IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

SCOTT R. DRURY, Plaintiff, v. LIBERTY PRINCIPLES PAC and DAN PROFT, Defendants.	Case No. 14 CH 16080 Honorable Allen P. Walker Calendar 03

MEMORANDUM OPINION AND ORDER

This matter comes to be heard on Defendants, Liberty Principles PAC and Dan Proft's, Motion for Summary Judgment. The matter has been fully briefed and argued before the Court. Defendants' Motion for Summary Judgment is granted.

BACKGROUND

Scott Drury ("Plaintiff"), is a former Democratic State Representative for the 58th District of Illinois, elected November of 2012. In November of 2014, Plaintiff ran for reelection against Republican candidate, Mark Neerhof ("Neerhof"). Plaintiff defeated Neerhof in that election and was reelected as State Representative. Defendant, Liberty Principles PAC ("LPP"), is an Illinois intendent expenditure committee that supported Neerhof in the 2014 campaign. Defendant, Dan Proft ("Proft"), was the President of LPP.

On May 27, 2014, during the Illinois 98th General Assembly, the Illinois Senate passed Senate Bill 16 ("SB 16"), which proposed changes in funding for Illinois public school districts. According to various reports, SB 16, if enacted, would have had potentially negative effects on various school districts throughout Illinois. However, SB 16 was never called for a vote in the Illinois House of Representatives, nor presented to any committee on which Plaintiff was a member during the 98th General Assembly. Additionally, Plaintiff did not co-sponsor, help draft, or advocate for SB16. Instead, in response to SB 16, the Illinois House of Representatives introduced House Resolution 1276 ("HR 1276"), which condemned SB 16 as "a piecemeal reallocation of State tax dollars that [would] negatively impact hundreds of school districts," and "urge[d] the members of [the Illinois House of Representatives] to cease their efforts to pass Senate Bill 16 . . .." Def. Ex. C. Plaintiff was invited to co-sponsor HR 1276 but did not do so. *Id*.

On October 4, 2014, LPP and Proft (collectively "Defendants"), published a mail advertisement (the "Mail Ad") in the 58th representative district, which included the following statements about Plaintiff:

> (a) "Scott Drury supports defunding our schools so that party bosses will fund his campaign;"
> (b) "Incumbent State Rep. Scott Drury is doing the bidding of Illinois' Political Ruling Class at the Expense of our Local Schools;"
> (c) "Scott Drury has made the choice to serve Illinois' Political Ruling Class at the expense of our schools;" and
> (d) "Scott Drury's plan would cut approximately $6,918,523 in funding of our local schools and send our tax dollars to other school districts."

Def. Mot. Ex. A.

Additionally, beginning on or about October 4, 2014, and continuing to approximately October 7, 2014, Defendants published a cable television advertisement (the "TV Ad") that was aired in the 58th representative district, and stated the following:

> Scott Drury wants to cut funding for our local schools by as much as seventy percent. Incumbent State Representative Scott Drury has put his Chicago Democrat Party's bosses ahead of our schools. Drury's plan would cut state funding for our schools by more than $6.9 million. Drury's plan would send our tax dollars to Chicago schools. Scott Drury made the choice to serve Illinois' political ruling class at the expense of our schools. On November 4, you have a choice. Bring balance back to state government by voting no on Scott Drury.

Def. Mot. Ex. A.

On October 2, 2014, Plaintiff sent Comcast, the cable television company that aired the TV Ad, a cease-and-desist letter advising Comcast that the TV Ad contained false statements about Drury. *Id*. LPP also received a copy of the cease-and-desist letter on October 3, 2014. On October 4, 2014, LPP sent Plaintiff an email, providing two reasonable explanations for LPP to infer that he supported SB 16, including that "(1) Drury's campaign [was] being financed by Political Action Committees ("PACs"), including the Illinois Network of Charter Schools ("INCS"), who were strong advocates of passing SB 16, and (2) Drury's status as a member of the Democratic caucus pushing SB 16." Def. Mot. Ex. P.

On October 6, 2014, Plaintiff filed an eighteen-count Verified Complaint for Injunctive and Other Relief against LPP, Proft, Neerhof and Neerhof for Illinois[1], and Comcast[2], alleging defamation per se and false light invasion of privacy. The Complaint has since been amended, and the operative complaint is the Second Amended Complaint ("SAC").

On December 4, 2019, Defendants filed a Motion for Summary Judgment. On January 7, 2020, Plaintiff filed a response to the motion, as well as a Motion to Strike Portions of Defendants' Consolidated Statement of Undisputed Material Facts in Support of Motion for Summary Judgement. The motion sought to strike certain affidavits and exhibits submitted in support of the Motion for Summary Judgment.

On January 28, 2020, Defendants filed a Response to Plaintiff's Motion to Strike and a Reply in Support of their Motion for Summary Judgment. The Reply referenced a new affidavit.

On February 24, 2020, Plaintiff filed a Sur-response in opposition to the Motion for Summary Judgment, and on March 10, 2020, Defendants filed a Sur-reply in support of their Motion for Summary Judgment. On May 18, 2021, the Court heard oral arguments on the Motion for Summary Judgment. These motions are presently before the Court.

SUMMARY JUDGMENT STANDARD

Summary judgment should be granted by the court "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show no genuine issue of material fact exists" and when "the moving party is entitled to a judgment as a matter of law." 735 ILCS § 5/2-1005(c) (West 2021); *Berlin v. Sarah Bush Lincoln Health Center*, 179 Ill. 2d 1, 7 (1997). A party seeking summary judgment bears the burden of making a *prima facie* case demonstrating that there are no genuine issues of material fact and if done, judgment as a matter of law should be granted in its favor. *Williams v. Covenant Med. Ctr.*, 316 Ill. App. 3d 682, 689 (4th Dist. 2000). The burden of proof and the initial burden of production in a motion for summary judgment lie with the movant. *Medow v. Flavin*, 336 Ill. App. 3d 20, 28 (1st Dist. 2002). While the non-moving party is not required to prove his case in response to a motion for summary judgment, he must present a factual basis that would arguably entitle him to judgment. *Pielet v. Pielet*, 407 Ill. App. 3d 474, 490 (2d Dist. 2010). A party may obtain summary judgment when the question is purely one of law. *Smith v. Rengel*, 97 Ill. App. 3d 204, 205 (4th Dist. 1981). Finally, in ruling on a motion for summary judgment, the court is required to strictly construe all evidentiary material submitted in support of the motion for summary judgment, liberally construe all evidentiary material submitted in opposition and all evidence and inferences made by this court must be viewed in the light most favorable to the non-moving party. *Kolakowski v. Voris*, 83 Ill. 2d 388, 398 (1980); *Anderson v. LPP Lobby, Inc.*, 477 U.S. 242, 255, (1986).

[1] On September 6, 2018, the Court granted the Neerhof Defendants' 2-615 Motion to Dismiss, and they were dismissed from the case.

[2] Comcast was voluntarily dismissed from the case pursuant to an Agreed Order for Voluntary Dismissal dated December 11, 2014.

DISCUSSION

I. Plaintiff's Motion to Strike

As a preliminary matter, the Court notes that Plaintiff filed a Motion to Strike Portions of Defendants' Consolidated Statement of Undisputed Material Facts in Support of Motion for Summary Judgment. Plaintiff asserts that the Court previously granted his motion to strike paragraphs 8-26 of Proft's affidavit, attached as Exhibit N to Defendants' Motion for Summary Judgment, in its January 9, 2015 Order. Thus, Plaintiff argues that under the law of the case doctrine, the Court should again strike those paragraphs of the affidavit. Additionally, Plaintiff asks the Court to strike Exhibits C, G-H, J, L-O and R, and any factual allegations based upon those exhibits, namely paragraphs 5-6, 10, 14, 16-18, 21-23 and 28 of Defendants' Statement of Facts. Specifically, Plaintiff moves to strike Exhibit C, which is a purported printout of HR 1276, because he argues it (1) lacks foundation, (2) is unauthenticated, (3) is hearsay, and (4) is unsupported by an affidavit. Plaintiff moves to strike Exhibits G, H, J, L, M, O, and R on the same grounds as Exhibit C, in addition to arguing that those exhibits are irrelevant[3].

Defendants respond that Plaintiff's evidentiary objections to all of the exhibits are now moot because Defendants filed a First Amended Statement of Undisputed Facts, which updates Defendants' Statement of Facts at paragraph 14 (noting that "[o]n September 29, 2014, the Mail Speech was sent to the U.S. Postal Service for delivery") and paragraph 17 (stating that "[t]he September 27, 2014 advertisement buy was for one week, meaning the TV Speech ran from October 1, 2014 to October 7, 2014"), and also updates the exhibits (Exhibits J, M, L and N) supporting each fact. Additionally, Defendants assert that Plaintiff waived his opportunity to object to some of the exhibits when he cited to some of them in his own statement of facts. Defendants note that Plaintiff cited to Exhibit D, which is an email from former Representative Ron Sandack, urging him to co-sponsor HR 1276 on September 24, 2014. Defendants also point out that while Plaintiff raised evidentiary objections to Exhibit L, an email from Comcast identifying the TV Ad by its advertisement identification number, he cited to Exhibit L twice in his response to the Motion for Summary Judgment. Pltf. Opp., p. 6, 12. Finally, Defendants note that Plaintiff cited to Exhibit G, which is titled "Mail #4", to argue that Defendants created a copy of the Mail Ad on September 23, 2014. Pltf. Opp., p. 4, 6, and 12. Moreover, Defendants assert that if Plaintiff wanted to dispute Defendants' affidavit, he could have filed his own counter-affidavits instead. Since Plaintiff did not file any counter-affidavits, Defendants argue that Plaintiff has waived his opportunity to object to the exhibits at this point in the litigation.

Defendants contend that even if the Court determines paragraphs 8-26 of Proft's Affidavit (Exhibit N) were previously stricken, the primary support for paragraphs 17 and 18 of their Statement of Facts comes from Defendants' Exhibits M, L, and O. Further, Defendants note that while paragraph 23 is derived from Proft's Affidavit (Exhibit N) and states "[a] third reasonable explanation [for LPP] to infer that Plaintiff supported SB 16] was Plaintiff's failure to co-sponsor

[3] Exhibit G is labeled "Mail #4 – All School Funding" which Defendants cite in support of ¶10 in the SOF.
Exhibit H is a screenshot which Defendants cite in support of ¶10 in the SOF.
Exhibits J, M, and O are invoices cited in support of Defendants' SOF ¶14, 17-18.
Exhibit L is an email from Comcast, dated September 27, 2014, cited in support of Defendants' SOF ¶16-17
Exhibit R is a copy of a "We Ask America" poll, dated September 11, 2014, cited in support of Defendants' SOF ¶28.

HR 1276," this citation is not used for its truth, but rather to show one of the explanations Defendants gave Plaintiff for the ads when they responded to the cease-and-desist letter.

Plaintiff objects to Defendants' First Amended Statement of Facts as improper because the new evidence and affidavits were submitted after Defendants filed their Motion for Summary Judgment and after Plaintiff filed his response. Additionally, Plaintiff argues the new evidence does not cure the deficiencies asserted in his Motion to Strike. Drury notes that pursuant to Illinois Supreme Court Rule 191(b), affidavits are to be based on personal knowledge, shall not be conclusory, and must consist of facts admissible in evidence. Ill. S. Ct. R. 191(a) (West 2021). Plaintiff argues many of the new affidavits are not based on personal knowledge, are conclusory, and are hearsay.

"The sufficiency of affidavits offered in support of or in opposition to a motion for summary judgment is governed by Ill. Sup. Ct. R. 191." *Woolums v. Huss*, 323 Ill. App. 3d 628, 630 (4th Dist. 2001). The requirements of Rule 191 are satisfied "if from the document as a whole it appears that the affidavit is based upon the personal knowledge of the affiant and there is a reasonable inference that the affiant could competently testify to its contents." *Id*. The decision of whether to grant a motion to strike is within the court's discretion. *Id*. "Because an affidavit serves as a substitute for trial testimony, it is necessary that there be strict compliance with Ill. Sup. Ct. R. 191(a) to ensure that trial judges are presented with valid evidentiary facts upon which to base a decision. *Enbridge Pipeline (Ill.), LLC v. Kiefer*, 2017 IL App (4th) 150342, ¶ 1. "An Ill. Sup. Ct. R. 191(a) affidavit must not contain mere conclusions and must include the facts upon which the affiant relied." *US Bank, NA v. Avdic*, 2014 IL App (1st) 121759, ¶ 1.

The Court grants Plaintiff's motion in part and denies it in part. The Court declines to consider Defendants' First Amended Statement of Facts because Defendants did not seek leave of the Court to amend the Statement of Facts. Additionally, the Court agrees with Plaintiff that paragraphs 8-26 of Proft's Affidavit (Exhibit N) were previously stricken in the Court's January 9, 2015 Order. As such, the Court declines to consider those paragraphs in ruling on Defendants' Motion for Summary Judgment. Plaintiff's motion to strike Exhibits G, H, and L is granted because the Court finds Defendants have not properly laid the foundation for, or authenticated, these exhibits. The Court, however, is going to allow Exhibits C, J, M, O, and R.

Having addressed Plaintiff's Motion to Strike, the Court now turns to the Motion for Summary Judgment.

II. Defendants' Motion for Summary Judgment

Defendants argue summary judgment in their favor is warranted because the undisputed facts negate Plaintiff's claims against them for defamation. According to Defendants, to support a common law defamation claim in Illinois, a plaintiff must allege that (1) the defendant made a false statement about the plaintiff; (2) the defendant made an unprivileged publication of the statement to a third party; and (3) the publication damaged the plaintiff. *Green v. Rogers*, 234 Ill. 2d 478, 491 (2009). Additionally, Defendants argue that since Plaintiff is a public figure, to succeed on his defamation claim, he must prove "by clear and convincing evidence, that the defendant acted with 'actual malice' in making the defamatory expression." *Jacobson v. CBS*

Broad., Inc., 2014 IL App (1st) 132480, ¶ 26. Defendants assert that actual malice "requires the plaintiff to prove that the statement was made with (1) knowledge of its falsity or (2) in reckless disregard of whether it was true or false." *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964); *Krasinski v. United Parcel Service, Inc*., 124 Ill. 2d 483, 491 (1998).

First, Defendants contend that the undisputed facts do not show a "reckless disregard" for the truth when they published the TV Ad and the Mail Ad. According to Defendants, reckless disregard exists where a defendant publishes material "without a reasonable basis for belief in its truth." *Bloomfield v. Retail Credit Co*., 14 Ill. App. 3d 158, 172 (1st Dist. 1973). Defendants note they deposed Ariel Johnson ("Johnson"), Director of Government Affairs for the INCS, a third-party expert, who testified it was reasonable to infer candidates, like Plaintiff, who were supported by INCS, also supported the policy positions of INCS, including its general support of SB 16. Def. Mot. Ex. 5, ¶ 24. Additionally, Defendants contend they verified the accuracy of the statements contained in the Mail Ad and TV Ad prior to publishing them. Defendants claim that in response to the cease-and-desist letter, Proft e-mailed two reasonable explanations for why Defendants believed the statements to be true, including that (1) Plaintiff's campaign was being financed by INCS and additional PACs that supported SB 16; (2) Plaintiff was a member of the House Democratic Caucus allegedly pushing SB 16. Thus, Defendants argue there was a "reasonable basis" for them to believe their statements were true, and therefore, Plaintiff is unable to prove reckless disregard.

Second, Defendants argue Plaintiff cannot prove "knowledge of falsity" because publication of the Mail Ad occurred before Defendants received the cease-and-desist letter. Defendants claim the Mail Ad had already been approved, printed, and sent to the post office for delivery before Defendants received the cease-and-desist letter. Specifically, Defendants contend they (1) created the Mail Ad on September 23, 2014; (2) sent a copy to Defendants' mail vendor, Jeff Cook, who designed the mailer and sent it back to Defendants for approval on September 26, 2014; and (3) sent the Mail Ad to the post office on September 29, 2014. Def. Mot., Ex. I, J. Thus, because the cease-and-desist letter was not sent until October 2, 2014, Defendants assert that Plaintiff cannot prove "knowledge of falsity" when Defendants published the Mail Ad.

For the same reasons, Defendants contend Plaintiff cannot prove "knowledge of falsity" in publishing the TV Ad. Defendants claim the TV Ad was approved, and the airtime purchased on September 27, 2014, prior to Defendant's receipt of Plaintiff's cease-and-desist letter on October 3, 2014.According to Defendants, while Plaintiff claims they "continued to publish the [TV Ad], and caused it to continue to be published," Plaintiff has not alleged any actions Defendants took to publish the TV Ad after they received the cease-and-desist letter on October 3, 2014. Defendants note that the TV Ad ran for one week, from October 1, 2014, to October 7, 2014, and was not renewed thereafter. Accordingly, Defendants argue that since Plaintiff cannot prove "reckless disregard" for the truth of the statements or "knowledge of falsity," he cannot satisfy the "actual malice" element of his defamation claim.

Finally, Defendants argue Plaintiff cannot prove harm to his reputation because despite Defendants distributing the advertisements, Plaintiff's polling numbers improved, and he ultimately won his 2014 reelection campaign. Defendants contend that the only poll taken before the election was a "We Ask America" poll, which determined that Plaintiff was leading by 8%.

Def. Mot., Ex. R. Defendants assert that despite publishing the ads, on election day, the same poll showed Plaintiff won the election by a greater margin of 9%. Accordingly, Defendants maintain the undisputed facts contradict Plaintiff's claim that his reputation was damaged due to the ads. Defendants insist that since Plaintiff suffered no harm because of the ads, he cannot prevail in his claims for defamation and false light, and therefore, Defendants are entitled to summary judgment in their favor.

Plaintiff responds that summary judgement should not be granted because genuine issues of material fact exist on the issue of actual malice. First, Plaintiff argues there is a genuine issue of fact as to whether Defendants acted with reckless disregard in publishing the ads. According to Plaintiff, "when the defendant is the original source of the defamatory information and relies merely upon inferences drawn from certain events, reckless disregard may be shown where the defendant failed to make inquiry to ascertain whether the inferences drawn were correct where there are other inferences that may have been drawn from the same events." *Edwards v. Paddock Publ'ns*, 327 Ill. App. 3d 553, 565 (1st Dist. 2001) (finding reckless disregard where a reporter falsely published that a star athlete and homecoming court member had been arrested on drug charges based on inferences drawn from a yearbook without verifying those inferences); and *Catalano v. Pechous*, 83 Ill. 2d 146 (1980) (finding reckless disregard where a city clerk accused others of bribery based on improper inferences, where other inferences existed).

Plaintiff contends Defendants published false statements about him based on unverified inferences that he supported SB 16, despite the existence of facts that cast doubt as to the truthfulness of those inferences. Plaintiff argues Defendants could have made more favorable inferences, such as (1) that Plaintiff did not vote on HR 1276 because he was unaware of it, (2) that Plaintiff was a Democrat because his values aligned with the party's, and (3) that the Children's PAC supported him because he supported their broader issues, which did not include SB 16. Moreover, Plaintiff argues the Court need not consider Johnson's opinion because Defendants failed to qualify Johnson as an expert. *Musberger, Ltd. v. Meier*, 394 Ill. App. 3d 781, 800 (1st Dist. 2009). Additionally, even if she were qualified, Plaintiff argues Johnson merely opined it was reasonable to infer that INCS supported candidates who supported its policy positions, which did not include SB 16. Def. Mot., Ex. 3, 12 - 13. Finally, Plaintiff claims that the Court need not consider Defendants' explanations for their inference that the Mail Ad was true because the issue of reasonableness is a question of fact.

Second, Plaintiff argues genuine issues of fact exist concerning whether Defendants published the defamatory statements with knowledge that they were false. According to Plaintiff, while Defendants rely on various emails, invoices, and a document entitled "Mail #4 – all school funding" in support of their Motion for Summary Judgment, Defendants have not provided any affidavits or testimony to lay the foundation for, or authenticate, such documents. Additionally, Plaintiff argues these documents are hearsay. *Rodriguez v. Frankie's Beef/Pasta and Catering*, 2012 IL App (1st) 113155, ¶14 ("Evidence not admissible at trial cannot be used to support … a motion for summary judgment"). Plaintiff contends the evidence actually establishes that Defendants knew the statements in the ads were false when they published them. Plaintiff alleges that Defendants continued to publish the TV Ad after receiving and responding to the cease-and-desist letter. Additionally, Plaintiff contends the fact that he received the Mail Ad on October 4, 2014, after Defendants received the cease-and-desist letter, leads to a reasonable inference that

Defendants published the Mail Ad after receiving the cease-and-desist letter. Plaintiff insists these facts preclude summary judgment.

Lastly, Plaintiff claims his damages are a disputed issue of fact, and the mere fact that he defeated his opponent in the election does not diminish the harm to his reputation. Plaintiff asserts that the election poll Defendants rely on to support their motion is inadmissible because it lacks foundation and authentication.

Defendants reply that while Plaintiff challenged the evidentiary foundation of their exhibits, he failed to substantively dispute any of the facts relied upon in their motion. Defendants further assert that they were not required to file any affidavits at all to support their Motion for Summary Judgment. 735 ILCS 5/2-1005 ("A defendant may, at any time, move with or without supporting affidavits for a summary judgment. . .."). However, Defendants contend they did attach exhibits to their motion, and the exhibits are acceptable evidence to support their facts under Illinois law. See *Carruthers v. B. C. Christopher & Co*., 57 Ill. 2d 376, 380 (1974) ("If the party moving for summary judgment supplies facts which, if not contradicted, would entitle such a party to a judgment as a matter of law, the opposing party cannot rely upon his complaint or answer alone to raise genuine issues of material fact"). Defendants argue that if Plaintiff wanted to dispute one of Defendants' facts, he could have filed his own counter-affidavit. *Winnetka Bank v. Mandas,* 202 Ill. App. 3d 373, 387-88 (1st Dist. 1990) ("While parties opposing a summary judgment motion are not required to prove their case, they are under a duty to present a factual basis which would arguably entitle them to judgment in their favor.").

According to Defendants, while Plaintiff claims there are genuine issues of material fact on the issue of actual malice, "the question of whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law." *Milkovich v. Lorain Journal Co*., 497 U.S. 1, 17 (1990). Moreover, while Plaintiff attempts to argue that Defendants' failure to inquire whether their inferences about Plaintiff were correct was reckless, this Court's September 12, 2017 Order on Defendant's Motion to Dismiss Plaintiff's First Amended Complaint (the "2017 Order") determined that "the general rule that a defendant's failure to investigate the truth or falsity of a statement before it is published is not sufficient to establish that a defendant acted with reckless disregard of the truth of the statement." Def. Reply, Ex. A. Defendants note that the Court's 2017 Order further explained that *Catalano* and *Edwards*[4], two of the cases cited by Plaintiff in his response, stood for the proposition that "a failure to investigate may be sufficient to establish reckless disregard. . . when there is *substantial reason to doubt the truth of the inference that results in the alleged defamatory statement*." *Id*. at 15 (emphasis added). Defendants argue that while Plaintiff claims Defendants could have drawn other inferences from the three facts that formed the basis of Defendant's ads– Plaintiff's party affiliation, receipt of campaign contributions from INCS, and failure to sign on to HR 1276 – Plaintiff fails to establish there was any substantial reason for Defendants to doubt the truth of the inferences they made. Thus, Defendants maintain that Plaintiff cannot prove reckless disregard.

In reply to Plaintiff's claim that Defendants had knowledge of the falsity of their statements, Defendants assert that Plaintiff has failed to demonstrate there is a genuine dispute of

[4] Defendants contend *Edwards* is distinguishable from the instant case because the plaintiff in *Edwards* was a private citizen, whereas Drury is a public figure.

fact as to this issue as well. According to Defendants, Plaintiff conflates what may have been the truth regarding various facts with Defendants' knowledge of those facts. For instance, while Plaintiff contends in his response that he did not co-sponsor HR 1276 because he did not become aware of it until later, Defendants assert that this fact, even if true, is irrelevant to whether Defendants defamed Plaintiff because Plaintiff failed to establish that Defendants knew this fact. In addition, Defendants note that while Plaintiff attached 194 pages of emails he allegedly sent to his constituents denouncing his support for SB 16, he failed to set forth any facts that suggest Defendants had knowledge of the existence of the e-mails. Defendants contend that the only question before this Court is whether it was reasonable for Defendants to infer that Plaintiff supported SB 16 in light of the fact that he did not co-sponsor HR 1276. To this point, Defendants claim that when they published the ads, all they knew was that Plaintiff did not co-sponsor HR 1276, despite the fact that several of his Democratic colleagues did. As such, Defendants maintain that it was reasonable for them to infer Plaintiff's support for SB 16. Defendants further argue the timing of the events is particularly relevant here. Defendants note the undisputed facts reveal that they approved, paid for, and distributed the TV Ad and Mail Ad prior to receiving Plaintiff's cease-and-desist letter on October 2, 2014. Thus, because Plaintiff cannot prove reckless disregard or knowledge of falsity, Defendants reiterate there is no genuine dispute of material fact on the issue of actual malice.

Finally, Defendants refute Plaintiff's contention that he need not prove actual damages because his claim is for defamation *per se*. According to Defendants, Illinois recognizes only a limited number of defamatory *per se* statements: "(1) those imputing the commission of a criminal offense; (2) those imputing infection with a loathsome communicable disease; (3) those imputing an inability to perform or want of integrity in the discharge of duties of office or employment; (4) those that prejudice a party, or impute lack of ability, in his or her trade, profession or business; and (5) those imputing adultery or fornication." *Van Horne v. Muller*, 185 Ill.2d 299, 307 (1998). Defendants argue none of these circumstances apply in this case because Defendants did not accuse Plaintiff of a crime, claim that he suffered from a disease, or claim that he was unfaithful to a spouse. Defendants contend that even if Plaintiff attempted to argue the ads called into question Plaintiff's integrity, such an argument would fail because the statements merely expressed disagreement over a policy issue, rather than attacking Plaintiff's character. Defendants note they did not accuse Plaintiff of accepting bribes, lying, or abusing his power – statements that would call into question Plaintiff's integrity. Rather, Defendants claim the ads opined that Plaintiff supported a particular piece of legislation that Defendants disagreed with, and that Plaintiff did so because of his political alliances. Defendants assert that "if a defamatory statement does not fall within one of the limited categories of statements that are actionable per se, the plaintiff must plead and prove that [he] sustained actual damage of a pecuniary nature to recover." *Bryson v. News Am. Publ'ns*, 174 Ill.2d 77, 88 (1996). Because Defendants' statements do not fall into one of the defamation *per se* categories, Defendants maintain that Plaintiff was required to plead and prove he sustained damages. Defendants also argue Plaintiff cannot establish he suffered damages because he won the election despite the publications. Thus, Defendants insist they are entitled to summary judgment on this issue.

"To state a cause of action for defamation, a plaintiff must present facts showing the defendant made a false statement about the plaintiff, the defendant made an unprivileged publication of that statement to a third party, and the publication caused damages." *Hadley v. Doe*,

2015 IL 118000, ¶ 30. "A defamatory statement is one that harms a person's reputation because it lowers the person in the eyes of others or deters others from associating with her or him." *Id.*

Where a plaintiff in a defamation action is a public figure, he must prove a defendant's alleged defamatory statements were made with actual malice, regardless of whether the plaintiff is alleging defamation *per se* or *per quod*. *Hardiman v. Aslam*, 2019 IL App (1st) 173196, ¶ 1; See also *Korbar v. Hite*, 43 Ill. App. 3d 636, 637 (1st Dist. 1976). "Actual malice for false light invasion of privacy has the same standard as defamation." *Jacobson v. CBS Broad., Inc*., 2014 IL App (1st) 132480, ¶ 44.

a. Actual Malice

Defendants contend summary judgment in its favor is proper because Plaintiff has failed to prove Defendants acted with actual malice in publishing the ads. The Court agrees. As Defendants note, actual malice "requires the plaintiff to prove that the statement was made with (1) knowledge of its falsity or (2) in reckless disregard of whether it was true or false." *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964); *Krasinski v. United Parcel Service, Inc*., 124 Ill. 2d 483, 491 (1998). First, the Court finds Defendants have met their burden of proving there is no genuine dispute of material fact regarding Defendants' "knowledge of falsity" because publication of the Mail Ad and TV Ad occurred before Defendants received the cease-and-desist letter, and Plaintiff has not shown that Defendants took any affirmative actions to publish the ads after receiving the cease-and-desist letter. Defendants attached invoices to their Motion for Summary Judgment, which show that the Mail Ad and the TV Ad were approved, printed, and sent to the post office for delivery before Defendants received the cease-and-desist letter on October 2, 2014. Def. Mot., Ex. I, J. Moreover, Plaintiff did not refute these facts with any exhibits showing Defendants continued to publish the Mail Ad and TV Ad beyond the paid timeframe. Accordingly, the Court finds no dispute of material fact on this issue.

Next, Plaintiff claims Defendants published the statements in the TV Ad and Mail Ad with "reckless disregard" of whether they were true or false. Notably, Plaintiff cites *Edwards* and *Catalano* in support of his proposition that reckless disregard may be shown where a defendant is the original source of a publication and relies solely on certain inferences without verifying the accuracy of those inferences. *Edwards*, 327 Ill. App. 3d at 565. However, as Defendants assert, the Court already analyzed and addressed these two cases in its 2017 Order on Defendants' Motion to Dismiss Plaintiff's First Amended Complaint. Specifically, the Court noted:

> "According to *Catalano* and *Edwards*, then, there exists an exception to the general rule that a defendants' failure to investigate the truth or falsity of a statement before it is published is not sufficient to establish that a defendant acted with reckless disregard of the truth of the statement. *Id*. at 565-556. A failure to investigate may be sufficient to establish reckless disregard when the defendant who failed to investigate was the original source of the statement, the statement resulted from an inference based on other facts, those other facts permit other inferences to be drawn, and there is substantial reason to doubt the truth of the inference that results in

> the alleged defamatory statement. *Id*. *Importantly, this failure to investigate multiple inferences theory of reckless disregard does not eliminate the requirement that there must be sufficient allegations to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication or that defendant published the matter despite a high degree of awareness of probable falsity." Id.* at 564. *In other words, even where an alleged defamatory statement is based on an inference from facts that permit other inferences, the plaintiff must still allege that the facts on which the defendant made the inference cast serious doubt on the truth of the alleged defamatory statement, especially when the facts support other identifiable inferences*."

2017 Order at p. 15, Def. Reply, Ex. A (emphasis added).

In that same order, the Court found that Plaintiff failed to plead Defendants entertained serious doubts as to the veracity of their statements prior to publishing them, or that they published the statements despite a high degree of awareness that they were probably false. *Id*. Additionally, the Court held that merely alleging there were other inferences Defendants could have drawn from the facts was insufficient, and Plaintiff would need to state what other inferences could be drawn from the facts Defendants asserted as the basis for their alleged defamatory statements. *Id*.

While Plaintiff's Second Amended Complaint sets forth other inferences that Defendants could have derived from the facts – such as (1) that Plaintiff did not vote on HR 1276 because he was unaware of it, (2) Plaintiff was a Democrat because his values aligned with the party's, and (3) the Children's PAC supported him because he supported their broader issues, which did not include SB 16 – for purposes of summary judgment, he has not put forth any evidence that Defendants' entertained serious doubts as to the truth of their inferences prior to publishing the ads. As such, the Court finds there is no genuine dispute of fact as to this issue.

Having determined there is no genuine issue dispute of fact on the issue of whether Defendants acted with "actual malice" in publishing the ads, the Court does not find it necessary to address the parties' arguments on the issue of damages. Accordingly, the Court finds that Defendants are entitled to judgment as a matter of law because Plaintiff cannot succeed on his defamation *per se* and false light claims absent a showing of actual malice.

CONCLUSION

For the reasons stated above, Plaintiff's Motion to Strike is granted in part and denied in part. Plaintiff's motion to strike Exhibits G, H, and L is granted. Plaintiff's motion to strike Exhibits C, J, M, O, and R is denied. Defendants' Motion for Summary Judgment is granted. This order is final. All future status dates are stricken.

ENTERED:

DATE: September 13, 2021

Allen P. Walker, Judge Presiding

Allen Price Walker
Associate Judge