



PRESIDING JUSTICE CUNNINGHAM delivered the judgment of the court.  
Justices Connors and Justice Harris concurred in the judgment.

### ORDER

¶ 1 *Held:* Circuit court properly dismissed with prejudice plaintiff's action for defamation *per se*, where the alleged defamatory statements in a campaign brochure were not actionable false statements; plaintiff's claim for false light invasion of privacy cannot be sustained where it was premised upon the same allegations as the defamation *per se* claim; Citizen Participation Act does not apply to warrant awarding attorney's fees to defendants.

¶ 2 This appeal arises from the June 13, 2014 order entered by the circuit court of Cook County, which dismissed with prejudice a defamation *per se* action initiated by plaintiff Joseph Ponzio, against defendants Rocco D. Biscaglio and Biscaglio's various business entities—Rocco D. Biscaglio Financial Services, Inc., f/k/a R.D.B. Financial Services, Inc., and Rocco D. Biscaglio & Associates, Ltd. (collectively, the defendants), after Ponzio lost the 2013 election for Village President of the Village of Elmwood Park, Illinois. On appeal, Ponzio challenges the circuit court's section 2-615 dismissal of his lawsuit with prejudice (735 ILCS 5/2-615 (West 2012)), claiming that he had alleged sufficient facts to establish a cause of action for defamation *per se*.

¶ 3 BACKGROUND

¶ 4 In April 2013, Ponzio lost the election for the office of Village President of Elmwood Park, Illinois, to his political opponent, Angelo "Skip" Saviano. On May 2, 2013, Ponzio filed a defamation *per se* lawsuit against the defendants, seeking damages in connection with their involvement in the authorship, printing, and distribution of a campaign brochure entitled "The Ponzio Scheme" that was allegedly mailed to Elmwood Park residents on behalf of Saviano prior to election day.

¶ 5 On July 26, 2013, the defendants filed a motion to dismiss the complaint, arguing that the complained-of statements in "The Ponzio Scheme" brochure were not actionable. On January 14, 2014, the circuit court granted the motion to dismiss without prejudice, finding that the complaint failed to allege facts sufficient to establish the element of malice, but granted Ponzio leave to replead and file an amended complaint. However, upon the filing of Ponzio's February 11, 2014 motion to reconsider, the circuit court, on February 25, 2014, vacated the January 14, 2014 order granting the defendants' motion to dismiss, by finding that the complaint did allege sufficient facts to plead actual malice, and directed the defendants to answer the pleading. On March 4, 2014, however, the defendants filed a motion for rehearing and reconsideration (motion for reconsideration) of the court's February 25, 2014 ruling.

¶ 6 The complaint was eventually amended a few times and, on April 1, 2014, Ponzio filed a second amended complaint, seeking \$1 million in damages and \$500,000 in punitive damages. Count I of the second amended complaint alleged defamation *per se* against the defendants, claiming that Ponzio became a financial advisor after passing several examinations (Series 6, Series 7, Series 63, and Series 66 exams) in 2000 and 2001; that he was registered as an investment advisor with the Illinois Department of Securities; that he owned an investment advisor firm and authored a best-selling book on investing that was sold on Amazon.com; that he and his family had been life-long residents of the Village of Elmwood Park (the Village); that Ponzio took an interest in the rising real estate taxes and water rates in the Village; that he used his professional skills to begin a personal study of 12 years of municipal audits performed on the Village's finances and attended various Village budget hearings and open meetings; that on July 16, 2012, he publically announced his candidacy for the office of Village President on a party ticket called the "Voice Party"; that he assisted with the circulation of petitions among registered

voters which garnered nearly 1,000 signatures asking the Village's Board of Trustee to reconsider their recent vote to increase the annual water rate; that Ponzio presented the petitions to the Village Board of Trustees, which then reconsidered the issue and reversed its vote on the water rate hike; that Ponzio and other Voice Party members attended regular Board of Trustee meetings and, based on Ponzio's research and analysis of Village finances, addressed other Village issues such as pension, property taxes, and expenditures; that around December 2012, Saviano announced that he was seeking election for the office of Village President for an opposing party called the "People's Choice Party"; that defendant Biscaglio was "working behind the scenes" on behalf of Saviano by authoring, printing, and distributing a double-sided brochure entitled "The Ponzio Scheme" which was mailed to thousands of Village residents days before the municipal election; that the P.O. Box return address of the brochure was registered under Biscaglio's various business entities; that the purpose of the brochure was to attack the personal and professional reputation of Ponzio; that the brochure contained false and defamatory statements concerning Ponzio; and that the defendants knew the content of the brochure to be false and acted with actual malice to impugn Ponzio's reputation and thereby defeat his campaign for the office of Village President. Count II solely identified various individuals and entities<sup>1</sup> who were not named as defendants but from whom Ponzio sought information, by requesting the court to direct these individuals and entities to respond in discovery in the same manner as the named defendants in the lawsuit. Attached to the second amended complaint were a copy of

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<sup>1</sup> Eugene F. Carpino; James Caporusso; Gina M. Pesko; Jeffrey L. Sargent; Anthony "Tony" Del Santo; Angelo J. Lollino; Philip Marcantelli; Nick Pecora; Ray Soch; John Doria; Curtis Scott Advertising, Inc.; Chrysalis Consulting Group, Inc.; Christopher B. Burke Engineering, Ltd.; George Theo; Walter Drewko; Scott Cimmarusti; and John Doe.

"The Ponzio Scheme" brochure (Exhibit A) and a copy of Ponzio's own campaign fliers (Exhibits B and C).

¶ 7 On June 13, 2014, the circuit court entered an order granting the defendants' March 2014 motion for reconsideration and dismissing with prejudice Ponzio's second amended complaint, finding that "each statement in the defendants' political campaign mailing is either rhetorical hyperbole, true, or substantially true" such that it was not defamatory. On July 11, 2014, Ponzio filed a motion to reconsider the June 13, 2014 ruling and requested leave to amend his complaint, which the circuit court denied on September 15, 2014.

¶ 8 On October 3, 2014, Ponzio perfected a timely notice of appeal, which conferred jurisdiction upon this court pursuant to Supreme Court Rules 301 (eff. Feb. 1, 1994) and 303 (eff. June 4, 2008).

¶ 9 ANALYSIS

¶ 10 The relevant issue on appeal before us is whether the circuit court erred in dismissing with prejudice, Ponzio's second amended complaint, which we review *de novo*. See *Duffy v. Orlan Brook Condominium Owners' Ass'n*, 2012 IL App (1st) 113577, ¶ 14.

¶ 11 Ponzio argues that his second amended complaint alleged sufficient facts to demonstrate a *prima facie* cause of action for defamation *per se*, where the statements made in "The Ponzio Scheme" brochure sent by the defendants falsely imputed that Ponzio "lacked the ability or integrity to engage in his profession as a financial consultant and investment advisor and further falsely input[ed] [he] was 'trying to deceive' the public as to his professional qualifications." Ponzio also argues that the second amended complaint sufficiently alleged that the repeated use of the terms "deceive" and "Ponzio Scheme," coupled with the graphics of a "pyramid of \$100 bills" on the brochure, further accused him of engaging in a criminally deceptive practice.

¶ 12 The defendants counter that the circuit court properly dismissed Ponzio's defamation *per se* lawsuit, where the statements complained-of in "The Ponzio Scheme" brochure were not actionable because they were made in the context of a political campaign and constituted either facts or hyperbole.

¶ 13 As a preliminary matter, the defendants argue that Ponzio forfeited every argument he makes in his appellate brief by failing to plead them in his second amended complaint, and forfeited every claim he pled in the pleading by failing to argue it on appeal. In essence, the defendants argue that Ponzio's arguments on appeal differ from those made in his second amended complaint—that is, in the complaint, Ponzio stressed that his qualifications "as a political candidate" were impugned by the defendants, while he shifts his focus on appeal by arguing that his qualifications "as a financial advisor" were impugned. We disagree. Paragraphs 19, 20, and 40 in Ponzio's second amended complaint expressly alleged that the defendants published "The Ponzio Scheme" brochure for the purpose of attacking Ponzio's personal and professional reputation in order to impute either a lack of ability to perform his duties as a financial consultant and investment advisor or a want of integrity in the discharge of his employment duties. Thus, Ponzio has not forfeited his arguments on appeal.

¶ 14 A section 2-615 motion to dismiss challenges the legal sufficiency of the complaint based on defects apparent on its face. 735 ILCS 5/2-615 (West 2010). "In reviewing a section 2-615 dismissal motion, the relevant question is whether, taking all well-pleaded facts as true, the allegations in the complaint, construed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief may be granted." *Duffy*, 2012 IL App (1st) 113577, ¶ 14. A section 2-615 motion to dismiss is granted where "no set of facts can be proved entitling the plaintiff to recovery." *Id.* However, a plaintiff "may not rely on factual or legal conclusions

that are not supported by factual allegations." *Id.* Because Illinois is a fact-pleading jurisdiction, a plaintiff must allege facts sufficient to bring his or her claim within the scope of the cause of action asserted. *Turner v. Memorial Medical Center*, 233 Ill. 2d 494, 499 (2009).

¶ 15 The basis for Ponzio's lawsuit is that "The Ponzio Scheme" brochure, which was sent to Village residents during a contested political campaign, allegedly defamed him. Under the First Amendment of the United States Constitution, "Congress shall make no law \*\*\* abridging the freedom of speech, or of the press \*\*\*." U.S. Const., amend. I. The First Amendment is binding on the states through the Fourteenth Amendment. See, e.g., *Murdock v. Pennsylvania*, 319 U.S. 105, 108 (1943). There are, however, various constitutional limitations to free speech. One such limitation affects the standard of liability—that is, public figures must plead and prove actual malice. *New York Times Co. v. Sullivan*, 376 U.S. 254, 286 (1964). A second limitation focuses on the content of the speech and affects potential damages—if the speech relates to a matter of public concern, punitive damages are prohibited absent a showing of actual malice. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775 (1986). A third limitation affects both liability and damages—if the speech relates to a matter of public concern and is brought against a media publisher, the plaintiff must establish falsity as well as fault. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16 (1990).

¶ 16 State laws determine the degree of fault necessary to establish defamation. See *Gertz v. Welch*, 418 U.S. 323, 345-46 (1974). In Illinois, ordinary negligence is sufficient. *Edwards v. Paddock Pubs, Inc.*, 327 Ill. App. 3d 553, 562 (2001). Thus, to state a common law defamation claim in Illinois, a plaintiff must allege facts 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).

Statements are defamatory if they tend to harm a person's reputation by: (1) lowering that person's reputation in the community; or (2) deterring others from associating with that person. *Id.*, citing *Kolegas v. Heftel Broadcasting Corp.*, 154 Ill. 2d 1, 10 (1992); see also *Tuite v. Corbitt*, 224 Ill. 2d 490, 501 (2006).

¶ 17 In Illinois, a statement may be defamatory *per se* if its defamatory character is obvious and apparent on its face and injury to the plaintiff's reputation may be presumed. *Tuite*, 224 Ill. 2d at 501. Five categories of statements are considered defamatory *per se*—those that impute a person: (1) committed a crime; (2) is infected with a loathsome communicable disease; (3) cannot perform or lacks integrity to perform employment duties; (4) lacks ability, or otherwise prejudices him, in his trade, profession or business; and (5) engaged in fornication or adultery. *Solaia Technology, LLC v. Specialty Publishing Co.*, 221 Ill. 2d 558, 579-80 (2006); *Bryson v. News America Publications, Inc.*, 174 Ill. 2d 77, 87 (1996). Damages are presumed in a claim of *per se* defamation. *Bryson*, 174 Ill. 2d at 87. However, even if an alleged statement falls within one of the categories of defamation *per se*, it will not be actionable if it is reasonably capable of an innocent construction. *Green*, 234 Ill. 2d at 499. "Under the 'innocent-construction rule,' a court must consider the statement *in context* and give the words of the statement, and any implications arising from them, their natural and obvious meaning." (Emphasis in original.) *Id.*, citing *Kolegas*, 154 Ill. 2d at 11. If a statement may reasonably be innocently interpreted, it cannot be actionable *per se*. *Green*, 234 Ill. 2d at 499. Courts are not to undertake a balancing of reasonable constructions. *Id.* at 500.

¶ 18 A complaint for defamation *per se* must set forth the words alleged to be defamatory "clearly and with particularity." *Krueger v. Lewis*, 342 Ill. App. 3d 467, 470 (2003), citing *Lykowski v. Bergman*, 299 Ill. App. 3d 157, 163 (1998). This allows the defendants to properly

formulate their answer and affirmative defenses and provides the court with the ability to meaningfully review the statements. *Krueger*, 342 Ill. App. 3d at 470. Whether any particular statement is defamatory and whether any particular statement is an opinion or a factual assertion are both questions of law. *Tuite*, 224 Ill. 2d at 511. "If a statement is factual, and it is false, it is actionable." *Solaia*, 221 Ill. 2d at 582; see also *Seitz-Partridge v. Loyola University of Chicago*, 2013 IL App (1st)113409, ¶ 29 ("[s]tatements that are capable of being proven true or false are actionable, whereas opinions are not"), citing *Moriarty v. Greene*, 315 Ill. App. 3d 225, 233 (2000).

¶ 19 A statement will receive first amendment protection from defamation lawsuits if "it cannot be reasonably interpreted as stating actual facts about the plaintiff." *Maag v. Illinois Coalition for Jobs, Growth & Prosperity*, 368 Ill. App. 3d 844, 851 (2006). "While in one sense all opinions imply facts, the question of whether a statement of opinion is actionable as defamation is one of degree; the vaguer and more generalized the opinion, the more likely the opinion is nonactionable as a matter of law." *Wynne v. Loyola University of Chicago*, 318 Ill. App. 3d 443, 452 (2000). This legal middle ground may also apply to rhetorical hyperbole. See *Imperial Apparel, Ltd. V. Cosmo's Designer Direct, Inc.*, 227 Ill. 2d 381, 397 (2008). Indeed, "ill-informed, mean-spirited hyperbole is not necessarily defamatory *per se*." *Maag*, 368 Ill. App. 3d at 850. As noted in *Maag*, political and judicial campaigns are particularly ripe for outrageous and inflammatory statements that are also wholly protected and nonactionable forms of speech. *Id.* at 850-51 (quoting *Ogren v. Rockford Star Printing Co.*, 288 Ill. 405, 417 (1919) ("[w]hen anyone becomes a candidate for public office, conferred by the election of the people, he is considered as putting his character in issue, so far as it may respect his fitness and qualifications for office, and everyone may freely comment on his conduct and actions. His acts

may be canvassed and his conduct boldly censured"). In applying the test for determining whether a statement can reasonably be interpreted as stating actual fact so as to determine whether it is protected from defamation claims under the first amendment, we are guided by several criteria: (1) whether the statement has a precise and readily understood meaning, while bearing in mind that the first amendment protects overly loose, figurative, rhetorical, or hyperbolic language, which negates the impression that the statement actually presents facts; (2) whether the statement is verifiable as true or false; and (3) whether the statement's literary or social context signals that it has factual content or negates the impression that it is factual. *Imperial Apparel, Ltd.*, 227 Ill. 2d at 398; *Maag*, 368 Ill. App. 3d at 851. The statement is evaluated from the perspective of an ordinary reader, but whether or not a statement is a factual assertion that could give rise to a defamation claim is a question of law for the court. *Imperial Apparel, Ltd.*, 227 Ill. 2d at 398. Thus, Illinois defamation law dictates that, in cases brought by a public figure, such as Ponzio in the case at bar, allegedly defamatory statements are protected by the first amendment unless he can show that they are factual and false. Statements that are generalized opinion, rhetorical hyperbole, true, or substantially true are not actionable. See *Harrison v. Addington*, 2011 IL App (3d) 100810, ¶39 (true statements cannot support a claim of defamation); *Harrison v. Chicago Sun-Times, Inc.*, 341 Ill. App. 3d 555, 563 (2003) ("substantial truth" of the allegedly defamatory material is sufficient to establish the defense of truth to a defamation action).

¶ 20 In the case at bar, Ponzio's own campaign fliers, which were attached to the second amended complaint as Exhibits B and C, state that Ponzio's party (the Voice Party) "helped bring you this year's water rate freeze and next year's property tax cut"; that Ponzio's hard work for Elmwood Park is "starting to pay off"; that Ponzio is "an absolute expert on the Village's

budget"; and that Ponzio is a "best-selling author and nationally recognized financial consultant." Attached as Exhibit A to the second amended complaint was "The Ponzio Scheme," which is a double-sided mailing sent by the defendants to Village residents in response to Ponzio's campaign fliers. The front of the brochure sets forth the title as "*The Ponzio Scheme*," along with the following statement underneath that heading: "Joe Ponzio is trying to deceive the residents of Elmwood Park." A pile of \$100 bills is also depicted at the bottom of the front side of the brochure. The reverse side of the brochure states at the top of the page, "Joe Ponzio is trying to deceive you because he wants control of your hard earned tax dollars." In the center of the page is a photograph of Ponzio and the words: "THE FACTS about Joe Ponzio..." below which are two columns stating:

"Joe Ponzio says..."	"The Truth"
"He cut taxes and froze water rates"	"The current Village President and Trustees did that"
"He's an Expert on the Village Budget"	"He uses an anonymous person as his source"
"He's a 'Best-Selling Author' "	"He is listed 98,074 on amazon.com"
"He's a Nationally Recognized Financial Consultant"	"He has <u>no</u> professional designations /certifications as a financial consultant or investment advisor"

Below these columns are two more statements: "We can't trust Joe Ponzio as Elmwood Park Mayor," and "Vote NO to 'The Ponzio Scheme' on April 9th."

¶ 21 The second amended complaint alleged as defamatory, the following statements in the defendants' brochure: (1) the use of the term "Ponzio Scheme," which Ponzio claims is a clear reference to the well-known pyramid criminal financial scheme known as the "Ponzi Scheme";

(2) "Joe Ponzio is trying to deceive the residents of Elmwood Park"; (3) "Joe Ponzio is trying to deceive you because he wants control of your hard earned tax dollars"; (4) "Joe Ponzio says...He cut taxes and froze water rates. The Truth. The current Village President and Trustee did that"; (5) "Joe Ponzio says...He's an Expert on the Village Budget. The Truth. He uses an anonymous person as his source"; (6) "Joe Ponzio says...He's a 'Best Selling Author.' The Truth. He is listed 98,074 on amazon.com"; (7) "Joe Ponzio says...He's a Nationally Recognized Financial Consultant. The Truth. He has no professional designations/certifications as a financial consultant or investment advisor." In sum, the second amended complaint alleged that the defendants' brochure was false and defamatory because it imputed that Ponzio engaged or was engaging in a criminal financial enterprise known as a Ponzi Scheme and, therefore, was morally and ethically unfit to hold the Village presidency. It alleged that the brochure was also defamatory because it imputed that Ponzio was engaged in a criminal scheme to deceive Village residents. The pleading further alleged that statements made under the two columns on the reverse side of the brochure were also false and defamatory. Specifically, the pleading alleged that the four statements under the "Joe Ponzio says" column were false, never occurred, or were not attributable to him, while the four statements under the "The Truth" column of the brochure intentionally misled the reader.

¶ 22 On appeal, Ponzio does not challenge every statement in the brochure that he claims in his second amended complaint as defamatory. To the extent that he does not challenge on appeal certain statements in the brochure as defamatory, we find that he has forfeited review of the circuit court's dismissal of his defamation claim based on those statements. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008) ("[p]oints not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing"). Thus, we address only those arguments

which Ponzio affirmatively raises on appeal. First, Ponzio challenges the use of the term "Ponzio Scheme" in the brochure as defamatory *per se* by claiming that it implicates him in a criminal Ponzi scheme or a scheme to deceive Village voters by dishonestly holding himself out as a reputable investment advisor.<sup>2</sup> We find that although it is easy for an ordinary reader to make the mental leap from "Ponzio Scheme" to the familiar "Ponzi Scheme," there is no such thing as a "Ponzio Scheme" that is criminal in nature. Because the term "Ponzio Scheme" in the brochure neither has a "precise and readily understood meaning" nor is verifiable as true or false, we find that it cannot reasonably be interpreted as stating an actual fact about Ponzio. See *Imperial Apparel, Ltd.*, 227 Ill. 2d at 398 (setting forth criteria for determining whether statement can reasonably be interpreted as stating actual fact); *Maag*, 368 Ill. App. 3d at 851 (statement will receive first amendment protection if it cannot be reasonably interpreted as stating actual facts about the plaintiff). Rather, "Ponzio Scheme" is a made-up term that is nonactionable rhetorical hyperbole because it is understood in context "as an exaggeration rather than a statement of literal fact." *Kolegas*, 154 Ill. 2d at 15, citing *Greenbelt Cooperative Publishing Association, Inc. v. Bresler*, 398 U.S. 6 (1970) (in context, the word "blackmail" referred, not to criminal act, but to unreasonable negotiating practices); *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264, 284-86 (1974) (characterization of union "scab" as a "traitor" was understood to mean that the plaintiffs' actions were reprehensible, not treasonous); *Maag*, 368 Ill. App. 3d at 850 ("ill-informed, mean spirited hyperbole is not necessarily defamatory *per se*").

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<sup>2</sup> Ponzio impliedly argues that this statement falls within the enumerated categories of defamation *per se*, by imputing that he committed a crime (category 1), he lacked integrity to perform employment duties (category 3) or lacked the ability in his trade, profession, or business (category 4). See *Solaia*, 221 Ill. 2d at 579-80.

¶ 23 Nevertheless, Ponzio argues that the term "Ponzio Scheme," when viewed in context of the remainder of the brochure, cannot be understood as an exaggeration rather than a statement of literal fact. He bases this argument on a single sentence appearing in the circuit court's June 13, 2014 dismissal order, which, in reference to the last statement made in "The Truth" column of the brochure, stated that the defendants were "plainly implying that Ponzio was not a licensed or a qualified investment advisor." From there, he argues that reading the term "Ponzio Scheme" in the context of the circuit court's one-sentence finding, it was error for the court to conclude at the pleading stage of the case that the term "Ponzio Scheme" was merely rhetorical hyperbole and opinion. We disagree. The term "Ponzio Scheme," when placed in context of the entire brochure, does not suggest that it is related to Ponzio's profession; rather it refers to his alleged political activities and the defendants' opinion that Ponzio was misstating his achievements with voters in a hotly contested election. It is important to note that the brochure complained-of was sent to Village residents in the context of a campaign for public office, such that inflammatory and outrageous statements are nonactionable forms of speech and Ponzio had no reasonable expectation that his opponent would place him in a good light. See *Maag*, 368 Ill. App. 3d at 850-51 (quoting *Ogren*, 288 Ill. at 417 (candidates for public office put their own character at issue and everyone may freely comment on his conduct and actions)). While Ponzio argues that no reasonable reader of the brochure would believe it to have originated from his political opponent, since the brochure's return address showed that it was disseminated by a fake organization called "Illinois Taypayers" designed to conceal the defendants' true involvement on behalf of Ponzio's political opponent, Saviano, we find that this did nothing to remove the brochure from the overall context of the political arena as the plain content of the brochure clearly urges the public to "Vote NO to 'The Ponzio Scheme' on April 9th." Accordingly, we

find that the term "Ponzio Scheme" in the brochure was not a statement of actual fact about Ponzio, but rather a statement of opinion or rhetorical hyperbole in the context of a political campaign and was nonactionable. See *Turner-El v. West*, 349 Ill. App. 3d 475, 479 (2004) (reviewing court can affirm on any basis supported by the record, regardless of whether the circuit court relied on the same basis).

¶ 24 Second, Ponzio argues that the brochure's repeated use of the phrase "trying to deceive" in the statements "Joe Ponzio is trying to deceive the residents of Elmwood Park" and "Joe Ponzio is trying to deceive you because he wants control of your hard earned tax dollars," was defamatory *per se*. To the extent that Ponzio makes this argument on the same basis as his challenge to the use of the term "Ponzio Scheme" in the brochure, we likewise reject the argument. Here, the statements that Ponzio was "trying to deceive" Village residents in order to gain control of the residents' hard-earned money, are statements of opinion and not verifiable as true or false such that they can reasonably be interpreted as stating actual facts about Ponzio. The word "deceive" directly relates to the "Ponzio Scheme" phrase in the defendants' attempt to link Ponzio's supposed deceit with his goal of winning the election and, thereby, controlling the residents' tax dollars. However, when the "trying to deceive" statements are placed in the context of the brochure and the broader context of the election, they do not suggest that they related to Ponzio's profession as a financial consultant or investment advisor and, therefore, do not impute that Ponzio committed a crime by engaging in the illegal practice of his profession as he seems to suggest. See *Maag*, 368 Ill. App. 3d 844 (dismissal of defamation action brought by sitting judge running for retention affirmed, where disparaging statements in negative campaign flier accusing judge of being soft on crime and citing examples of his cases, were nonactionable as statements of opinion and rhetorical hyperbole as to plaintiff's performance as judge;

statements must be evaluated in the broader context of a hotly contested judicial election, and exaggerated rhetoric is commonplace in political campaigns). Rather, these statements refer to the defendants' conclusory opinion and rhetorical hyperbole that Ponzio was using misleading tactics to win votes. In support of his argument that the phrase "trying to deceive" was not merely rhetorical hyperbole, Ponzio cites *Kolegas*, 154 Ill. 2d 1, 12-16 (1992) and *Kumaran v. Brotman*, 247 Ill. App. 3d 216, 226-29 (1993), in which the courts held that the word "scamming" could be found to be defamatory *per se* because it attacked the plaintiff's integrity and reputation by implying that that he was lying and "trying to deceive" others. Ponzio argues that in the case at bar, under *Kolegas* and *Kumaran*, the defendants' use of the statements of "trying to deceive" in the brochure was likewise defamatory *per se* as a matter of law. We find these cases to be distinguishable, as neither *Kolegas* nor *Kumaran* involved statements made in the context of a political campaign about a public figure. Accordingly, we find that the term "trying to deceive" as used in the brochure was a nonactionable statement of opinion or rhetorical hyperbole and could not be reasonably interpreted as stating an actual fact about Ponzio.

¶ 25 Next, Ponzio challenges two of the four statements listed under the "Joe Ponzio says" and "The Truth" columns on the reverse side of the brochure: (1) "Joe Ponzio says...He's a 'Best Selling Author.' The Truth. He is listed 98,074 on amazon.com"; and (2) "Joe Ponzio says...He's a Nationally Recognized Financial Consultant. The Truth. He has no professional designations/certifications as a financial consultant or investment advisor." Ponzio argues that the circuit court erred in finding these two statements to be true and therefore, not actionable. He claims that these statements, when viewed in their overall context, could reasonably be interpreted by a person of ordinary intelligence as accusing Ponzio of not being qualified to engage in his profession as a financial consultant, as well as being engaged in a scheme of trying

to deceive the public concerning his professional background as a financial consultant and author. The defendants counter that these statements were true and could not serve as the basis for his defamation *per se* claim.

¶ 26 Neither truthful nor substantially truthful statements are actionable as defamatory. *Addington*, 2011 IL App (3d) 100810, ¶39 (true statements cannot support a claim of defamation); *Wynne*, 318 Ill. App. 3d at 451 (defendant is not liable for a defamatory statement if the statement is true); *Harrison*, 341 Ill. App. 3d 555, 563 (2003) ("substantial truth" of the allegedly defamatory material is sufficient to establish the defense of truth to a defamation action). To determine whether a statement is "substantially true," a statement's gist or sting is true if it produces in the recipient's mind the same effect that the truth would have produced. *Myers v. Levy*, 348 Ill. App. 3d 906, 920 (2004); *Moore v. People for the Ethical Treatment of Animals, Inc.*, 402 Ill. App. 3d 62, 71 (2010). While determining "substantial truth" is normally a jury question, the question is one of law where no reasonable jury could find that substantial truth had not been established. *Moore*, 402 Ill. App. 3d at 71. Determining "truth" is a question of law for the court and not considered an affirmative defense since a claim of falsity is a necessary element in any defamation cause of action. *Voyles v. Sandia Mortgage Corp.*, 196 Ill. 2d 288, 300 (2001).

¶ 27 With respect to the statement as to Ponzio's authorship, we find the entirety of the statement to be true. The first part of the statement states that "Joe Ponzio says...He's a 'Best Selling Author.'" The record shows that Ponzio's own campaign fliers, which were attached to the second amended complaint as Exhibits B and C, expressly tout that he is a "best-selling author." Thus, by Ponzio's own admission, this part of the statement is true. The second part of the statement states: "The Truth. He is listed 98,074 on amazon.com." Paragraphs 7 and 33 of

the second amended complaint expressly allege that Ponzio authored and published a book entitled, "F Wall Street," which was ranked on the Amazon.com website as 98,074 out of over 1,000,000 titles actually sold through the website, thus placing his book well within the top ten percent of titles sold on Amazon.com. Although "The Truth" column of the defendants' brochure plainly says that Ponzio's book was ranked 98,074th on Amazon.com and omitted the additional information that over one million titles were sold on Amazon.com, we find that the plain statement of Ponzio's book being ranked 98,074th is true. Moreover, while Ponzio argues that viewing this statement in its overall context could be interpreted by a person of ordinary intelligence as accusing him of being engaged in a scheme to deceive the public about his professional background as an author, we find that, regardless of the defendants' motives in placing Ponzio in an unfavorable light before the voters during a political campaign, the statement in issue was true. See, e.g., *Maag*, 368 Ill. App. 3d at 852 (while certain statements were simplistic, misleading, not accurate in every detail, and designed to generate fear and anger, they were nonetheless substantially true and thus, not actionable as defamatory). Therefore, we find this statement to be nonactionable and cannot support a claim for defamation *per se*.

¶ 28 With respect to the statement as to Ponzio's background as a financial consultant, we likewise find the statement to be true. The first part of the statement states; "Joe Ponzio says...He's a Nationally Recognized Financial Consultant." Again, Ponzio's own campaign fliers, which were attached as exhibits to the second amended complaint, expressly state that he is a "nationally recognized financial consultant." Thus, by Ponzio's own admission, this part of the statement is true. The latter part of the statement states: "The Truth. He has no professional designations/certifications as a financial consultant or investment advisor." Paragraph 35 of the second amended complaint admits that Ponzio filed a state public disclosure reporting that he

had no professional designations, but alleges that he has passed "all required state securities exams" in order to engage in the profession of investment advisor and that he was registered with the Illinois Department of Securities to engage in the profession. A copy of Ponzio's public disclosure filing with the state, which confirms that Ponzio had "0 professional designations" as an investment advisor, was attached as Exhibit D to the pleading. In the statement of facts of his opening brief on appeal, Ponzio also admits that he had no "professional designations" and no "certifications" with respect to his profession as a financial consultant and investment advisor. Thus, we find the brochure's statement that he had "no professional designations/certifications as a financial consultant or investment advisor" to be true.

¶ 29 Notwithstanding the foregoing, Ponzio argues that this statement is defamatory because while the circuit court "correctly found" that "there is no such thing as 'certifications' as that term was being used by [the] defendants in [the] brochure," this finding supports his argument that the defendants were "accusing [him] of engaging in a profession without having 'certification' when, in fact, no such thing even existed!" However, on the contrary, the circuit court's order dismissing Ponzio's defamation claim found only that there was "*nothing in the record* indicating that certifications are necessary to work as an investment advisor," but makes no definitive finding that certifications did not exist. Regardless of the implication Ponzio wishes to draw from the circuit court's observation, which we are not bound to follow in reviewing this case *de novo*, it is undeniably true that Ponzio has no "certifications" attendant to his profession as a financial consultant or investment advisor. As noted, within the context of a political campaign, Ponzio's political opponents are not required to put him in a favorable light and an ordinary reader of the brochure can reasonably expect certain information favorable to Ponzio to be omitted. See *Maag*, 368 Ill. App. 3d at 852 (finding statements made in a political election as

substantially true and not actionable as defamatory despite inaccuracies partly having to do with what was "left out").

¶ 30 Ponzio further argues at length that the statement regarding his lack of professional designations or certifications was false and thus, clearly actionable as defamatory *per se*, by again giving undue emphasis on the circuit court's one-sentence observation—as set forth in our previous discussion on the brochure's use of the terms "Ponzio Scheme" and "trying to deceive"—interpreting the statement by the defendants as "plainly implying that Ponzio was not a licensed or a qualified investment advisor." He specifically argues that because the meaning behind this one-sentence statement was false as he was clearly licensed and qualified by the Illinois Department of Securities to lawfully engage in the profession, the court erred in dismissing his defamation claim at this stage of the proceedings rather than allowing the jury to determine whether the statement was in fact defamatory. However, as noted, we are not required to adopt the circuit court's interpretation of the defendants' implication behind this alleged defamatory statement in our *de novo* review, and we find that the ordinary reader could reasonably interpret that statement as one by which the defendants tried to imply that Ponzio was not a "nationally recognized" financial consultant as he claimed, rather than that he lacked the qualifications to practice as one. See *Turner-El*, 349 Ill. App. 3d at 479 (reviewing court can affirm on any basis supported by the record, regardless of whether the circuit court relied on the same basis). Therefore, we find that, given the overall context of the political election, the statements complained-of were either rhetorical hyperbole, opinion, or truthful such that even viewing the second amended complaint in a light most favorable to Ponzio, no set of facts can be proved entitling him to recovery. See *Duffy*, 2012 IL App (1st) 113577, ¶14. Accordingly, we hold that the circuit court properly dismissed with prejudice Ponzio's defamation *per se* claim.

¶ 31 In granting the defendants' motion to dismiss the defamation *per se* claim with prejudice, the circuit court additionally found that Ponzio failed to allege facts from which a cause of action for false light invasion of privacy (false light claim) could be supported. Buried in paragraph 37 under the defamation *per se* count (count I) of the second amended complaint, Ponzio alleges that the brochure's statements placed him in a false light "in the eyes of the voters so as to prejudice [him] in his ongoing efforts at public service and further portray [him] as both lacking the integrity to perform the duties of an elected office as well morally and ethically unfit to be elected to the position of [Village President]."

¶ 32 To state a cause of action for false light, the plaintiff must allege that: (1) defendant's actions placed the plaintiff in a false light before the public; (2) the false light would be highly offensive to a reasonable person; and (3) defendant acted with actual malice. *Kolegas*, 154 Ill. 2d at 17, citing *Lovgren v. Citizens First Nat'l Bank*, 126 Ill. 2d 411, 419-23 (1989). The purpose underlying the false light cause of action is to define and protect an area within which every citizen must be left alone. *Lovgren*, 126 Ill. 2d at 420.

¶ 33 Ponzio now argues that the circuit court erred in dismissing his false light claim by finding that the complained-of statements in the brochure "did not invade Ponzio's right to privacy since none of them concerned facts that could be construed in any way as being private." Ponzio argues that the circuit court's ruling was premised upon a misapplication of the decision in *Lovgren*, in which our supreme court noted that "the heart of this tort lies in the publicity, rather than in the invasion into the plaintiff's physical solitude or affairs upon which the tort of invasion into seclusion is based." *Id.* at 418-19. Ponzio argues that because the basis of the circuit court ruling ignored the above-quoted finding in *Lovgren*, dismissal of his false light

claim was not warranted and he should be allowed to amend his complaint on remand to replead the false light claim as a separate count in the complaint.

¶ 34 The defendants counter that Ponzio failed to state a cause of action for false light where it was premised upon a defamation *per se* claim that was unsuccessful. We agree. In Ponzio's reply brief, he concedes that where a false light claim is premised upon the same facts as alleged in a defamation claim, the false light claim fails upon dismissal of the defamation claim. Thus, in light of our finding that Ponzio failed to state a cause of action for defamation *per se*, we find that Ponzio's false light claim, which was premised upon the same allegations as the defamation *per se* claim, fails as well. See *Seith v. Chicago Sun-Times, Inc.*, 371 Ill. App. 3d 124, 139 (2007) (because plaintiff's unsuccessful defamation *per se* claim is the basis of his false light claim, plaintiff's false light invasion of privacy claim fails as well); *Tuite v. Corbitt*, 358 Ill. App. 3d 889, 899 (2005), *reversed on other grounds*, 224 Ill. 2d 490 ("because the plaintiff's defamation *per se* claim fails, his false light invasion of privacy claim fails as well"). Accordingly, we hold that the circuit court did not err in dismissing with prejudice, Ponzio's false light claim. See *Turner-El*, 349 Ill. App. 3d at 479 (reviewing court can affirm on any basis supported by the record, regardless of whether the circuit court relied on the same basis).

¶ 35 Additionally, the defendants argue that this court should remand this case for a determination of their right to attorney's fees under the Citizen Participation Act (Act), (735 ILCS 110/1 *et. seq.* (West 2014)), for defending against Ponzio's baseless claims. The Act, commonly referred to as the anti-SLAPP (Strategic Lawsuits Against Public Participation) statute, was enacted to counteract lawsuits designed to chill a defendant's speech or protest activity and discourage opposition by others through delay, expense, and distraction. *Sandholm v. Kuecker*, 2012 IL 111443, ¶ 34; 735 ILCS 110/5 (West 2014) ("it is the purpose of this Act to

strike a balance between the rights of persons to file lawsuits for injury and the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government; to protect and encourage public participation in government to the maximum extent permitted by law; to establish an efficient process for identification and adjudication of SLAPPs; and to provide for attorney's fees and costs to prevailing movants"). The threat of SLAPPs "significantly chills and diminishes citizen participation in government, voluntary public service, and the exercise of these important constitutional rights. This abuse of the judicial process can and has been used as a means of intimidating, harassing, or punishing citizens and organizations for involving themselves in public affairs." 750 ILCS 110/5 (West 2014). Section 15 of the Act requires the moving party to demonstrate that the plaintiff's complaint is "based on, relates to, or is in response to any act or acts of the moving party in furtherance of the moving party's rights of petition, speech, association, or to otherwise participate in government." 735 ILCS 110/15 (West 2008). If the moving party has met his or her burden of proof, the burden then shifts to the responding party to produce "clear and convincing evidence that the acts of the moving party are not immunized from, or are not in furtherance of acts immunized from, liability" under the Act. *Sandholm*, 2012 IL 111443, ¶ 56.

¶ 36 We conclude, based on the parties' pleadings, that Ponzi's lawsuit was not based on, related to, or in response to the acts of the defendants in furtherance of the rights of petition, speech association or to participate in government. Ponzio's action for defamation *per se* does not resemble in any way a strategic lawsuit intended to chill participation in government or to stifle political expression. Rather, it is apparent that the true goal of Ponzio's action was not to interfere with and burden the defendants' freedom of speech and to participate in government, but to seek damages for what he believed to be personal harm to his reputation from the

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defendants' allegedly defamatory statements in the brochure. Therefore, we find the Act to be inapplicable to the instant case and the defendants are not entitled to attorney's fees under the Act.

¶ 37 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 38 Affirmed.