2021 WL 743493 (C.A.7) (Appellate Brief)
United States Court of Appeals, Seventh Circuit.

THE LAW OFFICES OF DAVID FREYDIN, P.C. and David Freydin Plaintiffs-Appellants,
v.
Victoria CHAMARA, Tetiana Kravchuk, Anastasia Shmotolokha,
Nadia Romenets, and John Does 1-10 Defendants-Appellees,.

No. 18-3216.
February 16, 2021.

Appeal from the United States District Court for the Northern District Court of Illinois
Case No. 17-C-8034
Judge Harry D. Leinenweber

Brief and Required Short Appendix of Plaintiffs-Appellants, Law Offices of David Freydin, P.C. & David Freydin

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1** ***JURISDICTIONAL STATEMENT

The District Court had subject matter jurisdiction in this action pursuant to 28 U.S.C. §1332(a)(1) because the Plaintiffs and all Defendants are citizens of different states and more than $75,000 is in controversy. The District Court had specific personal jurisdiction over this matter as a substantial part of the events giving rise to Plaintiffs' claims occurred within that judicial district. Venue was proper in the District Court pursuant to 28 U.S.C. §1391(b)(2) as a substantial part of the events giving rise to Plaintiffs' claims occurred in Cook County, Illinois, which is within that judicial district.

The District Court entered a Final Order granting the defendant's Motion to Dismiss Counts I-V of the plaintiff's Complaint with prejudice on September 26, 2018. The plaintiffs appealed that decision to the United States Court of Appeal for the Seventh Circuit on October 18, 2018.

STATEMENT OF THE ISSUES

The first issue on appeal is whether the district court erred and abused its discretion in dismissing Plaintiffs' Count I of Libel Per Se with prejudice based upon the district court's conclusion that the defendants' comments were non-actionable and constituted obvious expressions of protected opinion instead of Libel Per Se.

The second issue on appeal is whether the district court erred and abused its discretion by dismissing Plaintiffs' Complaint with prejudice without a single opportunity to file an amended complaint, such that the court violated Fed. R. Civ. P. 15 and existing precedent.

***2** The third issue on appeal is whether the district court erred and abused its discretion by dismissing Plaintiffs' Count V with prejudice based upon the district court's conclusion that Plaintiffs failed to properly plead published defamatory statements or to allege an underlying tort to support a civil conspiracy.

STATEMENT OF THE CASE

a. Procedural History

The plaintiffs-appellants are comprised of principal attorney David Freydin and his law practice, Law Offices of David Freydin, P.C. (R. 10). The defendantappellees are comprised of individuals who made negative posts about the plaintiffs online and include Victoria Ykrainka, Tetiana Jaifar, Nadia Romenets, Anastasia Shmotolokha, and the other unidentified individuals referred to as the John Doe defendants. (R. 10).

This case arises out of a series of negative comments, postings, and fraudulent online legal reviews created by the defendants and posted on Plaintiffs' business pages and other websites. (R. 12). The defendants' comments and fake reviews appeared on the Law Offices of David Freydin's business Facebook page, Yelp.com, and Google Reviews. (R. 12).

On November 6, 2017, the plaintiffs filed a five-count complaint against the defendants alleging the torts of (I) Libel Per Se, (II) False Light, (III) Tortious Interference with Contractual Relationships, (IV) Tortious Interference with Prospective Business Relationships and (V) Civil Conspiracy and requested a monetary judgment and equitable relief. (R. 14). On January 8, 2018, the defendants ***3** filed a motion to dismiss Plaintiff's complaint and a briefing schedule was provided by the court. (R. 6). On September 26, 2018, the district court dismissed the five-count complaint with prejudice. (R. 19). On October 5, 2018, the district court denied Plaintiff's request to file an amended complaint. (R. 19).

b) Statement of the Facts

In September 2017, the four named defendants and the John Doe defendants posted defamatory comments and fraudulent one-star reviews on David Freydin's business Facebook page, Yelp.com, and on Google reviews. (R.12-13). The defendants' statements accused Freydin of being unethical, racist, unprofessional, biased, and disrespectful. (R. 12-13). In addition, some of the defendants claimed that Freydin does not have the right to practice law or is unable to provide legal services. (R.13-14). Freydin did not have any social or professional interaction with any of the defendants prior to these posts. (R. 12). As such, the posts and fake reviews were fraudulent since Freydin had never provided any legal or other services of any type to the defendants. (R. 12). As a result of the negative comments and fake reviews, the plaintiff's lost substantial income and business from new and existing clients. (R. 14, 16-17).

SUMMARY OF THE ARGUMENT

The Plaintiffs' initial argument is that the district court erred and abused its discretion by dismissing Plaintiff's Count I for Libel Per Se with prejudice. Although the district court opinion acknowledged that the defendants' comments were defamatory per se, it ultimately concluded that the comments were subject to the ***4** defense of protected opinions, and therefore not actionable. This conclusion is erroneous because the plaintiffs properly pled allegations to establish Libel Per Se and because the defendants' comments are not constitutionally protected opinions.

The plaintiffs' argument initially points out that the district court opinion grouped the defendants' comments into a few lines rather than by individually analyzing each comment on a case-by-case basis. Once the comments are individually analyzed on a case-by-case basis, it is easier to establish context and to see that the fake reviews and fraudulent statements constitute defamation. The defendants did not follow Yelp or Facebook posting guidelines for business reviews by failing to review or obtain the services which they purport to review. There is no constitutional right, defense or protection that allows an individual to disseminate fake internet reviews on products or services they never received. Specifically, the defendants' comments indicate that Freydin is not a legitimate lawyer or a member of the legal profession which is false. In addition, the defendants' fake reviews and comments impute upon Freydin and his practice a lack of ability to perform in his profession or business. Many of the defendants' comments are factually verifiable including, “he has no right to practice law,” “the majority of which happen to be Ukrainian (referring to Freydin's client base),” “Terrible Experience. Unprofessional and disrespectful,” “David Freydin is biased and unprofessional attorney” and the multitude of one-star reviews.

The second argument establishes that the district erred and abused its discretion by dismissing the plaintiffs' complaint with prejudice in violation of ***5** Fed. R. Civ. P. 15 and by denying their request to file an amended complaint. The federal rules

and precedent provided indicate a liberal view on the amendment of pleadings to ensure cases that are decided on the merits. Here, the district court failed to allow the plaintiffs a single opportunity to amend its complaint to cure any deficiencies in the allegations. Further, the district court failed to provide a legal justification or rationale as to why the plaintiffs would not be granted an opportunity to amend their complaint. Therefore, the ruling is against the spirit of the federal rules and precedent which constitutes reversable error.

The plaintiffs' third argument is that the district court erred and abused its discretion by dismissing the plaintiffs' Count V (Civil Conspiracy). The district court opinion indicated that this count was dismissed because the plaintiffs failed to allege an underlying tort to support a civil conspiracy. As previously discussed, the plaintiffs properly pled the tort of Libel Per Se. Since this tort was established, there was evidence of an underlying tort to support a civil conspiracy. In addition, the court abused its discretion by disallowing the plaintiffs an opportunity to replead the count or to cure any alleged pleading deficiency.

*6 *ARGUMENT*

I. The District Court erred by dismissing Plaintiff's Count #1 of Libel Per Se with prejudice because the statements made by the defendants were actionable statements of fact and constituted defamation.

The district court's opinion specifically acknowledges that the comments made by the defendants in this case constitute Libel Per Se but concludes that the statements are obvious expressions of opinion and therefore not actionable. Specifically, the district court held as follows,

In this case, all the comments complained about involve Plaintiff's alleged lack of integrity in performing his employment duties and thus are defamatory per se unless subject to one of the defenses. Defendants assert that all their comments are obvious expressions of opinion and are therefore not actionable. The Court agrees. In *Solaia Technology,* the Court considered the publication of defendant's statements that plaintiffs, who are lawyers, were "deeply greedy people." The Illinois Supreme Court noted that the phrase has no precise meaning and it is not verifiable, and, while judgmental, it is not factual and therefore not actionable. All the complained of comments by Defendants such as "unethical," "unprofessional," "chauvinist," "one-star rating," "an embarrassment and a disgrace," "hypocrite," and "racist" are similar statements of opinion and are not factually verifiable. *Solaia,* 221 Ill. 2d at 581. The Motion to Dismiss Count I is granted. District Court Opinion, page 4-5. (R. 15-16).

The district court grouped the defendants' comments together, rather than by analyzing each comment individually which is required to determine meaning. The following comments made by the defendants in this action were posted on the Law Offices of David Freydin business Facebook page, Yelp and Google business search, and were published for world-wide consumption on the internet.

a) Victoria Ykrainka reviewed Law Offices of David Freydin - One * (star) rating 9/28/17

> "David Freydin - is an embarrassment and a disgrace to the US judicial system, *he has no right to practice law*. His unethical and derogatory comments, which target one particular nation - Ukrainians, show who he really is. He portrays himself as someone, who cares about the interests of his clients, the majority of which happen to be Ukrainian, but in reality, he is a complete hypocrite, ***7** chauvinist and racist. He does not hide his hatred and disrespect towards the Ukrainian nation on his personal FB page. Such an attorney is an embarrassment to any law firm.

b) Tetiana Jaifar reviewed Law Offices of David Freydin - One * (star) rating, 9/27/17 "He is not professional. He discriminates other nationalities. I don't recommend to do business with this attorney. Don't waste your money!!"

c) Nadia Romenets reviewed Law Offices of David Freydin - One * (star) rating, 9/28/17.

d) Anastasia Shmotolokha reviewed Law Offices of David Freydin - One * (star) rating, 9/30/17. “David Freydin is biased and unprofessional attorney”

e) John Does 1-10 Commentary:

(1) Law Offices of David Freydin, 560 W. Van Buren Street, Chicago IL 60607. “One star */5 Terrible Experience. Unprofessional and disrespectful.”

(2) Law Offices of David Freydin, 1320 Tower Rd., #136, Schaumburg, IL 60173. “One star */5 Terrible Experience. Awful customer service.”

(3) Law Offices of David Freydin, LLP, 579 EN Ave, Elmhurst, IL 60126. “One star */5 disrespectful and unprofessional.”

In each of these posts, the publisher defendant knew their review was fake and that any associated comments were false because they never used legal services provided by David Freydin nor any services provided by the other employees at the Law Offices of David Freydin P.C.. The defendants' clear intent here was a smear campaign designed to discredit the plaintiff and his business. The defendants sought to harm or destroy Freydin's business relationship with current and prospective clients, to cast Freydin in a false light, and to harm the plaintiffs' reputation in the public sphere and legal community.

a) The plaintiffs properly plead Libel Per Se.

A statement is defamatory *per se* if it involves words that impute the commission of a criminal offense, words that impute infection with a loathsome ***8** communicable disease, words that impute an inability to perform or want of integrity in the discharge of duties of office of employment, or words that prejudice a party, or impute a lack of ability in his or her trade, profession or business. *See Bryson v. News Am. Publications, Inc.*, 672 N.E.2d 1207, 1214-15 (1996). As a matter of substantive Illinois law, alleging or implying that a person is not a legitimate member of his profession is defamatory *per se*. *See Muzikowski v. Paramount Pictures Corp*., 322 F.3d 918, 926 (7th Cir. 2003). A plaintiff does not need to plead actual damage to his reputation if he asserts a claim of defamation *per se. See Bryson*, at 1214.

In this case, the defendants' comments implied that Freydin is not a legitimate member of the legal profession. They used hateful words to describe him including “disgraceful,” “racist,” and “unprofessional.” In addition, the district court found that “all the comments complained about involve Plaintiff's alleged lack of integrity in performing his employment duties and thus are defamatory per se unless subject to one of the defenses.” Federal District Court opinion (R. 15).

b) Defendants' statements are not constitutionally protected.

The defendants' assertion that their fraudulent reviews and derogatory comments are expressions of opinion is erroneous. The comments and fake reviews were made with the direct goal of injury to Freydin's business and were calculated to create negative ratings. The defendants implemented a systematic one-star review campaign to lower Freydin's online ratings and to cause damage to his reputation in the legal community. They used a variety of social media platforms to effectuate this plan including Facebook, Yelp, and Google business reviews.

***9** The defendants' defamatory statements and fraudulent one-star reviews are not constitutionally protected opinions. Further, the defendants are unable to render an opinion on a service that has never been provided.

"[It] would be destructive of the law of libel if a writer could escape liability for accusations of defamatory conduct' simply by using, explicitly or implicitly, the words, 'I think.'" *Milkovich,* 497 U.S. 1, 19 (1990). "If a speaker says, 'In my opinion John Jones is a liar,' he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and the statement, 'In my opinion Jones is a liar,' can cause as much damage to reputation as the statement, 'Jones is a liar.'" *Id.* at 18-19. Thus "a false assertion of fact can be libelous even though it is couched in terms of an opinion." *Id*. The Illinois Supreme Court had opined, there is no "wholesale defamation exemption for anything that might be labeled 'opinion.'" *Bryson v. News America Pub. Inc.*, 672 N.E.2d 1207, 1220 (Ill. 1996), quoting *Milkovich*, 497 U.S. at 18.

In addition, the defendants violated Facebook and Yelp guidelines by posting fraudulent business reviews. Before an individual can post a Yelp business review, Yelp users must agree to Yelp's Terms of Service and Content Guidelines (TOS) which require users to have actually been customers of the business for which they are posting a review. *See Yelp v. Hadeed Carpet Cleaning*, 752 S.E.2d 554, 558 (Va. Ct. App. 2014) (stating that the TOS requires users to base their reviews on their own personal experiences).

In this case, none of the four named defendants or the additional John Doe defendants were customers of the Freydin business for which they posted a review. The inherent nature of a business review implies that the reviewer had professional contact with the reviewee. It follows that the defendants' one-star reviews cannot plausibly be construed as an opinion on Freydin's ability to practice law or his legal ***10** ethics since no legal or business relationship existed between the parties. Further, the defendants acted with malice by holding themselves out to the public as individuals who were customers of Freydin while operating with the knowledge that the reviews were fake.

The John Doe commentary and one-star ratings included the terminology of "terrible experience" and "awful customer service." These comments are factually verifiable because the "terrible experience" never occurred and the "awful customer service" cannot be described in detail because the comment is fake. As such, these comments also constitute Libel per se and do not qualify as protected opinions under the first amendment. There is no protected opinion possible on a service which an individual has not received - it is objectively impossible. Nor is there a constitutional right or protection against publishing fake or fraudulent reviews on the internet.

In addition, there is no constitutional protection for unverified or racially profiled comments. Other districts have examined issues involving defamation in the context of cases involving claims of racism and one appellate court has determined, "{Ried's} July 1 Post could be understood as an accusation of concrete, wrongful conduct which can be proved to be either true or false. That makes it potentially defamatory." *La Liberte v. Reid,* 966 F. 3d 79, 93 (2nd Cir. 2020).

Victoria Ykrainka's comments are particularly disturbing in this regard. The private message sent to Freydin can establish the defendant's mindset which states, "I saw your post about Ukrainian cleaning ladies. You are a disgusting Jew! Too bad {the} Holocaust did not exterminate all of you!" She continues to spew hate on ***11** Freydin's business Facebook page with more racially-charged comments, "He portrays himself as someone, who cares about the interests of his clients, the majority of which happen to be Ukrainian, but in reality, he is a complete hypocrite, chauvinist and racist." These comments purport to show a deep understanding of Freydin, his business and his client base. First, the defendant shares that the majority of the plaintiff's clients are Ukrainian - which is a verifiable fact that can be disproven. Next, she attacks Freydin personally by calling him a "hypocrite, chauvinist, and racist" to discredit his business without having used his services. Finally, Ms. Ykrainka states that Freydin "has no right to practice law." This verifiable statement is false and defamatory - Mr. Freydin has been granted the right to practice law by the state of Illinois. This defamatory statement implies that Freydin practices law without a license or that there is some bar or impediment on his ability to practice. Both inferences are possible logical conclusions which may result from the defendant's baseless claims.

c) The defendants' statements impute an inability to perform or a want of integrity in the discharge of employment and a lack of ability in Freydin's profession or business.

The district court's opinion also states that the defendants' comments are statements of opinion and are not "factually verifiable." This assessment is incorrect because the Defendants' comments and one-star reviews have a precise and readily understood meaning - namely that Freydin and his law office are unfit to practice law or that they provide sub-standard legal services - both of which are actionable and defamatory *per se.* See ***12** *Muzikowski v. Paramount Pictures Corp*., 322 F.3d 918, 926 (7th Cir. 2003). ("As a matter of Illinois substantive law, alleging or implying that a person is not a legitimate member of her profession is defamatory *per se*."). The readily understood meaning behind the defendants' reviews is that they had some professional contact with the plaintiffs and that they are providing their review based on that contact. Here, the Defendants' one-star reviews are rooted and based upon a false factual implication, *i.e.,* that they had professional contact with Plaintiffs, when they did not.

Illinois courts consider the following three factors in differentiating between factual assertions and opinions: "(1) whether the statement has a precise and readily understood meaning; (2) whether the statement is verifiable; and (3) whether the statement's literary or social context signals that it has factual content." *J. Maki Const. Co. v. Chi. Reg'l Council of Carpenters*, 882 N.E.2d 1173, 1183 (Ill. App. Ct. 2008). Notably, "[w]ords that are mere name calling or found to be rhetorical hyperbole or employed only in a loose, figurative sense have been deemed nonactionable." *Pease v. Int'l Union of Operating Eng'rs Local* 150, 567 N.E.2d 614, 619 (Ill. App. Ct. 1991); see also *Milkovich*, 497 U.S. at 20 (explaining statements that are not reasonably understood as stating actual facts should not be actionable, in order to ensure that "public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation").

Here, the defendants' statements and one-star reviews imply that they had professional contact with Freydin, and the context of the reviews would influence the ***13** average recipient of the review to avoid retaining Freydin or his law office. The fact that Defendants' statements and one-star reviews appear on Plaintiffs' business page(s) implies that they had professional contact with Plaintiffs when they did not. The defendants' statements cast Freydin and his law office as unethical which is significant. Deeming an attorney "unethical" carries a precise and understandable meaning which would subject the attorney to the discipline of the ARDC. Further, the defendant reviews declaring Freydin worthy of only a one-star rating out of a possible five-star rating are not subject to innocent construction. The Illinois Supreme Court "has emphasized that the context of the statement is critical in determining its meaning, as a given statement may convey entirely different meanings when presented in different contexts." *Green v. Rogers*, 917 N.E.2d 450, 463 (Ill. 2009). "[W]hen the defendant clearly intended and unmistakably conveyed a defamatory meaning, a court should not strain to see an inoffensive gloss on the statement." *Id.*

Online ratings have a significant impact on businesses reviewed and imply that the reviewer has indeed had professional contact with the subject. To this end, Michael Luca, the Lee J. Styslinger III Associate Professor of Business Administrating at Harvard Business School, published a Working Paper finding that a one-star difference in rating has a substantial impact on revenue to a business. See *Luna, Michael, Reviews, Reputation and Revenue: The Case of Yelp.Com* (March 15, 2016), Harvard Business School NOM Unit Working Paper No. 12-016, at p. 4, 13, *https://ssrn.com/abstract=1928601*. In his Working Paper, Luna finds that a one-star improvement leads to a roughly 9% increase in revenue, in restaurants studied. *Id.* ***14** Conversely, a lower rating would result in a decrease in revenue. *Id*. Here, Freydin suffered more than a three-star reduction in ratings following the smear campaign carried out by the defendants which resulted in decreased business and revenue. As alleged in the plaintiffs' complaint, the defendants' statements and fake reviews constitutes libel per se defamation.

II. THE DISTRICT COURT ERRED AND ABUSED ITS DISCRETION BY DISMISSING THE PLAINTIFFS' COMPLAINT WITH PREJUDICE AND BY DENYING PLAINTIFFS' REQUEST TO FILE AN AMENDED COMPLAINT.

The District Court abused its discretion by denying Plaintiff's Motion to Clarify the court order of August 30, 2018 and request to file an amended complaint. Fed. R. Civ. P. 15 allows a party the opportunity to amend their pleadings to ensure cases are

decided on the basis of the substantive rights rather than mere technicalities. *Foman* at 181-182. See also *Schiavone v. Fortune*, 477 U.S. 21, 27 (1986) ("the spirit and inclination of the rules favors decisions on the merits, and rejects an approach that pleading is a game of skill in which one misstep may be decisive").

An appellate court reviews a district court's denial of a post-judgment motion for leave to replead for abuse of discretion. A district court abuses its discretion when its ruling rests on an error of law or cannot be located within the range of permissible decisions.
"In the absence of any apparent or declared reason--such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.--the leave sought should, as the ***15** rules require, be freely given. Of course, the grant or denial of an opportunity to amend is within the discretion of a district court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules of Civil Procedure." *Foman v. Davis*, 371 U.S. 178 (1962).

To illustrate, in *Village of South Elgin v. Waste Management of Illinois, Inc*. the defendant was sued based on a breach of contract theory. 348 Ill. App. 3d 929 (2004). The trial court found the complaint failed to sufficiently plead offer, consideration, and breach and dismissed plaintiff's complaint with prejudice for failure to state a cause of action. *Id.* This was Plaintiff's one and only complaint filed. Although the appellate court agreed with the trial court that the proof provided by Plaintiff to show an agreement was vague at best, the appellate court reversed the portion of the trial court's ruling that denied the Plaintiff an opportunity to replead stating, "plaintiff *must* be given an opportunity to replead its contract theory." *Id.* at 9. (emphasis added) see also *Barry Aviation Inc. v. Land O'Lakes Municipal Airport Comm'n*, 377 F.3d 682 (7th Cir. 2004) ("giving leave to amend freely is especially advisable when such permission is sought after the dismissal of the first complaint").

The court went on to explain that although mere conclusions will not meet the specificity standard that Illinois courts require, when the vague statements suggest that the plaintiff has additional facts that would entitle it to relief, the plaintiff should be given an opportunity to amend its complaint. *Id*. see also, *Quinn v. Mine*, 2016 Ill. App. 143327 (Ill. App. Ct. 2016) (The principle [that unless it clearly appears no set of facts exist that would entitle the plaintiff to relief, the dismissal should not be with ***16** prejudice] was relevant in [*Village of South Elgin v. Waste Management of Illinois, Inc*.] because the plaintiff's one and only complaint was dismissed without leave to replead, and after analyzing the complaint, the appellate court found the pleading to be somewhat lacking, and reversed and remanded for an opportunity to amend")); *Runnion v. Girl Scouts of Greater Chicago & NW Indiana*, 786 F.3d 510, 519 (7th Cir. 2015) ("In light of the presumption in favor of giving plaintiffs at least one opportunity to amend, denying a plaintiff that opportunity carries a high risk of being deemed an abuse of discretion"); *Mollberg v. Advanced Call Ctr. Techs., Inc.,* No. 18-CV-1210, 2019 LEXIS 9648 (E.D. Wis. 2019). ("Finally, I am cognizant that the Seventh Circuit has repeatedly stated that a "plaintiff whose original complaint has been dismissed under Rule 12(b)(6) should be given at least one opportunity to try to amend her complaint before the entire action is dismissed" and that when "a district court denies a plaintiff such an opportunity, its decision will be reviewed rigorously on appeal"); *Atlas IP, LLC v. Exelon Corp.*, 189 F.Supp. 3d 769, 799 (N.D. Ill. 2016) ("Litigants get one free bite at the amendment apple under Rule 15(a)(1)").

Additionally, in *Masada v. Ciccone*, the appellate court found the trial court to have abused its discretion when it only allowed one amendment prior to dismissing the case with prejudice and the trial court's reasoning failed to rest in any of the five factors mentioned above. 2016 Ill. App. 152470 (Ill. App. Ct. 2016). Upon denying Plaintiff leave to replead the trial court stated, "Plaintiffs' motion to reconsider is denied... There is no just reason for the delay in this order's enforcement of this final judgement ..." *Id.* at 17. The Appellate court determined that the trial court abused ***17** its discretion by denying Plaintiff's leave to replead without ever reviewing the additional facts that Plaintiff intended to bring forward. *Id.* at 36. Without analyzing anything further, the decision to deny leave to replead cannot be said to rest in any reason enumerated above and would not be adopted by any reasonable person. *Id.*

In the instant case, Plaintiffs filed a five-count complaint against Defendants and Defendants responded with a Motion to Dismiss under Rule 12(b)(6). This was Plaintiffs' first and only Complaint filed. The district court found the statements made by Defendants to be defamation *per se* but dismissed each count based on the following rationale: Count I Libel Per Se was dismissed based on the Judge's determination that the statements are non-actionable opinions; Count II False Light was dismissed based on failure to allege special damages; Count III Tortious Interference with Contractual Relations was dismissed based upon an insufficient pleading of enforceable contract; Count VI Tortious Interference with Prospective Business Relationship was dismissed because the court found insufficient proof of third parties that were undermined; and Count V Civil Conspiracy was dismissed based on the plaintiffs failure to properly plead an underlying tort.

Following the blanket dismissal, Plaintiffs filed a Motion to Clarify the Court Order of August 30, 2018, which sought to determine whether the dismissal was with or without prejudice ultimately inquiring whether Plaintiffs would be able to amend their complaint pursuant to Fed. R. Civ. 15. At the hearing on the Motion to Clarify, Plaintiffs' counsel requested leave to amend to bring additional facts forward to remedy any deficiencies. T.R.5. Prior to issuing his ruling, the judge requested the ***18** attorneys to remind him of the alleged discriminatory comment made by Freydin. After both attorneys reiterated the comment, the judge gave a one sentence response ending the case, “I think that this case should end now, so the motion is denied.” T.R. 5. Without any further explanation or justification for dismissing the entire case with prejudice and without allowing the plaintiffs even one opportunity to cure any alleged defects in the complaint, it is clear that this ruling is not within the range of permissible decisions and is an abuse of discretion based upon the federal rule of law and applicable precedent.

III. The District Court erred in dismissing Plaintiff's Count V of Civil Conspiracy with prejudice because the plaintiffs have properly pled published defamatory comments as addressed in section one and therefore have satisfied the requirement to allege an underlying tort that supports a civil conspiracy. Also, the plaintiffs do allege an agreement between the parties and that the defendants acted in concert to defame the plaintiffs.

a) Plaintiffs' State a valid claim for Civil Conspiracy.

A civil conspiracy is a combination of two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties to inflict a wrong against or injury upon another, and an overt act that results in damage. *Cooney v. Casady*, 735 F.3d 514 (7th Cir. 2012). An express agreement among all the conspirators is not a necessary element of a civil conspiracy. *Id.* The participants in the conspiracy must share the general conspiratorial objective, but they need not know all the details of the plan designed to achieve the objective or possess the same motives for desiring the intended conspiratorial result. *Id.*

***19** Here, the plaintiffs clearly allege that the Defendants banded together to engage in a smear campaign against Freydin and his law practice. Moreover, Defendants admit that they are members of the Ukrainian community and that in response to a “joke” Freydin posted to his personal Facebook page, they created a firestorm of damaging commentary and fraudulent legal reviews on Freydin's business Facebook, Yelp and Google pages. The commentary and reviews were defamatory in nature.

CONCLUSION

As the District Court has erred and abused its discretion by dismissing the Plaintiffs' five-count Complaint with prejudice, the Plaintiffs respectfully request that the District Court ruling be reversed and remanded.

Respectfully submitted,

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Appendix not available.