STATE OF ILLINOIS)		IN THE CIRCUIT COURT THEREOF
)		
COUNTY OF LASALLE)		GENERAL DIVISION
DONALD MAXON and JANET MAXON,	)	
Petitioners/Plaintiffs,	)	
	)	No. 2008-MR-125
vs.	)	
	)	
OTTAWA PUBLISHING COMPANY, a Delaware Limited Liability Company,	)	
Respondent.	)	
	)	
SUSAN WREN,	)	
Defendant.	)	

MOTION TO STRIKE AND DISMISS COUNT II (DEFAMATION) PURSUANT TO ILLINOIS SUPREME COURT RULE 224, 735 ILCS 5/2-615 AND 735 ILCS 5/2-619

Now comes Defendant, SUSAN WREN, Defendant, by her attorney, Darrell K. Seigler, of Darrell K. Seigler, Ltd., and for her Motion to Strike and Dismiss Count II (Defamation) Pursuant to Illinois Supreme Court Rule 224, 735 ILCS 5/2-615 and 735 ILCS 5/2-619, states as follows:

I.
MOTION TO STRIKE AND DISMISS PURSUANT TO ILLINOIS SUPREME COURT RULE 224

1. This Court, upon oral motion of the Petitioners, Donald Maxon and Janet Maxon, granted leave to file an amended petition for discovery before suit pursuant to Illinois Supreme Court Rule 224. Thereafter, the Petitioners filed a pleading containing two counts, with Count I being an "amended petition for discovery" pursuant to Illinois Supreme Court Rule 224 and Count II, naming Defendant, Susan Wren, which purports to state a cause of action at law for defamation, including monetary damages.

2. Illinois Supreme Court Rule 224, adopted in 1989, provides for a specialized procedure to engage in discovery for the "sole purpose of ascertaining the identity of one who may be responsible in damages". Rule 224 allows the filing of "an independent action for such discovery". The specific procedures for filing, including the requisite content of the petition, is set out in the Rule. A special "Summons for Discovery" is required to be used for service of process. An order issued under Rule 224 automatically expires 60 days after issuance, unless extended for good cause.

Supreme Court Rule 224 is inapplicable to a case where the identity of the defendant is already known. *Guertin v. Guertin*, 204 Ill.App.3d 527, 561 N.E.2d 1339 (3d Dist. 1990); *Roth v. St. Elizabeth's Hospital*, 241 Ill.App.3d 407, 607 N.E.2d 1356 (5th Dist. 1993).

3. Petitioners/Plaintiffs have improperly joined Defendant Susan Wren, and Count II, a claim at law for defamation and damages.

735 ILCS 5/2-603 provides that a pleading contain a plain and concise statement of the pleader's "cause of action, counterclaim, defense or reply." Each separate cause of action upon which separate recovery might be had shall be stated in a separate count or counterclaim. 735 ILCS 5/2-405, regarding joinder of defendants, provides that any person may be made a defendant, who, either jointly, severally or in the alternative, is "alleged to have or claim an interest in the controversy, or in any part thereof, or in the transaction or series of transactions out of which the controversy arose, or whom it is necessary to make a party for the complete determination or settlement of any question involved therein, or against whom a liability is asserted either jointly, severally or in the alternative arising out of the same transaction or series of transactions . . ."

In earlier days, improper joinder of parties not connected with a controversy in its proper scope was referred to as "multifariousness". *Roney v. Chicago Title & Trust Company*, 354 Ill.144, 188 N.E.194 (1933).

4. In summary, Petitioners/Plaintiffs have improperly joined an independent cause of action and a defendant in a action that is created by statute, in derogation of the common law and with a singular purpose. Statutes in derogation of the common law are strictly construed, and cannot be construed as changing the common law beyond what is expressed by the words of the statute or is necessarily implied from what is expressed. *Lites v. Jackson*, 70 Ill.App.3d 374, 387 N.E.2d 1118 (1979); *Great Lakes Mortgage Corp. v. Collymore*, 14 Ill.App.3d 68, 302 N.E.2d 248 (1973). The misjoinder is a violation of Rule 224 and the cited joinder statutes regarding pleadings and parties. Accordingly, Count II should be stricken and dismissed.

II.
MOTION TO DISMISS COUNT II PURSUANT TO 735 ILCS 5/2-615

A. Count II is substantially insufficient in law, based on defects apparent on its face, and should be dismissed with prejudice.

1. The alleged defamatory statement does not identify or refer to Plaintiffs, and extrinsic facts have not been sufficiently alleged to properly plead that the statement was "of and concerning" the Plaintiffs. The statement is not actionable.

A motion to dismiss under Section 2-615 of the Code of Civil Procedure attacks the legal sufficiency of a complaint. A cause of action should not be dismissed under Section 2-615 unless it is clear that no set of facts can be proved under the pleadings that would entitle plaintiff to recover. Whether a complaint should be dismissed under Section 2-615 presents a

question of law. *Tuite v. Corbitt*, 224 Ill.2d 490, 866 N.E.2d 114 (2006); *Oliveira v. Amoco Oil Co.*, 201 Ill.2d 134, 776 N.E.2d 151 (2002). Such a motion challenges the legal sufficiency of a complaint based on defects apparent on its face. *Marshall v. Burger King Corp.*, 222 Ill.2d 422, 856 N.E.2d 1048 (2006). A 2-615 motion admits all well-pleaded facts, together with all reasonable inferences that can be drawn therefrom. *Romanek v. Connelly*, 324 Ill.App.3d 393, 753 N.E.2d 1062 (2001).

As a case in point very similar to this, before a further discussion of general and specific defamation law applying to this case, it is useful to review the facts and holding in *Chicago City Day School v. Wade*, 297 Ill.App.3d 465, 697 N.E.2d 389 (1st Dist. 1998). There, the school brought suit against Roma Wade and WLS Radio for defamation during a radio broadcast. The complaint alleged that the statements were defamatory per se. The trial court dismissed the complaint pursuant to Section 2-615 on the grounds that the statements came under the "innocent construction rule". The trial court held that the statements did accuse the school of bribery, but that it was possible to innocently construe the accusation as being directed at others besides the school. Further, the alleged accusation of lying was determined to "Rhetorical Hyperbole", and not as assertion of fact. The reviewing court analyzed the general law of defamation, the innocent construction rule as modified and adopted in *Chapski v. Copley Press*, 92 Ill.2d 344, and applied the rule, which favors defendants in per se actions in that a non-defamatory interpretation must be adopted if reasonable [citing *Mittelman v. Witous*, 135 Ill.2d 220, 552 N.E.2d 973 (1989)]. The court noted that Illinois has adopted the minority rule of the innocent construction rule, which prevents a case from getting to the jury if there is any possible reasonable innocent interpretation of the language. Under the majority rule, the judge decides on

whether the language is reasonably susceptible of a defamatory interpretation, and if it is, the case goes to the jury despite any conceivable innocent interpretation, to determine whether in fact the publication was understood to be defamatory or to refer to the plaintiff. Thus, in Illinois, the question of whether there is any possible reasonable innocent interpretation of the language is a question of law to be determined by the court. In the *Wade* case, the reviewing court determined that even if the statements, which alluded to the bribing of a city official, were to be considered defamatory per se, it is not clear who Roma was referring to as the "briber" in her statements. Thus, even if the statements which follow are actionable per se, they could reasonably be innocently construed. The court distinguished other cases cited by the plaintiff, since there was no question in those cases that the publishers of the statement were referring to the plaintiff. Upon examination of the record in *Wade*, the court found that plaintiff failed to plead extrinsic facts to demonstrate how third persons could believe that the defamatory statements referred to plaintiff. The court stated as follows:

> Although it is reasonable to assume that Roma was referring to the School when she commented on the how the city officials allegedly took a bribe, it is just as reasonable to believe that someone other than the school, perhaps the parents of the students at the school, attempted to influence city officials or Martinez. Roma stated throughout her broadcast that the kids who go this school get dropped of in Jaguars and Mercedes, in essence alluding to the wealth of the students and their families . . . I and sum, we note that if the statements can be innocently construed, given its context, it should be so construed, since we are under no duty to balance the reasonable constructions. See *Harte* [*v. Chicago Council of Lawyers*, 220 Ill.App.3d 255, 581 N.E.2d 275 (1991)]. We also emphasize that the focus of the innocent construction rule is whether defendant's statements can be innocently construed in a manner that falls outside of the per se category, not whether defendant's statements addressing the conduct of the unknown briber is reasonable. In other words, we can innocently construe Roma's statements as referring to someone other than the plaintiff, regardless of whether it is reasonable to think that a parent offered Martinez a bribe at the risk of getting caught and getting punished.

As to the general law applicable here, the defamation action in Illinois provides redress for false statements of fact that harm reputation. A statement is considered defamatory if it tends to cause such harm to the reputation of another that it lowers that person in the eyes of the community or deters third persons from associating with him or her. *Hopewell v. Vitullo*, 299 Ill.App.3d 513, 701 N.E.2d 99 (1998); *Kolegas v. Heftel Broadcasting Corp.*, 154 Ill.2d 1, 607 N.E.2d 201 (1992).

There are two types of defamatory statements, defamation per se and defamation per quod. A statement is defamatory per se if the words used are so obviously and materially harmful to the plaintiff that injury to the plaintiff's reputation may be presumed, i.e., a showing of special damages is unnecessary. The defamatory character of the statement is apparent on its face, and extrinsic facts are not necessary to explain. Illinois recognizes five categories of defamatory statements that are considered actionable per se, including those imputing the commission of a criminal offense. *Bryson v. News America Publication*, 174 Ill.2d 77, 672 N.E.2d 1207 (1996); *Van Horne v. Muller*, 185 Ill.2d 299, 705 N.E.2d 898 (1998); *Owen v. Carr*, 113 Ill.2d 273, 497 N.E.2d 1145 (1986); *Brown & Williamson Tobacco Corp. v. Jacobson*, 713 F.2d 262 (7th Cir. 1983); and *Schaffer v. Zekman*, 196 Ill.App.3d 727, 554 N.E.2d 988 (1990).

Under Illinois law, a statement may be actionable as libel per quod if it is actually defamatory and if specific damage is alleged. Such an action is established where a publication not libelous on its face is rendered defamatory by extrinsic facts or innuendo and special damages are proven. *American Pet Motels v. Chicago Veterinary Medical Assoc.*, 106 Ill.App.3d 626, 435 N.E.2d 1297 (1982); *Audition Division, Ltd. v. Better Business Bureau of Metropolitan Chicago*, 120 Ill.App.3d 254, 458 N.E.2d 115 (1983). Put another way, statements are actionable per quod

if they necessitate extrinsic facts or innuendo to explain their defamatory meaning, and require evidence demonstrating, as a matter of fact, that some substantial injury resulted to the aggrieved person from their use. *Heerey v. Berke*, 188 Ill.App.3d 527, 544 N.E.2d 1037 (1989); *Schaffer v. Zekman*, supra.

In a defamation action, a complaint must clearly identify the specific defamatory material. *Heying v. Simonaitis*, 126 Ill.App.3d 157, 466 N.E.2d 1137 (1984). To make out a claim of defamation, a plaintiff must set forth sufficient facts to show: (1) that the defendant made a false statement concerning the plaintiff; (2) that there was an unprivileged publication of the defamatory statement to a third party by the defendant; and (3) that the publication of the defamatory statement damaged the plaintiff. *Krasinski v. United Parcel Service*, 124 Ill.2d 483, 530 N.E.2d 468 (1988); *Parker v. House O'Lite Corp.*, 324 Ill.App.3d 1014, 756 N.E.2d 286 (2001); *Brennan v. Kadner*, 351 Ill.App.3d 963, 814 N.E.2d 951 (2004); *Stavros v. Marrese*, 323 Ill.App.3d 1052, 753 N.E.2d 1013 (2001).

An essential element of a defamation per se or defamation per quod claim is that the challenged statement be "of and concerning the plaintiff", i.e., that the alleged defamatory statement be identifiably about the plaintiff. *Schivarelli v. CBS, Inc.*, 333 Ill.App.3d 755, 776 N.E.2d 693 (2002); *Aroonsaqul v. Shannon*, 279 Ill.App.3d 345, 664 N.E.2d 1094 (1996).

There can be no recovery for a false and defamatory statement unless it was made specifically of and concerning the plaintiff. *Rosenblatt v. Baer*, 383 U.S.75, 15 L.Ed.2d 597, 86 S.Ct. 669; *Velle Transcendental Research Assoc. v. Esquire, Inc.*, 41 Ill.App.3d 799, 354 N.E.2d 622 (1976). The determination of whether an article is "of and concerning" the plaintiff is not a question of fact for the jury but rather a question of law for the court, as is the question of

whether the article complained of is libelous per se. The appropriate rule of construction requires that words allegedly libelous that are capable of being read innocently must be so read and declared non-actionable as a matter of law, i.e., the "innocent construction rule". *John v. Tribune Co.*, 24 Ill.2d 437, 181 N.E.2d 105 (1962); *Proesel v. Myers Publishing Co.*, 48 Ill.App.2d 402, 199 N.E.2d 73 (1964). The rule requires that the statement be "considered in context, with the words and the implications therefrom given their natural and obvious meaning". If, under this construction, the statement may reasonably be innocently interpreted or reasonably be interpreted as referring to someone other than the plaintiff, then it is not actionable as a matter of law. *Chapski v. Copley Press*, 92 Ill.2d 344, 352, 442 N.E.2d 195 (1982); *Cartwright v. Garrison*, 113 Ill.App.3d 536, 447 N.E.2d 446 (1983). In Illinois, if a defamatory article does not name the plaintiff, it must be alleged and proved that third persons, i.e., persons other than plaintiff and defendant, must have reasonably understood that the article was "of and concerning" the plaintiff. *Algozino v. Welch Fruit Products*, 345 Ill.App.135, 102 N.E.2d 555 (1951); *Velle Transcendental Research Assoc. v. Esquire, Inc.*, 41 Ill.App.3d 799, 354 N.E.2d 622 (1976). The conclusion of the pleader that the plaintiff was referred to in the statement must be disregarded as to this issue, in considering the efficacy of a motion to dismiss. *Bottorff v. Spence*, 36 Ill.App.2d 128, 183 N.E.2d 1 (1962). Instead, this must be done by the pleading of extrinsic facts to demonstrate that third persons reasonably believed that the defamatory statement referred to the plaintiff. *Barry Harlem Corp. v. Kraff*, 273 Ill.App.3d 388, 652 N.E.2d 1077 (1995); *Bryson v. News America Publications*, 174 Ill.2d 77, 672 N.E.2d 1207 (1996). The test is whether a reasonable person receiving the communication would understand that the plaintiff was referred to. *Proesel v. Myers Publishing Co.*, 24 Ill.App.2d 501, 165 n.E.2d 352 (1960); *Wheeler v. Dell*

Publishing Company, 300 F.2d 372 (C.A.7 Ill. 1962).

The complaint must allege that the statement complained of was understood, by its readers, to refer to the plaintiff; it is not enough to constitute defamation that the plaintiff knew he was the subject of the article. The language used in the article must be construed according to its natural and obvious meaning. The meaning of language alleged to be defamatory cannot, by innuendo, be extended beyond a reasonable construction. Innuendoes are not available to impute defamation to an article otherwise innocent of defamatory meaning. *Archibald v. Belleville News Democrat*, 54 Ill.App.2d 38, 203 N.E.2d 281 (1964). The law does not recognize a cause of action for defamation by resorting to innuendo alone. The function of innuendo is to explain a matter already expressed, but not to change the sense of the words used. *Voris v. Street and Smith Publications*, 330 Ill.App.409, 71 N.E.2d 338 (1947); *Life Printing & Publishing Co. v. Field*, 324 Ill.App.254, 58 N.E.2d 307 (1944); *Harris Trust & Savings Bank v. Phillips*, 154 Ill.App.3d 574, 506 N.E.2d 1370 (1987). Where there is no specific or definitive factual context at the root of the alleged defamatory statement, rendering it capable of being objectively verified as true or false, the statement is not actionable defamation. *Schivarelli v. CBS, Inc.*, 333 Ill.App.3d 855, 776 N.E.2d 693 (2002); *Dubinsky v. United Airlines Master Executive Council*, 303 Ill.App.3d 317, 708 N.E.2d 441 (1999); and *Doherty v. Kahn*, 289 Ill.App.3d 544, 682 N.E.2d 163 (1997). Where a statement does not have a precise and readily understood meaning because of its broad scope and lack of detail, and cannot be objectively verified as true or false because the statement is ambiguous and indefinite, so that a number of possible facts might support the conclusion of the statement, the statement is not actionable. Such a statement was found to lack a "precise and readily understood meaning" because of its broad scope and lack of

detail. *Hopewell v. Vitullo*, 299 Ill.App.3d 513, 701 N.E.2d 99 (1998). The preliminary determination of whether a statement is capable of being reasonably understood by third persons as referring to the plaintiff is a question of law. *Bereksy v. Teschner*, 64 Ill.App.3d 848, 381 N.E.2d 979 (1978).

As to Count II of the Amended Petition filed herein, the alleged defamatory statement attributed to Defendant does not mention the Plaintiffs, by name or other identification; in fact, the statement does not mention any person or entity. Thus, standing alone, the statement is missing an essential element for a defamation claim in Illinois, rendering the statement non-actionable as a matter of law. *Krasinski v. United Parcel Service*, 124 Ill.2d 483, 530 N.E.2d 468 (1988); *Aroonsaqul v. Shannon*, 279 Ill.App.3d 345, 664 N.E.2d 1094 (1996); *Chapski v. Copley Press*, 92 Ill.2d 344, 442 N.E.2d 195 (1982). The statement at issue, as a matter of law, cannot be injurious to the plaintiffs on its face and is therefore not defamatory per se. A plaintiff that is not named in the defamatory material must plead colloquium to establish that the publication was defamatory as to him; in such cases, the material is not libel per se and consequently, special damages must be alleged with particularity. *Moore v. Streit*, 181 Ill.App.3d 587, 537 N.E.2d 408 (1989); *Colucci v. Chicago Crime Commission*, 31 Ill.App.3d 802, 334 N.E.2d 461 (1975). The rigorous standard of the modified innocent construction rule (announced in *Chapski v. Copley Press*, supra) favors defendants in per se actions in that a non-defamatory interpretation must be adopted if it is reasonable. Whether a statement may reasonably be innocently interpreted is a question of law to be resolved by the Court. In such instance, extrinsic facts must be pleaded to demonstrate that third persons reasonably believed that the defamatory statement referred to plaintiffs. *Bryson v. News America Publication*, 174 Ill.2d 77, 672 N.E.2d 1207 (1996); *Chicago*

City Day School v. Wade, 297 Ill.App.3d 465, 697 N.E.2d 389 (1998); *Schaffer v. Zekman*, 196 Ill.App.3d 727, 554 N.E.2d 988 (1990). Additionally, special damages must then be alleged with particularity. *Schaffer v. Zekman*, supra; *Colucci v. Chicago Crime Commission*, supra.

The simple allegation by a plaintiff that a statement was "of and concerning" him is a conclusion and is insufficient to support an action for defamation per se. *Schaffer v. Zekman*, 196 Ill.App.3d 727, 554 N.E.2d 988 (1990); *Coffey v. MacKay*, 2 Ill.App.3d 802, 277 N.E.2d 748 (1972).

In the instant case, assuming, *arguendo*, that a false and defamatory statement of fact was actually made, that statement must have been made "concerning the plaintiff". If the statement is not concerning the plaintiff, the statement is not actionable. This is the mandated result when considering the requisite elements of an action for defamation, as well as application of the modified "innocent construction" rule as adopted in Illinois. *Chapski v. Copley Press*, 92 Ill.2d 344, 442 N.E.2d 195 (1982); *John v. Tribune Co.*, 24 Ill.2d 437, 181 N.E.2d 105, Cert.Den. 371 U.S. 877 (1962). It is submitted that under any applicable ground, the statement at issue in Count II is not "of and concerning the plaintiff" and is not actionable as a matter of law.

Plaintiffs here may argue that the "context" included in Count II provides sufficient basis for the identification of plaintiffs. Certain cases have dealt with a similar argument. In *Vantassell-Matin v. Nelson*, 741 F.Supp.698 (N.D.Ill, 1990), the court, in dealing with the issue of whether the articles were "of and concerning" plaintiffs, referred to the plaintiff's contention that all of the published articles formed the "context" of the alleged defamatory statements and identified plaintiffs. That court cited *Mittelman v. Witous*, 135 Ill.2d 220, 552 N.E.2d 973 (1990), wherein the Illinois Supreme Court held that a plaintiff may not resort to proof of

extrinsic facts, other than those essential to understand the context in which a statement it was made, to establish the defamatory nature of a statement which is not otherwise facially defamatory. Likewise, in *Aroonsaqul v. Shannon*, 279 Ill.App.3d 345, 664 N.E.2d 1094 (1996), the court found that the statements were not reasonably capable of being understood as referring to the plaintiffs, because there was no way to connect the statement, *standing alone*, to the plaintiffs. It was only through other information disseminated by the subject broadcast, over which the defendant did not exercise any control, that the plaintiffs could possibly be connected to the statement. The statement was not actionable.

Thus, even if one considers the additional allegations of Count II, alleging innuendo or context for the purpose of establishing the Plaintiffs as the subject of the alleged statement, the result is the same: the statement is not actionable. Count II asserts that the alleged defamatory statement by Defendant, on April 17, 2008, at 11:20 p.m., was in response or comment to an earlier post by "FabFive" at 9:55 p.m. on April 17, 2008. That post by FabFive, as was the case with the rest of the partial string of blog entries attached to the Complaint, referred to "the Town Council" and "several members of the OPC [Ottawa Planning Commission]", and referred to "the BRIBED members". The alleged defamatory statement by "birdie1" was one sentence: **"FabFive: The bribe has continued since you were last on!!".** There is no reference in that post, directly or by inference or implication, to the Plaintiffs. Even using context or innuendo, the only possible identification related to the alleged defamatory statement is to "members", using this specific reference from the FabFive post of April 17, 2008. A review of the string of blogs attached to the Complaint in support of Count II (Exhibit B) demonstrates that a variety of persons, classes of people and entities were discussed with regard to the issues of the bed and

breakfast ordinance and the Maxon's request to the city. Reference was made to the Ottawa City Council, Ottawa Plan Commission, Ottawa Visitors Center ("OVC"), "the city", "the mayor", "Heritage Harbor", individual named members of the Ottawa Plan Commission, the Christian Hospitality Network (CHN), "Prairie Rivers" (B&B), "Commission" or "Committee members" that were "directly in business with real estate" or "good buddies with members of the city council". In "Exhibit A" of the Amended Petition, not attached and referenced in support of Count II, there is mention of "motel planners" "the motel industry" the "design review committee (DRC)". In the absence of direct identification of the Plaintiffs in the alleged defamatory statement, the extrinsic facts pled in Count II can be innocently construed and reasonably interpreted as referring to someone other than the Plaintiffs, rendering the statement non-actionable as a matter of law [in addition to numerous cases cited here, see *Kirchner v. Greene*, 294 Ill.App.3d 672, 691 N.E.2d 107 (1998)]; *Mittelman v. Witous*, 135 Ill.2d 220, 552 N.E.2d 973 (1989).

Since a requisite element for pleading and proof is absent, and the extrinsic facts pleaded in Count II fail to sufficiently allege that the statement was "of and concerning" Plaintiffs, Count II should be dismissed with prejudice. The defect cannot be cured by amendment.

2. Under the "innocent construction" rule in Illinois, the words of the alleged statement are not actionable as defamation per se.

Count II seems or attempts to allege that the statement at issue constitutes defamation per se (no allegation of special damages and reference to "illegal activity/actions". If that is the case, the statement is not actionable as a matter of law. The modified innocent construction rule as adopted in Illinois (*Chapski v. Copley Press*, 92 Ill.2d 344, 442 N.E.2d 195 [1982]) applies only

to per se actions, i.e., those which stand or fall upon the import of the statement, without the aid of extrinsic facts, and for which damages are presumed. The rule of innocent construction in Illinois applies to the meaning of words, as well as the identification of the object of the speech, or the question of colloquium, and to the determination of whether the statement is a statement of fact. According to *Chapski*, the question of whether a statement may reasonably be innocently construed is initially a question of law; only if it is not capable of being innocently construed may the question be given to the finder of fact for a determination of whether it actually was so understood. *Chapski*, supra; *Spelson v. CBS, Inc.*, 581 F.Supp.1195 (N.D.Ill.1984).

The rule has not been extended to per quod actions, which are only actionable in consequence of extrinsic facts showing circumstances under which the statements at issue were said or the damages resulting to the slandered party. A plaintiff can always seek to establish a per quod action in an attempt to avoid the innocent construction rule by utilization of extrinsic facts to establish the defamatory nature of a statement not otherwise facially defamatory. The whole point of a per quod defamation action is to establish the defamatory character of a statement which is otherwise innocent on its face. Extrinsic facts are not a part of per se analysis. *Mittelman v. Witous*, 135 Ill.2d 220, 552 N.E.2d 973 (1989).

Accordingly, Count II cannot as a matter of law state an action for defamation per se and, if so intended, should be dismissed with prejudice.

The statement alleged in Count II, as a matter of law, cannot constitute defamation per se, as it includes innuendo.

Innuendo may be relevant in cases of defamation per quod, but is irrelevant on the issue

of whether words are actionable per se, since words not actionable per se cannot be made so by innuendo. *Kimball v. Ryan*, 283 Ill.App.456 (1936); *Brewer v. Hearst Publishing Co.*, 185 F.2d 846 (C.A.7 Ill.1950). To determine whether a published article is defamatory per se, the court must view it stripped of all innuendo, colloquium or extrinsic or explanatory circumstances; if the words are unambiguous and incapable of an innocent meaning, they may be declared defamatory as a matter of law. The meaning of the words alleged to be defamatory cannot, by innuendo, be extended beyond a reasonable construction. Words alleged to be defamatory will receive an innocent construction if they are reasonably susceptible of it. *Dowie v. Priddle*, 216 Ill.553, 75 N.E.243; *Life Printing & Publishing Company v. Field*, 324 Ill.App.254, 58 N.E.2d 307; *Brewer v. Hearst Publishing Company*, supra.

Accordingly, if Count II attempts to allege defamation per se, it fails as a matter of law and should be dismissed with prejudice.

3. Count II fails to properly allege an action for defamation per quod.

Loosely translated, per quod means "with explanation". Under this theory, the plaintiff must prove an innuendo (extrinsic facts that are sufficient to reasonably support the defamatory meaning plaintiff urges) and allege special damages. *Mittelman v. Witous*, supra; *Allen v. Ali*, 105 Ill.App.3d 887, 435 N.E.2d 167 (1982).

Here, the words are simply not defamatory, either per se or per quod. The words are not reasonably or fairly capable of the meaning assigned to them by the Plaintiffs, who are not named or identified in any manner in the statement. Assuming that the word "bribed" in fact denotes illegal conduct, there is no allegation, or extrinsic fact which can be reasonably interpreted to reach such a conclusion, that the Plaintiffs engaged in conduct constituting bribery. The meaning

of the language alleged to be defamatory cannot, by innuendo, be extended beyond a reasonable construction. The complaint must allege that the statement complained of was understood by third party readers to refer to the Plaintiff, and was reasonably understood by those third persons as referring to the Plaintiff. *Archibald v. Belleville News Democrat*, 54 Ill.App.2d 38, 203 N.E.2d 281 (1964); *Bereksy v. Teschner*, 64 Ill.App.3d 848, 381 N.E.2d 979 (1978). Here, the statement is not defamatory, on its face or by innuendo.

Additionally, Count II contains no proper allegation of special damages, as required in an action per quod. If a defamatory statement does not fall within a per se category, the plaintiff must plead and prove that he sustained actual damage of a pecuniary nature ("special damages") to recover. *Bryson v. News America Publications*, 174 Ill.2d 77, 672 N.E.2d 1207 (1996). Illinois courts have consistently stated that general allegations such as damage to one's health or reputation, economic loss, and emotional distress are insufficient to state a cause of action for defamation per quod. Allegations of damage in the form of a loss of business and income, exposure to public contempt, mental anguish, and damage to reputation have been determined to be insufficient. *Kurczaba v. Pollock*, 318 Ill.App.3d 686, 742 N.E.2d 425 (2000). There are few examples of sufficient allegations of special damages, but an example is contained in *Becker v. Zellner*, 292 Ill.App.3d 116, 684 N.E.2d 1378 (1997), in which it was alleged that a third party had actually stopped doing business with the plaintiffs as a result of the statement, resulting in pecuniary loss.

Count II fails to state any type of specific pecuniary damage, and seems to suggest general damages, and is insufficient as a matter of law. Count II should be dismissed.

4. The statement alleged in Count II is cloaked with First Amendment protection as opinion in that it cannot be reasonably interpreted as stating actual and objectively verifiable fact concerning the Plaintiffs.

A statement will receive First Amendment protection provided it does not state actual facts. Only factual statements capable of being proven true or false are actionable. This is a part from the question of whether the statement is "of or concerning" the plaintiff. The determination of whether a statement is of fact or opinion is a question of law, and Illinois courts follow the totality of the circumstances analysis as a guideline, developed in *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984). *Moriarty v. Greene*, 315 Ill.App.3d 225, 732 N.E.2d 730 (2000); *Brennan v. Kadner*, 351 Ill.App.3d 963, 814 N.E.2d 951 (2004).

In this analysis, the court considers the statement from the perspective of an ordinary reader of the statement. A four-part test is used to determine whether the average reader would view a statement as one of fact or opinion: (1) the precision of the statement; (2) the verifiability of the statement; (3) literary context of the statement; and (4) public and social contexts of the statement. If it is clear that the writer is exploring a subjective view, and interpretation, a theory, conjecture or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is actionable. *Moriarty v. Greene*, supra.

The literary, public and social contexts are a major determinant of whether an ordinary reader would view an alleged defamatory statement as constituting fact or opinion. The *Brennan v. Kadner*, supra, court drew upon a California Supreme Court opinion regarding this principle, stating that where potentially defamatory statements are published in a "public debate, a heated labor dispute, or in another setting in which the audience may anticipate efforts by the parties to

persuade others to their positions by use of epithets, fiery rhetoric or hyperbole, language which generally might be considered as statement of fact may well assume the character of statements of opinion."

A statement of opinion relating to matters of public concern which does not contain a provably false factual connotation is fully constitutionally protected. Such a statement on matters of public concern must be provable as false before there can be liability under State defamation law. Protection exists for statements that cannot reasonably be interpreted as stating actual facts about an individual. This provides assurance that public debate will not suffer for lack of "imaginative expression" or the "rhetorical hyperbole" which has traditionally added much to public discourse. *Milkovich v. Loraine Journal Co.*, 497 U.S.1, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990); *Aroonsaqul v. Shannon*, 279 Ill.App.3d 345, 664 N.E.2d 1094 (1996).

Here, the statement at issue was made in connection with an ongoing municipal governmental issue regarding the establishment of a bed and breakfast ordinance, and the request of the Plaintiffs to establish a bed and breakfast within the city. A review of Exhibits A and B, only a portion of the entire set of articles and blog chains, clearly demonstrates that the literary and social context did not signal a factual content and the statement is not of the nature that is objectively verifiable as true or false.

Similarly, in *Dubinsky v. United Airlines Master Executive Council*, 303 Ill.App.3d 317, 708 N.E.2d 441 (1999), the alleged defamatory statement was that defendant called plaintiff a "crook" in front of 30 to 40 of his fellow pilots and their wives. The court held that the statement was not actionable because it was not made in any specific factual context, holding that one cannot rely on an assumption that those who heard the statement were completely apprised of all

of the developments in the controversy so as to create a definitive factual context for the use of the word "crook". A similar result obtained in *Doherty v. Kahn*, where the court determined that there were no specific facts at the root of the statements capable of being objectively verified as true or false. Here, the statement is not actionable because of its literary and social context, and because an ordinary reader would not reasonably perceive the statement as making objectively verifiable assertions about the Plaintiffs. *Imperial Apparel v. Cosmo's Designer Direct*, 227 Ill.2d 381, 882 N.E.2d 1011 (2008).

5. Under the allegations of Count II, Plaintiffs are "limited purpose public figures", involved in an issue of public concern, and the alleged statement relates to said issue of public concern, requiring proper allegations and proof of actual malice.

Assuming, arguendo, that the statement at issue is deemed somehow defamatory and actionable, Count II fails to state a cause of action upon which relief may be granted, because the Plaintiffs are "limited purpose public figures", as defined under Illinois law, and the statement arose in the context of an issue of public concern. As with a general purpose public figure, these Plaintiffs are required to competently allege and prove actual malice, i.e., knowledge of the statements falsity or reckless disregard of whether it is false or not. One becomes a "limited purpose public figure" by thrusting himself to the forefront of particular public controversies in order to influence the resolution of the issues involved. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed. 2d 789 (1974); *Davis v. Keystone Printing Service*, 155 Ill.App.3d 309, 507 N.E.2d 1358 (1987).

The entire context of all statements and "blogs" involved in this action derived from the efforts of the Plaintiffs to secure municipal permission to construct and operate a bed and

breakfast, and the amendments to the Ottawa B & B ordinance.

Because Count II fails to sufficiently allege actual malice on the part of the Defendant, Count II should be dismissed as substantially insufficient in law.

III.

MOTION TO DISMISS COUNT II PURSUANT TO 735 ILCS 5/2-619(a)(9)

A. Alternatively, Count II should be dismissed with prejudice under Section 2-619, by reason and application of the modified "innocent construction rule" adopted in Illinois.

In the alternative, Defendant moves for dismissal of Count II, with prejudice, pursuant to Section 2-619(a)(9). In considering such a motion, the court may rely upon affirmative matters outside the pleadings. In a defamation action, the question of whether the allegedly defamatory language is rendered non-actionable per se by the "innocent construction" rule may properly be considered in a Section 2-619 motion to dismiss. *Cartwright v. Garrison*, 113 Ill.App.3d 536, 447 N.E.2d 446 (1983); and *Bryson v. News America Publications*, 174 Ill.2d 77, 672 N.E.2d 1207 (1996).

In support of this Motion, Defendant submits "Exhibit A", comprised of the affidavit of counsel for Defendant and attachments, which include various newspaper articles, "Letters to Editor", and editorial articles of The Times from 2007 and 2008, all regarding the issue of the Maxons' request for establishment of a bed and breakfast and amendments to the Ottawa ordinance.

Whether and to what extent the First Amendment constrains state defamation law depends on the circumstances of the case at issue. Two considerations must be taken into account. The first is whether the plaintiff is a public figure or official or is, instead, merely a

private figure. The second is whether the speech at issue is of public concern. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S.767, 106 S.Ct.1558, 89 L.Ed.2d 783 (1986); *Imperial Apparel v. Cosmo's Designer Direct*, 227 Ill.2d 381, 882 N.E.2d 1011 (2008).

The question of whether the plaintiffs are public or private figures affects the standard of liability. If the plaintiffs are public figures or officials, the First Amendment precludes them from obtaining redress in a defamation action unless they can prove that the allegedly defamatory statements were made with actual malice. *Costello v. Capital Cities Communications*, 125 Ill.2d 402, 532 N.E.2d 790 (1988) (citing *New York Times Company v. Sullivan*, 376 U.S.254, 84 S.Ct.710 [1964]). If the plaintiffs are private figures, the First Amendment does not normally impose any restriction on the liability standards states may adopt. In Illinois, the degree of fault required under such circumstances is ordinary negligence. *Edwards v. Paddock Publications*, Inc., 327 Ill.App.3d 553, 763 N.E.2d 328 (2001).

In contrast to a plaintiff's status, the content of the challenged speech, specifically whether it addresses a matter of public concern, does not determine the standard of liability. That question bears on the standards that must be satisfied in order to recover punitive damages. Where the cause of action is based on defamatory statements concerning a matter of public concern, punitive damages may not be imposed absent a showing of actual malice. *Imperial Apparel v. Cosmo's Designer Direct*, 227 Ill.2d 381, 882 N.E.2d 1011 (2008).

In *Curtis Publishing Co. v. Butts*, 388 U.S.130, 87 S.Ct. (1975), the Supreme Court equated a public figure with one who commands a substantial amount of public interest by his position alone, or one who by his purposeful activity has thrust himself into the vortex of an important public controversy. The extension of the *New York Times* privilege was justified since

such public figures command sufficient continuing public interest and have sufficient access to means of counter-argument to be able "to expose through discussion the falsehood and fallacies" of the defamatory statements. In *Gertz v. Robert Welch, Inc.*, 418 U.S.323, 94 S.Ct. 2997 (1974), the Court further noted that public figure status may rest on two alternative bases: an individual achieving such pervasive fame or notoriety that he becomes a public figure for all purposes and in all context; or, more commonly, an individual voluntarily injecting himself or drawn into a particular public controversy, thereby becoming a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions. The question involves looking to the nature and extent of an individual's participation in the particular controversy giving rise to the alleged defamation. One becomes a "limited purpose public figure" by thrusting himself to the forefront of particular public controversies in order to influence the resolution of the issues involved. *Davis v. Keystone Printing Service*, 155 Ill.App.3d 309, 507 N.E.2d 1358 (1987).

A review of Exhibit A (attached hereto) clearly reveals that the bed and breakfast issue, both as to the request by Plaintiffs for the construction and opening of one, and the resultant effort to amend the existing bed and breakfast ordinance, constitutes an issue of public concern and a public controversy. Over a 17 month period, in excess of thirty (30) news articles, editorial articles, and "Letters to the Editor" were published in The Times newspaper and on its website (Exhibit A). The issue was brought before the Ottawa Plan Commission (OPC) in several of its regular meetings, and the Ottawa City Council considered the issue on more than one occasion prior to a final vote amending the bed and breakfast ordinance, to prohibit construction to such facilities, on June 3, 2008 (see Exhibit A).

The role of the Plaintiffs in connection with that public issue and controversy is equally clear. They created the issue and commenced the controversy by requesting municipal permission to establish a bed and breakfast in their home in January of 2007. Subsequently, they continued their pursuit of that goal with city officials, resulting in the creation and promulgation of a public issue regarding an amendment to the existing B & B ordinance.

These Plaintiffs rendered themselves "limited purpose public figures", thus requiring a proper allegation and proof of actual malice as to any alleged defamation of and concerning them in connection with that issue and controversy. Because Count II fails to contain the necessary allegations to establish the right of the Plaintiffs to any relief, Count II should be dismissed with prejudice pursuant to Section 2-619(a)(9).

Respectfully Submitted,

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