but assumed, because she had met with Klocek, that she knew his version of the events. *Id*. Holtschneider also spoke with Doyle, and he knew Doyle got his information from the Muslim students and they had worked with other DePaul employees. *Id*.

Holtschneider's letter states that Klocek used a "gesture interpreted as obscene," even though Holtschneider admitted that he had never seen the gesture or a first or

second hand report on what the gesture was or why anyone interpreted it as obscene. R. Vol. 18 C4459. He fabricates that Klocek pointed his finger in the students faces, a point that even Klocek's main accuser, Salma Nassar, denied. Supp. R. Vol. 3 C525. Holtschneider also fabricates that Klocek acted in a "menacing manner." He testified that there were no specific threats; only that when you put the pieces together, including the waving of arms, "menacing" gives a description of the moment. R. Vol. 18 C4458. Holtschneider repeatedly testified that the investigation is not for the president to do; that such responsibility is given to a dean or an appropriate vice president. R. Vol. 18 C4444. However, he published his article anyway.

C. There is evidence that Robin Florzak's letter was published with actual malice.

Florzak testified that Denise Mattson wrote the article in *The Post*, and Florzak was the copy editor. Supp. R. Vol. 3 C571. Florzak transmitted the article to two newspapers which ran an article by Jay Ambrose, as well as the U-Wire, which goes to many college papers. *Id*. at C572. Florzak sent the article to the whole U-Wire because she believed other colleges might publish the Ambrose article, and then they would have both articles to publish at once. *Id*. Florzak knew the article would run with her name on the byline; however, she did no investigation as to the truth of her assertions. *Id.* at C574, 576. She was aware that Mattson had spoken to a student who was at the table, one DePaul employee, Amalia Lopez, and three DePaul administrators, Dumbleton, Doyle, and Holtschneider. *Id*. at C572. Florzak never asked Mattson whether she had spoken to Klocek about his version of the events. *Id*. at C573. Nor did Florzak look into what was said between Klocek and the students at the Activities Fair. *Id*. at C577. She did not know what the obscene gesture was that she referenced in her article. *Id*. at C575.

Florzak did not consider that Mattson's policy as DePaul's Associate Vice President of Public Relations is not to give both sides of a dispute, but to spin a story in DePaul's favor. Florzak did no investigation whatsoever, and should have questioned the validity of the article. *Id.* at C572, Supp. R. Vol. 3 C556.

Klocek provided sufficient facts upon which a jury could find that Defendants published statements while recklessly disregarding the falsity of their reports. *Snitowsky*, 297 Ill. App. 3d at 316. There are genuine issues of material fact whether Defendants published their statements with actual malice, which should be decided by a jury.

CONCLUSION

Wherefore, Plaintiff respectfully requests reversal and remand of the case; with leave to file his Third or Fourth Amended Complaint or, in the alternative, for a jury trial on the merits of his claims in the Second Amended Complaint and 24 attached exhibits.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 50 pages.

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CERTIFICATE OF SERVICE

I, Noel W. Sterett, state that the other parties to this appeal at the following addresses:

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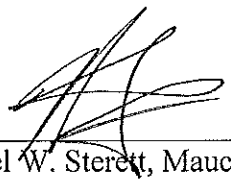
were served with three copies of this document and attachment by arranging on January 19, 2010 for hand delivery to said addresses in accordance with S. Ct. Rule 341(e).



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