2021 WL 2386535 (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.
May 28, 2021.

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

Brief of Defendants-Appellees, Victoria Chamara, Tetiana Kravchuk, and Nadia Romenets

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3** ***TABLE OF CONTENTS

JURISDICTIONAL STATEMENT 1
STATEMENT OF ISSUES 1
STATEMENT OF THE CASE 1
SUMMARY OF THE ARGUMENT 4
ARGUMENT 6
CONCLUSION 21
CERTIFICATE OF COMPLIANCE WITH FRAP RULE 32(a)(7), FRAP RULE 32(g), and CR 32(c) 22
PROOF OF SERVICE 23

4** ***TABLE OF AUTHORITIES

FEDERAL CASES

Arlin-Golf, LLC v. Vill. of Arlington Heights, 631 F.3d 818 (7th Cir. 2011) 15, 18
Arreola v. Godinez, 546 F.3d 788 (7th Cir. 2008) 15
Cincinnati Ins. Co. v. Flanders Elec. Motor Serv., Inc., 131 F.3d 625 (7th Cir. 1997) 6
Cooney v. Casady, 735 F.3d 514 (7th Cir. 2012) 19
Crestview Vill. Apartments v. United States Dep't of Hous. & Urban Dev., 383 F.3d 552 (7th Cir. 2004) 18
Fannon v. Guidant Corp., 583 F.3d 995 (7th Cir. 2009) 16
Forman v. Davis, 371 U.S. 178 (1962) 15
George v. Kraft Foods Global, Inc., 641 F.3d 786 (7th Cir. 2011) 18
Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) 7
Griffin v. Foley, 542 F.3d 209 (7th Cir. 2008) 6
Kimzey v. Yelp! Inc., 836 F.3d 1263 (9th Cir. 2016) 9
Kubiak v. City of Chicago, 810 F.3d 476 (7th Cir. 2016) 5
La Liberte v. Reid, 966 F. 3d 79 (2nd Cir. 2020) 13
McCoy v. Iberdrola Renewables, Inc., 760 F.3d 674 (7th Cir. 2014) 15
***5** *Milkovich v. Lorain Journal Co.,* 497 U.S. 1 (1990) 7, 14
O'Boyle v. Real Time Resolutions, Inc., 910 F.3d 338 (7th Cir. 2018) 16-18
Runnion ex rel. Runnion v. Girl Scouts of Greater Chicago & Nw. Indiana, 786 F.3d 510 (7th Cir. 2015) 15, 17
Sanders v. Venture Stores, Inc., 56 F.3d 771 (7th Cir. 1995) 18-19
Skolnick v. Correctional Medical Services, Inc., 132 F.Supp.2d 1116 (N.D. Ill. 2001) 7

Warciak v. Subway Restaurants, Inc., 949 F.3d 354 (7th Cir. 2020) 5
STATE CASES
Crossfit, Inc. v. Mustapha, CIV.A. 13-11498-FDS, 2014 WL 949609 (D. Mass. Mar. 10, 2014) 10
Ghorbani-Moghaddam v. Nevins, 2019 NNHCV186081525 Westlaw 7567206 (Conn. Super. Ct. 2019) 9-10
Green v. Rogers, 917 N.E.2d 450 (Ill. 2009) 7-8, 11
Hadley v. Doe, 34 N.E.3d 549 (Ill. 2015) 11
Hopewell v. Vitullo, 701 N.E.2d 99 (Ill. App. Ct. 1998) 6-7
Indeck North American Power Fund, L.P. v. Norweb PLC, 735 N.E.2d 649 (Ill. App. Ct. 2000) 20
Pease v. Int'l Union of Operating Eng'rs Local 150, 567 N.E.2d 614 (Ill. App. Ct. 1991) 14
Solaia Technology v. Specialty Pub. Co., 852 N.E.2d 825 (Ill. 2006) 6-7
***6** *Stone v. Paddock Publications, Inc.*, 961 N.E.2d 380 (Ill. App. Ct. 2011) 8, 14
Village of South Elgin v. Waste Management of Illinois, Inc., 810 N.E.2d 658 (Ill. App. Ct. 2004) 16-17
FEDERAL STATUTES
Fed. R. App. P. 28 5
Fed. R. Civ. P. 61 18-19
Fed. R. App. P. 32 22

****7 JURISDICTIONAL STATEMENT***

The Defendants-Appellees hereby state that the Plaintiffs-Appellants' Jurisdictional Statement is complete and correct.

STATEMENT OF ISSUES

1. Whether the District Court erred in dismissing Plaintiffs-Appellants Count I for Libel *Per Se* by concluding the Defendants-Appellees' comments were protected opinions under the First Amendment.

2. Whether the District Court abused its discretion by dismissing Plaintiffs-Appellants' Complaint, with prejudice, and denying Plaintiffs-Appellants' leave to amend the Complaint, after considering both parties' arguments during the Motion to Clarify Hearing.

3. Whether the District Court erred in dismissing Plaintiffs-Appellants' Count V for Civil Conspiracy, with prejudice, after ruling that Plaintiffs-Appellants underlying cause of action for defamation failed and, therefore, could not support a claim for Civil Conspiracy. [1]

STATEMENT OF THE CASE

The Defendants-Appellees are Ukrainian-Americans, Nadia Romenets, Tetiana Kravchuk, Victoria Chamara, and ten other unidentified individuals referred to as the John Doe Defendants. (R. at 10) [2] . The undersigned counsel represents Defendants-Appellees Romenets, Kravchuk, and Chamara (collectively referred to as ***8** "Defendants"). The Plaintiffs-Appellants include Principal Attorney, David Freydin, and his law practice, Law Offices of David Freydin, P.C. (collectively referred to as "Freydin") (R. 10).

On September 26, 2017, Freydin made a public Facebook post stating, "Did Trump put Ukraine on the travel ban list?! We just cannot find a cleaning lady!" (T.R. 4). [3] When challenged, Freydin commented under the original post, stating, "My business

with Ukrainians will be done when they stop declaring bankruptcies. If this offends your national pride, I suggest you look for underlying causes of why 9 out of 10 cleaning ladies we've had were Ukrainian and 9 out of 10 of my law school professors were not. Until then, if you don't have a recommendation for a cleaning lady, feel free to take your comments somewhere else." (T.R. 4).

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***9** The Defendants, outraged by Freydin's posts, responded by expressing their opinions about Freydin's character in their own posts on Freydin's Facebook business page. (R. at 13-14). Defendant Nadia Romenets posted a one-star review *with no additional textual comment* to the Facebook business page of the Law Offices of David Freydin (Appellants' Appx. 32).

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Defendants Kravchuk and Chamara posted one-star reviews with commentary to that same page. (Appellants' Appx. 28-30). Defendant Tetiana Kravchuk wrote:

"He is not professional. He discriminates other nationalities. I don't recommend to do business with this attorney. Don't waste your money!!" (Appellants' Appx. 30).

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Defendant Victoria Chamara wrote:

"David Freydin- is an embarrassment and 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, ***10** but in reality, he is a complete hypocrite, 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." (Appellants' Appx. 28).

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TABLE

Defendants all live in different states outside of Illinois. (R. at 10). There is nothing in the record to demonstrate that Defendants had any prior relationship before making these posts and, indeed, they did not.

SUMMARY OF THE ARGUMENT

Defendants respectfully ask this Appellate Court to affirm the District Court's dismissal of Freydin's Complaint. Dismissal of Count I for Libel *Per Se* should be affirmed because Defendants' online comments are mere expressions of opinion protected by the First Amendment. The District Court's decision pertaining to Count I was not erroneous because (1) the District Court properly considered the statements, both independently and contextually, as mere expressions of opinion protected by the First Amendment, and (2) Freydin provides no authoritative ***11** precedent supporting his argument that an online rating by a non-client is in and of itself a defamatory statement. [4] Dismissal of Count V for Civil Conspiracy should be affirmed because Freydin

fails to sufficiently plead libel *per se* or any other independent cause of action supporting his civil conspiracy claim, and none of the Defendants had any preexisting association before this matter. Lastly, the District Court's denial of Freydin's request to file an amended complaint should be affirmed because deciding whether an amendment would be futile and unduly prejudicial is within the District Court's discretion. In this case, the District Court correctly concluded that Freydin cannot present any new factual allegations, in an amended complaint, that would change its ruling.

a. Standard of Review

The Plaintiffs-Appellants' Brief fails to provide the appellate standard of review for the dismissal of Counts I and V as required by Fed. R. App. P. 28(a)(9)(B). A dismissal for failure to state a claim is reviewed under the no-deference *de novo* standard when considering the meaning or application of controlling law. *Warciak v. Subway Restaurants, Inc.*, 949 F.3d 354, 356 (7th Cir. 2020). To properly state a claim, a plaintiff's complaint must contain allegations that plausibly suggest the plaintiff has a right to relief beyond mere speculation. *Kubiak v. City of Chicago*, 810 F.3d 476, 480 (7th Cir. 2016).

***12** Concerning the denial of a post-judgment motion for leave to replead, the Appellate Court reviews for abuse of discretion. *Cincinnati Ins. Co. v. Flanders Elec. Motor Serv., Inc.*, 131 F.3d 625, 628 (7th Cir. 1997). That said, the Appellate Court may not reach the merits of the underlying judgment in doing so. *Id.* A decision is only an abuse of discretion when it is downright unreasonable, not just incorrect. *Id.* The appellant bears the substantial burden of proving abuse of discretion. *Id.* Under the abuse of discretion standard, the Appellate Court shall not second-guess the decision of the trial judge so long as it is in conformity with established legal principles and reasonably applied to the facts of the case. *Id.* Therefore, an Appellate Court intervenes only when it is apparent that the trial judge has acted unreasonably. *Griffin v. Foley*, 542 F.3d 209, 217 (7th Cir. 2008).

ARGUMENT

I. The District Court's dismissal of Freydin's Libel *Per Se* claim is proper because Defendants' statements are mere expressions of opinion protected by the First Amendment and reasonably capable of innocent construction.

To state a claim 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 that this publication caused damages. *Solaia Technology, LLC v. Specialty Pub. Co.*, 852 N.E.2d 825, 839 (Ill. 2006). In determining whether an expression can be construed as stating a fact, Illinois courts consider whether the statement has a precise and readily understood meaning, whether the statement is verifiable, and whether the statement's literary or social context signals that it has factual content. ***13** *Hopewell v. Vitullo,* 701 N.E.2d 99, 103 (Ill. App. Ct. 1998). The statements giving rise to a defamation *per se* claim must be pled with precision and particularity. *Green v. Rogers,* 917 N.E.2d 450, 459 (Ill. 2009).

a) Defendants' statements are mere expressions of opinion protected by the First Amendment.

Consistent with the First Amendment, even statements that fall into a recognized category of defamation *per se* are not actionable unless they contain an assertion of fact that is provably false. *Milkovich v. Lorain Journal Co.,* 497 U.S. 1, 20 (1990). Under the First Amendment, there are no false ideas; "however pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries, but on the competition of other ideas". *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 339-40 (1974). Therefore, the First Amendment protects overly loose, figurative, rhetorical, or hyperbolic language, which negates the impression that the statement presents facts. *Hopewell,* 701 N.E.2d 99 at 103. Such language is typically construed as opinion rather than fact. *Skolnick v. Correctional Medical Services, Inc.,* 132 F. Supp. 2d 1116, 1127 (N.D. Ill. 2001).

In this case, the District Court ruled Defendants' comments are nonactionable as obvious expressions of opinion, citing *Solaia Technology, LLC*, 852 N.E.2d at 825; (R. at 14-16). In *Solaia*, the Illinois Supreme Court ruled that defendant's published

statement that plaintiffs as lawyers were "deeply greedy people" was not actionable; while judgmental, the phrase had no precise meaning and was not factually verifiable. *Id.* at 841. Like *Solaia*, the District Court in this case ruled, "all the complained of comments by Defendants such as 'unethical', 'unprofessional', ***14** 'chauvinist', 'one-star rating', 'an embarrassment and a disgrace', 'hypocrite', and 'racist' are similar statements of opinion and are not factually verifiable". (R. at 14-16).

b) The internet context further strengthens Defendants' First Amendment defense.

First Amendment protection applies equally, if not more so, to speech made via the internet. *Stone v. Paddock Publications, Inc.*, 961 N.E.2d 380, 388 (Ill. App. Ct. 2011). "With the proliferation of limitless vehicles for speech on the internet, Americans now have outlets for anonymous free speech that were unimaginable only a decade ago". *Id.* at 394. Although courts evaluate an allegedly defamatory statement from an ordinary reader's perspective, it is a question of law whether the statement is a factual assertion that could support a defamation claim. *Id.* at 391. The Illinois Supreme Court has emphasized that the context of the statement is critical in determining its meaning; a given statement may convey entirely different meanings when presented in different contexts. *Green v. Rogers,* 917 N.E.2d 450, 463 (Ill. 2009). In this case, the context of Defendants' statements is clear. Defendants' comments were made on Facebook in response to offensive posts Freydin made on his public Facebook business page. (R. at 12-14). A reasonable reader of Defendants' posts can readily discern that these statements are a response to Freydin's initial statements, not independent criticisms of Freydin's services as their personal lawyer.

15** ***c) One-star ratings without further comment on business review platforms are merely opinions.

Defendant Nadia Romenets posted a single one-star review with no additional text to the Facebook business page of the Law Offices of David Freydin. (Appellants' Appx. 32). Freydin contends Defendant Romenets' one-star rating is defamatory *per se*, alleging that her review is based on actual use of Freydin's services. (Appellants' Br. 12-13). Freydin argues that the review is a verifiably false statement because Romenets never actually used Freydin's services. (Appellants' Br. 12-13). However, Freydin provides no binding authority for this particular contention.

A lone one-star rating cannot convey an objectively verifiable fact because there is no further comment contextualizing it. Although the Seventh Circuit has not addressed this particularly modern issue, other appellate courts have ruled that lone one-star ratings are not defamatory. *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1270 (9th Cir. 2016). Further, an additional extrinsic jurisdictional opinion is more illustrative. In 2019, the Superior Court of Connecticut considered a defamation case where the defendant admitted he posted a one-star Google review and one-star Facebook review of a plaintiff's dental practice without any further comment. *Ghorbani-Moghaddam v. Nevins*, NNHCV18608152, 2019 WL 7567206 (Conn. Super. Ct. Nov. 22, 2019). The court reasoned that the plaintiff's defamation claim was not actionable:

> It is clear from the face of the Google and Facebook reviews that no words were used in the comment section and only a one-star review was left. Because nothing was written in support of the one-star reviews, the only potential 'statement' that the court has before it is the one-star rating. The one-star rating, unaccompanied by text, in and of itself does not convey an objective fact, but rather a mere opinion. Indeed, the review cannot be proved true or false. There is no way to read the review ***16** and relate it to an event or state of affairs that existed in the past, or present, that is also capable of being known, and an ordinary person seeing the one-star review would likely understand it as an expression of the writer's opinion due to the fact there are no facts or allegations provided in support of the rating...The plaintiffs in this action have failed to prove their claims of defamation by a fair preponderance of the evidence as against defendant. *Id.*

Moreover, whether Defendants actually used Freydin's services before leaving a starred-review is immaterial to a defamation claim. A memorandum from the United States District Court for the District of Massachusetts is explanatory. In *Crossfit, Inc. v. Mustapha*, CIV.A. 13-11498-FDS, 2014 WL 949609 (D. Mass. Mar. 10, 2014), several individuals gave a commercial sports club one-star ratings and substantive textual reviews without ever using the club's services. The Court ruled that it is irrelevant whether the reviewers based their reviews on actual personal experiences at the sports club so long as the statements were mere opinion or hyperbole:

> Such statements cannot form the basis of a defamation claim. Defendant contends that because several of the individuals gave the Chelmsford Sports Club a one-star review, their reviews are defamatory. The basis of that contention is that these individuals have, by writing a review, implicitly warranted that their review is based on an actual use of the services of the club. Because these individuals have never used the club's services, defendant contends, their reviews and ratings are not merely opinion or hyperbole but are factual statements. The Court can find no authority for the contention that the review format makes opinion or hyperbole actionable. *Id.*

Thus, Defendant Romenets' mere one-star review is not defamatory such that the District Court's decision to dismiss this case vis-á-vis Defendant Romenets should be affirmed.

17 *d) One-star ratings with textual comment are still protected under the First Amendment so long as they are mere expressions of opinion or reasonably capable of innocent construction.

Even if a statement falls into one of the categories of defamation *per se*, it is not actionable if it is reasonably capable of innocent construction. *Green v. Rogers,* 917 N.E.2d 450, 463 (Ill. 2009). The innocent-construction rule requires courts to consider statements in context and give the words of statements, and any implications arising from them, their natural and obvious meaning. *Id.* Thus, a statement reasonably capable of a nondefamatory interpretation is interpreted as such. *Id.* There is no balancing of reasonable constructions; if a statement is reasonably capable of innocent construction, it cannot be actionable *per se*. *Id.* Courts must interpret allegedly defamatory words as they appear to be used and according to the idea they are intended to convey to reasonable readers. *Hadley v. Doe*, 34 N.E.3d 549, 557 (Ill. 2015). If a statement is defamatory *per se*, but not subject to an innocent construction, it may still enjoy First Amendment protection as an expression of opinion. *Id.* at 558.

In *Green,* the Supreme Court of Illinois held that a little league president's statement to the coaching board alleging that a parent-coach had exhibited "a pattern of misconduct and abuse towards children" was capable of innocent construction, and therefore not defamation *per se*. *Green,* 917 N.E.2d 450 at 464-65. The Court held that the allegedly defamatory statement made at the board meeting to select new coaches was not perceived by those in attendance as the "worst forms of abuse or misconduct, but only ... of coarsely reproaching players, coaches, and umpires." *Id.* at 465. The ***18** instant case is analogous to *Green* because Defendants' statements were not alleging the worst form of professional misconduct pertaining to Freydin's legal services, but only more innocuous comments intended to convey opinions regarding Freydin's character. [5]

Defendants Victoria Chamara and Tetiana Kravchuk posted one-star reviews with accompanying commentary on Freydin's Facebook business page. (Appellants' Appx. 28-30). Freydin argues that these posts constitute libel *per se* because they portray his law office as unprofessional and unethical. (Appellants' Br. 13). He argues that readers of these posts will conclude that the word "unethical" subjects Freydin to ARDC discipline. (Appellants' Br. 13). However, Chamara's post uses the word "unethical" in reference to Freydin's character in response to his personal Facebook post, demonstrated by the context of her broader sentence. (Appellants' Appx. 28). Defendant Chamara wrote:
"David Freydin- is an embarrassment and 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, 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." (Appellants' Appx. 28).

Defendant Tetiana Kravchuk wrote:
"He is not professional. He discriminates other nationalities. I don't recommend to do business with this attorney. Don't waste your money!!" (Appellants' Appx. 30).

***19** Further, Freydin improperly characterizes Defendants' comments as "fake reviews" without support from any case law. (Appellants' Br. 8). Defendant's comments are certainly not fabricated. The context clearly shows that the statements are not about actual services rendered by Freydin to the Defendants. Instead, they represent actual opinions about Freydin and his disparagement of the Ukrainian community. When read in their entirety, the comments do not explicitly or implicitly state Defendants received any actual legal services from Freydin. Rather, like *Green,* the context of the statements supports a finding that they are mere expressions of opinion reasonably capable of innocent construction.

e) General statements charging a person with being racist are not actionable.

Finally, Freydin describes his own denigrating posts as "jokes", yet simultaneously demands this Court deem Defendant Chamara's response that he is a "racist" as libel *per se*. (R. at 13; Appellants' Br. 19). Freydin relies on the nonbinding case of *La Liberte v. Reid,* 966 F. 3d 79, 93 (2nd Cir. 2020) for the proposition that a claim of racism may potentially be defamatory *per se* if it accuses concrete, wrongful conduct which can be proved true or false. (Appellants' Br. 10). However, the California Appellate Court made clear that general or abstract statements charging a person with being racist, unfair, or unjust are not actionable. *Id.* Defendant Chamara's public post opining that Freydin is racist is a general statement, reasonably capable of innocent construction. Likewise, Defendant Kravchuk's public opinion that Freydin is unprofessional and discriminatory is a general statement, reasonably capable of innocent construction. A reasonable ***20** Facebook user reading these posts in context would quickly understand that they are generalized statements of opinion, not factually verifiable assertions.

Thus, Freydin's construction of these comments as concrete statements of fact is improper because Defendants' words do not have a precise and verifiable meaning in this context. The most natural and obvious interpretation of Defendants' comments is mere opinions regarding Freydin's character and not any statement of fact pertaining to Freydin's fitness to practice law. There is no objective basis or precise criteria hereupon which to determine whether Freydin is a chauvinist, racist, unprofessional, unethical, or closed-minded. Thus, Defendants' statements are reasonably capable of innocent construction, if not otherwise substantially true.

In sum, words that are mere name calling or found to be rhetorical hyperbole 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). 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. *Milkovich*, 497 U.S. at 20. As a matter of public policy, encouraging those easily offended by online commentary to sue their "tormenters" would lead to unnecessary litigation and create a chilling effect on many citizens who post on countless internet comment boards. *Stone,* 961 N.E.2d 380 at 394. Thus, an ordinary web-surfer would construe Defendants' statements as rhetoric and mere opinion rather than genuine facts. Treating negative online reviews and starredratings ***21** of businesses as actionable defamation would brand almost every deleterious criticism subject to claims of libel, seriously chilling First Amendment rights.

II. The District Court's denial of Freydin's request for leave to amend was proper and should be affirmed by this Court.

The District Court did not err or abuse its discretion by denying Freydin's request to file an amended complaint. (T.R. 5). "[D]istrict courts have broad discretion to deny leave to amend where there is undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies, undue prejudice to the defendants, or where the amendment would be futile." *Arreola v. Godinez*, 546 F.3d 788, 796 (7th Cir. 2008). An appellate court reviews a district court's denial of a post-judgment motion for leave to replead for abuse of discretion. *Runnion ex rel. Runnion v. Girl Scouts of Greater Chicago & Nw. Indiana,* 786 F.3d 510, 524 (7th Cir. 2015). An abuse of discretion occurs where there is an outright refusal to grant leave to amend without any apparent justification. *Forman v. Davis,* 371 U.S. 178, 182 (1962).

This Court has recognized on many occasions that the right to amend is not absolute and a district court does not abuse its discretion by denying a motion for leave to amend when the plaintiff fails to establish that the proposed amendment would cure the deficiencies identified in the earlier complaint. *Arlin-Golf, LLC v. Vill. of Arlington Heights,* 631 F.3d 818, 823 (7th Cir. 2011). District courts may refuse to entertain a proposed amendment on futility grounds when the new pleading would not survive a motion to dismiss. *McCoy v. Iberdrola Renewables, Inc.*, 760 F.3d 674, 685 (7th Cir. 2014). To survive a motion to dismiss for failure to state a claim, a plaintiff must allege enough facts to state a claim to relief that is plausible on its face. ***22** *O'Boyle v. Real Time Resolutions, Inc.*, 910 F.3d 338, 342 (7th Cir. 2018). When reviewing a denial of leave to amend based on futility, the Court of Appeals applies *de novo* the legal-sufficiency standard to determine if the proposed amended complaint fails to state a claim. *Id.* at 347.

In *O'Boyle*, this Court affirmed the district court's dismissal of the complaint for failure to state a claim and denial of leave to amend even though the plaintiff had no prior chance to amend the complaint. *Id.* at 341. This Court acknowledged that appellate review under such circumstances must be more rigorous when a plaintiff has had no prior chance to amend the complaint. *Id.* at 347. Nonetheless, this Court ruled in *O'Boyle* that the district court had not abused its discretion in denying leave to amend on grounds of futility, undue delay, and prejudice. *Id.* at 341. This Court reasoned that when a plaintiff waits until post-judgment to seek leave to amend without providing good reason for the delay nor additional substantive facts arising after dismissal, allowing leave to amend would prejudice the defendants due to the increased expenditure of resources in having to engage in separate additional motion practice. *Id.* at 348. A plaintiff's apparently strategic maneuver to wait until after the court rules on a motion to dismiss to introduce new factual allegations is grounds for denying leave to amend. *Fannon v. Guidant Corp.*, 583 F.3d 995, 1003 (7th Cir. 2009).

a) There are no alternative or supplemental factual pleadings that would impart plausibility to Freydin's libel per se claim.

Now on appeal, Freydin primarily relies on *Village of South Elgin v. Waste Management of Illinois, Inc.*, 810 N.E.2d 658 (Ill. App. Ct. 2004) to support his request for leave to amend. (Appellants' Br. 15-16). In *Village of South Elgin*, there was a ***23** discrepancy about whether an initial memorialization of an agreement constituted a contract itself. *Id.* at 669. The appellate court concluded that the district court should have allowed plaintiff to amend its complaint because there were additional facts that could change the lower court's ruling. *Id.* at 672. However, the present case is distinguishable from *Village of South Elgin* because the facts of Freydin's initial Complaint were sufficient and comprehensive; Freydin provides no additional specific facts that could change the lower court's ruling now on appeal.

Therefore, the facts and procedural history of this case are more analogous to *O'Boyle* than *Village of South Elgin*. Freydin's initial Complaint already set forth the statements at issue, who posted them, the date they were published, the platforms they were published on, and what third-parties could view the statements. Freydin has not specified what additional facts he contends could be included in an amended complaint other than a vague reference to the discovery requests he served in his separately filed state court proceeding against different defendants, not including Defendants-Appellees. (T.R. 4). In short, Freydin provides no additional specific facts for this Court to consider.

The general principle that courts should grant a plaintiff at least one opportunity to amend after a grant of a motion to dismiss is rooted in allowing for an opportunity to fix pleading deficiencies. *See Runnion*, 786 F.3d at 518. Here, however, dismissal was not based on a pleading defect but because the facts, as pled, did not give rise to a cognizable libel *per se* claim. Where a claim fails as a matter of law, and ***24** not because of any failure to plead facts necessary to support the legal theory, granting leave to amend would be futile. *See O'Boyle,* 910 F.3d at 346.

Prejudice to the non-moving party is another consideration relevant to assessing whether to grant leave to amend a complaint. *George v. Kraft Foods Global, Inc.*, 641 F.3d 786, 789-91 (7th Cir. 2011). Here, permitting amendment of the complaint when there are no additional significant facts that would change the court's ruling, would be futile and prejudice the Defendants. Were Defendants required to engage in separate motion practice and prepare a new responsive pleading at this stage of the proceeding, they would be prejudiced by significant expenditure of additional time and resources.

b) The District Court's rationale for denying leave to amend was sufficiently supported by the record.

To the extent that a district court's order constitutes error due to its brevity, that error is harmless. *See Arlin-Golf, LLC,* 631 F.3d at 823; *see also* Fed. R. Civ. P. 61. A contrary holding would impose upon the defendants and the court the arduous task of responding to an obviously futile gesture on the part of the plaintiff. *Crestview Vill. Apartments v. United States Dep't of Hous. & Urban Dev.,* 383 F.3d 552, 558 (7th Cir. 2004). In other words, the district court having ruled with a succinct statement does not, without more, equate to a reversible abuse of discretion. Even where a district court does not expressly set forth detailed reasoning for its denial of a request for leave to amend a complaint, such a ruling may be deemed proper and affirmed where the district court's reasoning is apparent based on the record. *Sanders v. Venture Stores, Inc.*, 56 F.3d 771, 773-74 (7th Cir. 1995). An appellate court may ***25** affirm a district court's denial of a request for leave to amend a complaint on any ground that is supported by the record. *Id.*

Freydin argues that the District Court abused its discretion by not providing a sufficient justification for denial of leave to amend. (Appellants' Br. 18). However, the District Court's rationale for its ruling was apparent in light of the Parties' briefing on the issue and the District Court's concise statement, "I think that this case should end now, so the motion is denied". (T.R. 5). In other words, the justification was evident and sufficiently supported by the record, bolstered by the substantial explanations of both attorneys at the Motion to Clarify hearing. (T.R. 2-5). Any finding of such error due to the Judge's brevity should not be considered an abuse of discretion. At most, the succinctness of the District Court's reasoning constitutes harmless error pursuant to Fed. R. Civ. P. 61 and does not warrant vacating or reversal of the District Court's dismissal with prejudice of the Complaint.

III. The District Court's dismissal of Freydin's Count V Civil Conspiracy claim was proper because Freydin failed to sufficiently plead an underlying tort supporting the claim.

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, 519 (7th Cir. 2013). Vague and conclusory allegations of the existence of a conspiracy are not enough to survive a motion to dismiss. *Id.* In Illinois, plaintiff must allege, in addition to an agreement among the defendants to commit a tortious act, an independent cause of action underlying the conspiracy. ***26** *Indeck North American Power Fund, L.P. v. Norweb PLC,* 735 N.E.2d 649, 662 (Ill. App. Ct. 2000). Conspiracy is not an independent tort; where a plaintiff fails to state an independent cause of action underlying its conspiracy allegations, the claim for a conspiracy also fails. *Id.* Characterizing a combination of acts as a conspiracy is insufficient to withstand a motion to dismiss. *Id.*

In this case, there is no civil conspiracy because there is no libel *per se*. Freydin's argument that Defendants actively came together to engage in a smear campaign against Freydin is unfounded. There is nothing in the record that indicates that

Defendants acted in concert, came to any agreement, or had any preexisting relationship prior to this suit. Defendants are only loosely related via the broad web of the internet and a shared ethnicity. Such imprecise and conclusory allegations of Defendants' relationships are insufficient to support a conspiracy claim. Accordingly, dismissal of this claim should be affirmed because Freydin fails to prove an underlying tort and any relationship between the parties.

*27 CONCLUSION

Because the District Court did not err or abuse its discretion by dismissing the Plaintiffs-Appellants' five-count Complaint with prejudice, including Count I for Libel *Per Se* and Count V for Civil Conspiracy before this Court on appeal, the Defendants-Appellees respectfully request that the District Court's ruling be affirmed.

Respectfully submitted,

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Footnotes

1 The only counts remaining on appeal are Counts I for Libel *Per Se* and Count V for Civil Conspiracy.

2 Record citations in this brief employ the same abbreviations as in the Appellants' brief. *See* Appellants' Br. 2.; R. represents “Record” and T.R. represents “Transcript Record”.

3 By default, any Facebook user, including users who don't follow the poster, can see and comment on public Facebook posts. Facebook Help Center, *https://www.facebook.com/help/1625371524453896*

4 Defendants' comments and ratings were in fact based on their personal experience with Freydin exclusively via Facebook. (R. at 12-13). Any postings to Yelp and Google are inapplicable to Defendants. While Freydin alleges on appeal, for the first time, that platform guidelines were violated, these are separate claims rooted in breach of contract theory, wholly irrelevant to the elements of a claim for libel *per se*. (Appellants' Br. 9).

5 Appellant also relies on *Green* for case law regarding the context of the statements.

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