NO. 5-06-0403

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

PAULA SMITH-CADE and FLOYD CADE,	) Appeal from the) Circuit Court of) Williamson County.
Plaintiffs-Appellants,	)
v.	) No. 03-L-98
LUTHERAN SOCIAL SERVICES OF ILLINOIS and KIM HOLDER,	) Honorable) Phillip G. Palmer,
Defendants-Appellees.	) Judge, presiding.

RULE 23 ORDER

The plaintiffs, Paula Smith-Cade and Floyd Cade, filed an eight-count complaint in the circuit court of Williamson County, against the defendants, Lutheran Social Services of Illinois (Lutheran Services) and Kim Holder, seeking damages arising from statements made and published in an addendum to an adoptive-home-study assessment. The circuit court of Williamson County dismissed the fifth amended complaint with prejudice on the ground that it failed to state a cause of action. On appeal, the plaintiffs claim that the circuit court erred in dismissing all counts in the fifth amended complaint and in dismissing several counts in the second, third, and fourth amended complaints.

I. Procedural Background

This action arises from the publication of an addendum to an adoptive-home-study assessment that reversed the prior recommendation to approve the plaintiffs as adoptive parents. A summary of the facts alleged in the fifth amended complaint, including the adoptive-home-study assessment and addendum that was attached to and incorporated in the

complaint, follows.

According to the complaint, the plaintiffs contacted Lutheran Services in September 2001 because they were seeking to adopt an infant. Christy Mitchell, an adoption coordinator for Lutheran Services, was assigned to interview the plaintiffs and to conduct a home-study assessment. She investigated the personal, social, marital, economic, and health history of the plaintiffs. Mitchell completed the assessment on January 16, 2002. According to the assessment, the plaintiffs were a loving and intelligent couple who had the commitment, resources, and insight to parent and support a child. According to the assessment, the plaintiffs were approved as adoptive parents, and Lutheran Services indicated that it would complete postplacement services for them. The report was signed by Christy Mitchell and her supervisor, Kim Holder.

In December 2001, the plaintiffs learned that Lutheran Services had closed its domestic adoption program, so they hired an attorney, Kim Kulengel-Jones, to assist them in locating prospective placements. Around the same time, Mitchell accepted a different position within Lutheran Services, and Kim Holder was assigned to the plaintiffs' case. Shortly after this transition, a foster-family-home license was issued to the plaintiffs. In April 2002, the plaintiffs located a potential placement and notified Holder. Holder proceeded to contact the maternity worker for the birth mother. Holder and the maternity worker concluded that direct contact between the plaintiffs and the maternity worker could present a potential conflict of interest. They agreed that the maternity worker would provide status reports regarding the birth mother to Holder and that Holder would update the plaintiffs and their attorney. On April 29, 2002, the maternity worker telephoned Holder and left a message that the birth mother had given birth the previous day. The maternity worker stated that the birth mother was very emotional after delivering the baby and that she expressed some apprehension about her adoption decision. Holder called the plaintiffs and

reported the news. The plaintiffs nervously awaited word from Holder about the birth mother's decision. On May 2, 2002, the plaintiffs learned that the birth mother had decided to keep her baby. A few days later, the plaintiffs terminated the defendants' services.

On May 13, 2002, Holder completed an addendum to the home-study assessment. Therein, she presented her account of her contacts with the plaintiffs and the events leading up to and following the failed adoption. Holder noted that the plaintiffs became increasingly anxious as the birth mother wrestled with her decision regarding the adoption. Holder also noted that when she called the plaintiffs on April 29, 2002, to inform them that the birth mother was reconsidering her decision, Paula Cade seemed very anxious. Holder reported that Paula Cade said she was nervous about the placement and that she "needed to get some weed" to calm her nerves. Holder also reported that she spoke with the plaintiffs' attorney later that day and that the attorney indicated that Paula Cade had made a similar comment to her. Holder noted that she called the plaintiffs a few times on April 30, 2002, to provide updates. Holder reported that during one conversation, Paula Cade stated that she had been a "nervous wreck" since learning of the birth and that "she needed some weed to calm herself." Holder reported that during their conversation, Paula Cade became hostile and revealed that she had a miscarriage on Mother's Day 2001. Holder noted that when she spoke with the plaintiffs on May 2, 2002, she encouraged them to take some time to address their feelings of loss. Holder reported that Paula Cade stated that "they needed to take some time to heal" and that she and her husband had decided "to get some chicken and beer for the evening." Holder suggested that she meet with the plaintiffs, but Paula Cade would not agree to a visit. Holder noted that the plaintiffs had called her manager to voice some complaints. Holder included recommendations in the addendum and provided the following comments:

> "It appears that Mr. and Mrs. Cade are not satisfied with or cooperative with the services that Lutheran Social Services of Illinois provides [*sic*]. It seems that this

family has several issues regarding infertility that have not been fully addressed. It also appears that this family has suspected drug and/or alcohol usage that needs to be fully investigated.

Lutheran Social Services of Illinois recommends that a meeting be conducted to address those concerns prior [*sic*] Mr. and Mrs. Cade receiving a placement of a child in their home. This meeting will also allow Mr. and Mrs. Cade to fully disclose their opinions and position within the agency.

Because of the unresolved issues stated above, Lutheran Social Services of Illinois recommends that this family not be considered for an adoptive placement at this time. Lutheran Social Services of Illinois believes that it would not be appropriate to complete any post[]placement services for this family by any other agency or attorney at law until the above issues are addressed."

The report, dated May 13, 2002, is signed by Holder and her supervisor. There is a handwritten note on that final page of the assessment. It states that the home-study addendum was released June 21, 2002. It does not indicate to whom it was released.

According to the complaint, shortly after they terminated the defendants' services, the plaintiffs contacted an attorney, Laura Sipes, to inquire about adopting from any of her clients. Sipes contacted Holder to inquire about releases for information on the plaintiffs. Holder did not have a release from the plaintiffs allowing her to talk with Sipes about the situation. Holder told Sipes about the negative findings in the addendum. The plaintiffs first learned about the addendum from Sipes. Sipes told the plaintiffs that she had five leads regarding potential placements but that she could not pursue those leads due to the negative recommendations in the addendum. Two other agencies also informed the plaintiffs that potential placements could not be pursued due to recommendations in the addendum. The plaintiffs contacted the defendants seeking to correct the addendum or to include their own

addendum to the home-study assessment. Lutheran Services denied those requests.

On May 12, 2003, the plaintiffs filed a complaint against the defendants in Williamson County, alleging a breach of contract, a breach of confidentiality, libel, intentional infliction of emotional harm, and intentional interference with a contract. The addendum written by Holder is at the core of the plaintiffs' action. The defendants moved to dismiss the complaint for a failure to state a cause of action. The trial court entered an order striking the complaint and granting leave to file an amended complaint. The plaintiffs filed an amended complaint, and that one was also dismissed on the defendants' motion. The trial court provided the plaintiffs additional opportunities to amend the complaint, but the amended versions were dismissed for a failure to state a cause of action. After considering the fifth amended complaint, alleging defamation *per quod*, intentional infliction of emotional harm, negligence, and false-light invasion of privacy, the court found that the complaint failed to state any cause of action and that additional attempts to amend it would be futile. The complaint was dismissed with prejudice.

Before we delve into the issues on appeal raised by the plaintiffs, we must take up two motions that were taken with the case. The defendants filed a motion to strike the arguments in the plaintiffs' brief that address the trial court's orders dismissing earlier versions of the complaint. The defendants contend that the plaintiffs failed to incorporate or reference the theories and allegations from earlier versions of the complaint into the fifth amended complaint and that therefore the plaintiffs waived any claim of error regarding the court's decisions to dismiss the earlier versions.

When an amended complaint is complete and does not refer to, reallege, adopt, or incorporate the dismissed counts of a prior complaint into the subsequent complaint, the earlier complaint is effectively abandoned and withdrawn and it ceases to be a part of the record. *Boatmen's National Bank of Belleville v. Direct Lines, Inc.*, 167 Ill. 2d 88, 99-100,

656 N.E.2d 1101, 1106 (1995). In order to preserve for appeal the dismissal of claims in a complaint, a plaintiff must stand on the dismissed counts and challenge the ruling at the appellate level or he must make reference to or incorporate the dismissed counts in the subsequent complaints. *Ottawa Savings Bank v. JDI Loans, Inc.*, 374 Ill. App. 3d 394, 399, 871 N.E.2d 236, 240 (2007). When the plaintiffs filed their fifth amended complaint without incorporating the dismissed counts, they waived any claim of error regarding the former pleadings. *Ottawa Savings Bank*, 374 Ill. App. 3d at 400, 871 N.E.2d at 241. In this appeal, we consider only the sufficiency of the pleadings in the fifth amended complaint.

The defendants also filed a motion to dismiss the plaintiffs' counts alleging false-light invasion of privacy on the ground that those claims are barred by the statute of limitations. A statute of limitations fixes the time within which a remedy may be sought. The failure to file an action within the applicable statute of limitations is an affirmative defense that is waived if not raised in the trial court. *People v. Stenson*, 296 Ill. App. 3d 93, 95, 694 N.E.2d 204, 205 (1998). In this case, the limitations issue was not raised in the trial court, and it is therefore waived.

II. Discussion of the Issues

On appeal, the plaintiffs contend that the trial court erred in dismissing the fifth amended complaint for a failure to state a cause of action. A motion to dismiss a complaint for a failure to state a cause of action attacks the legal sufficiency of the pleadings and questions whether the facts alleged in the complaint, if proved, are sufficient to entitle the plaintiff to the requested relief. *Kolegas v. Heftel Broadcasting Corp.*, 154 Ill. 2d 1, 8-9, 607 N.E.2d 201, 205-06 (1992). In ruling on the motion, the court must accept as true all well-pleaded facts and all reasonable inferences therefrom and interpret them in the light most favorable to the plaintiff. *Kolegas*, 154 Ill. 2d at 8-9, 607 N.E.2d at 205-06. Our review is *de novo*. *Schivarelli v. CBS, Inc.*, 333 Ill. App. 3d 755, 759, 776 N.E.2d 693, 696 (2002).

A. Defamation *Per Quod*

We first consider whether the trial court erred in dismissing the plaintiffs' claims for defamation *per quod.* The plaintiffs contend that the factual allegations set forth in counts I and II are sufficient to state a claim for defamation *per quod.* The plaintiffs argue that Holder's comments, particularly those regarding the plaintiffs' use of cannabis and alcohol and her call for a full investigation of that situation before determining the plaintiffs' status as adoptive parents, were plainly intended to and did "blacklist" the plaintiffs as adoptive parents. The defendants counter that the complaint is legally insufficient because the defamatory comments are subject to the innocent-construction rule. The defendants also claim that the plaintiffs consented to the publication of the home-study assessment and the addendum and that the defendants' communications are privileged.

A communication is defamatory if it tends to harm an individual's reputation by lowering the individual in the estimation of the community or by deterring third persons from associating or dealing with the individual. *Kolegas*, 154 Ill. 2d at 10, 607 N.E.2d at 206 (citing Restatement (Second) of Torts §559 (1977)). To prove a claim of defamation, a plaintiff must show that the defendant made a false statement concerning the plaintiff, that there was an unprivileged publication of the defamatory statement to a third party by the defendant, and that the plaintiff was damaged. *Solaia Technology, LLC v. Speciality Publishing Co.*, 221 Ill. 2d 558, 579, 852 N.E.2d 825, 839 (2006).

A statement is defamatory *per se* when the words used are so obviously harmful to the plaintiff that injury to his reputation may be presumed. *Kolegas*, 154 Ill. 2d at 10, 607 N.E.2d at 206. Under Illinois law, there are five categories of statements that are considered defamatory *per se*: (1) those that impute a lack of integrity in the discharge of duties of office or employment, (2) those that impute the commission of a crime, (3) those that impute an infection with a loathsome communicable disease, (4) those that impute a lack of ability in

a trade, profession, or business, and (5) those that impute fornication or adultery. *Bryson v. News America Publications, Inc.*, 174 Ill. 2d 77, 88, 672 N.E.2d 1207, 1214-15 (1996). A statement is not defamatory *per se* if it is capable of an innocent construction. *Bryson*, 174 Ill. 2d at 90, 672 N.E.2d at 1215.

A statement is defamatory *per quod* where the defamatory character of the statement is not apparent on its face and extrinsic facts are required to explain its meaning, or where the statement is defamatory on its face but does not fall within one of the limited categories that are actionable *per se*. *Bryson*, 174 Ill. 2d at 103, 672 N.E.2d at 1221. In a defamation *per quod* action, the plaintiff must plead and prove special damages. *Bryson*, 174 Ill. 2d at 103, 672 N.E.2d at 1221. The innocent-construction rule is not applicable in defamation *per quod* cases. *Quinn v. Jewel Food Stores, Inc.*, 276 Ill. App. 3d 861, 869, 658 N.E.2d 1225, 1232 (1995).

The plaintiffs' claims for defamation *per quod* are based on comments in the addendum indicating directly or by inference that the plaintiffs needed cannabis and alcohol to cope with the stresses of the adoption process and recommending that the plaintiffs' approval as adoptive parents be stayed pending a full investigation into their drug and alcohol usage. We find that these statements would tend to harm the reputation of individuals seeking to adopt children and that they would tend to deter adoption agencies and attorneys from associating or dealing with them. We do not find that the recommendations constitute constitutionally protected opinions. When Holder's recommendations are considered in the context of the home-study assessment, there is a reasonable inference that her opinions are justified by the existence of unexpressed defamatory facts, and they are therefore actionable. See *Bryson*, 174 Ill. 2d at 99, 672 N.E.2d at 1219; *Barakat v. Matz*, 271 Ill. App. 3d 662, 671, 648 N.E.2d 1033, 1041 (1995).

We also find that the plaintiffs have alleged special damages with sufficient

particularity. The complaint alleges that the plaintiffs suffered the loss of the material advantages of their associations with an adoption attorney and two adoption agencies, including the exclusion from consideration as approved, adoptive parents. If the plaintiffs can present evidence supporting the alleged losses, they may be entitled to relief. *Becker v. Zellner*, 292 Ill. App. 3d 116, 127-28, 684 N.E.2d 1378, 1387 (1997).

The defendants argue that the plaintiffs signed consents authorizing them to release the home-study assessment to other adoption professionals. A review of the complaint shows that the plaintiffs adequately pled that the defendants disclosed the defamatory information to a third party without a release. This matter presents a disputed issue of fact. It goes beyond the issue of the sufficiency of the pleadings. Thus, it is appropriately considered at a later stage in the proceedings.

Next, the defendants suggest that the statements are absolutely privileged because they pertain to judicial proceedings. Alternatively, they propose that the statements are conditionally privileged because the adoption agency and its social worker had a duty to utter the statements for the benefit of the prospective adopted child.

Whether a defamatory statement is protected by an absolute or qualified privilege is a question of law for the court. *Larson v. Doner*, 32 Ill. App. 2d 471, 473, 178 N.E.2d 399, 400 (1961). The defense of absolute privilege provides complete immunity in civil cases and is based on the theory that public policy favors the free flow of information in the due course of legislative proceedings, in judicial proceedings if arguably relevant to the proceedings, and in statements made by public officers in their official capacity. *Larson*, 32 Ill. App. 2d at 474, 178 N.E.2d at 400-01. The occasions where defamatory statements are absolutely privileged are necessarily narrow and generally limited to legislative, judicial, and quasi-judicial proceedings. *Zych v. Tucker*, 363 Ill. App. 3d 831, 834, 844 N.E.2d 1004, 1007 (2006). Within the judicial context, the privilege covers formal pleadings, in-court

communications, and any communication pertinent to pending litigation. *Barakat*, 271 Ill. App. 3d at 668, 648 N.E.2d at 1039. The addendum at issue was not generated as a part of any judicial proceeding, and it was not made as a part of an in-court communication. Under the circumstances, we do not find that the addendum is absolutely privileged.

The defense of conditional privilege may be raised where the occasion created a recognized duty or interest that makes a communication privileged. *Quinn*, 276 Ill. App. 3d at 871, 658 N.E.2d at 1233. The three categories of conditionally privileged occasions are: (1) situations in which some interest of the person who publishes the defamatory matter is involved, (2) situations in which some interest of the person to whom the matter is published or of some other third person is involved, and (3) situations in which a recognized interest of the public is concerned. *Kuwik v. Starmark Star Marketing & Administration, Inc.*, 156 Ill. 2d 16, 29, 619 N.E.2d 129, 135 (1993). A court looks only to the occasion itself for the communication and determines as a matter of law and general policy whether the occasion created some recognized duty or interest so that the communication is privileged. *Kuwik*, 156 Ill. 2d at 27, 619 N.E.2d at 134.

In the case at bar, Lutheran Services, a licensed child-welfare agency, conducted a home-study assessment on behalf of and at the request of the plaintiffs, and when a potential placement was identified, the agency communicated and coordinated with the agency assisting the birth mother. Under that circumstance, the agency and its workers are obliged to conduct a professional assessment of its clients' qualifications to become adoptive parents and to candidly apprise them of the results of the assessment. Typically, the agency will proceed to assist persons deemed qualified to locate potential placements and to communicate with the representative of the birth mother. Presumably, the agencies will counsel those deemed unqualified about whether and how they can become qualified as adoptive parents and will provide supportive services. The clients seeking to become

adoptive parents clearly have an interest in the home-study assessment. The occasion of a home study also involves some interest of a third party, the child who will be adopted. We believe that this type of situation fits within the second category of conditionally privileged occasions. *Kuwik*, 156 Ill. 2d at 29, 619 N.E.2d at 135.

However, the defamatory communication can be actionable if the qualified privilege was abused. *Kuwik*, 156 Ill. 2d at 30, 619 N.E.2d at 135. A qualified privilege may be abused by the performance of a reckless act that shows a disregard for the defamed party's rights, including the failure to properly investigate the truth of the matter, the failure to limit the scope of the material, or the failure to send the material to only proper parties. *Kuwik*, 156 Ill. 2d at 30, 619 N.E.2d at 136. Whether a privilege has been abused is a question of fact for the jury. *Kuwik*, 156 Ill. 2d at 27, 619 N.E.2d at 134. In this case, the allegations in the fifth amended complaint adequately allege that the defendants acted recklessly in making untrue statements, in failing to investigate the truth of those statements, and in sending the addendum to unauthorized parties. The plaintiffs adequately pled that the scope of the qualified privilege was exceeded and that there was a reckless disregard for the plaintiffs' rights.

Accepting the well-pleaded allegations as true, we conclude that the complaint sets forth sufficient allegations to state a cause of action for defamation *per quod*. The trial court erred in dismissing counts I and II for a failure to state a cause of action.

B. False-Light Invasion of Privacy

We next consider whether the trial court erred in dismissing the plaintiffs' claims for false-light invasion of privacy. To sustain a cause of action for false-light invasion of privacy, the plaintiffs must plead and prove that (1) they were placed in a false light before the public as a result of the defendants' actions, (2) the false light in which the plaintiffs were placed would be highly offensive to a reasonable person, and (3) the defendants acted with

knowledge that the statements were false or with reckless disregard for whether the statements were true or false. *Kolegas*, 154 Ill. 2d at 17-18, 607 N.E.2d at 210-11.

In regard to the first element of the tort, the plaintiffs allege that as a direct result of the defendants' false statements, they were placed in a false light before the public and before individuals with which they have a special relationship, including adoption professionals. The defendants contend that the plaintiffs failed to meet the "before the public" element where there are no factual allegations that private information was disseminated to anyone but Laura Sipes.

The general allegations in the fifth amended complaint, liberally construed, indicate that the addendum was published to two adoption agencies, in addition to Sipes, as a result of the actions of the defendants. The publicity requirement differs from the publication requirement of defamation. Publicity requires a dissemination of false information to a community with whom the plaintiff has a special relationship, so that the communication is regarded as substantially certain to become a matter of public knowledge within the community. *Kurczaba v. Pollock*, 318 Ill. App. 3d 686, 699-700, 742 N.E.2d 425, 436-37 (2000); *Poulos v. Lutheran Social Services of Illinois, Inc.*, 312 Ill. App. 3d 731, 739-40, 728 N.E.2d 547, 555 (2000). In this case, there are no factual allegations indicating that the addendum was publicized to the community of adoption professionals. The facts alleged do not satisfy the publicity element. Counts VII and VIII were properly dismissed.

C. Intentional Infliction of Emotional Harm

Next, we consider whether the trial court erred in dismissing the plaintiffs' claims for intentional infliction of emotional distress. In order to state a cause of action for intentional infliction of emotional harm, the plaintiff must allege facts to indicate that the defendant's conduct was extreme and outrageous, that the defendant knew that there was a high probability that his conduct would cause severe emotional stress, and that the conduct in fact

caused severe emotional distress. *McGrath v. Fahey*, 126 Ill. 2d 78, 86, 533 N.E.2d 806, 809 (1988). Whether conduct is extreme and outrageous is evaluated on an objective standard based on all of the facts and circumstances. *McGrath*, 126 Ill. 2d at 90, 533 N.E.2d at 811.

In this case, the plaintiffs assert that the defendants, working as adoption coordinators on behalf of the plaintiffs, gained access to information regarding the plaintiffs' physical and emotional health and that the defendants were in a position to have actual or apparent power to affect the plaintiffs' interests. But the complaint falls short of asserting facts to establish that the defendants threatened to use their authority in a coercive or retaliatory manner. See *McGrath*, 126 Ill. 2d at 90-92, 533 N.E.2d at 811-12; *Rudis v. National College of Education*, 191 Ill. App. 3d 1009, 1014, 548 N.E.2d 474, 478 (1989). Upon objectively evaluating the conduct in light of the specific factual allegations and circumstances of this case, we conclude that the publication of a home-study assessment addendum containing false statements suggesting that the plaintiffs might have issues with drugs or alcohol that require further investigation is highly offensive but not so outrageous in character and so extreme in degree that it goes beyond all possible bounds of decency. The trial court properly found that the plaintiffs failed to state a cause of action for intentional infliction of emotional distress. Counts III and IV were properly dismissed.

D. Negligence

Finally, we consider whether the trial court erred in dismissing the plaintiffs' claims for negligence. A legally sufficient negligence action sets out facts that establish the existence of a legal duty owed by the defendant to the plaintiff, a breach of the duty, and an injury proximately caused by the breach. *Corgan v. Muehling*, 143 Ill. 2d 296, 306, 574 N.E.2d 602, 606 (1991).

In counts V and VI of the fifth amended complaint, the plaintiffs allege that the defendants were negligent in that they breached their duties to maintain the confidentiality

of the plaintiffs' records and to inform the plaintiffs that their approval as adoptive parents was in question. This court has recognized the existence of an adopting parent-adoption agency relationship such that the law would impose on the agency a duty of reasonable conduct for the benefit of the adopting parent. See *Roe v. Catholic Charities of the Diocese of Springfield, Illinois*, 225 Ill. App. 3d 519, 536-37, 588 N.E.2d 354, 365 (1992). In this case, the plaintiffs retained the defendants to render insight into the adoption process and to assist them in locating and preparing to adopt a baby. The adverse consequences of failing to promptly apprise the plaintiffs of any change in their qualifications and their approved status as adoptive parents are reasonably foreseeable to adoption professionals. The defendants have information, knowledge, and experience regarding the adoption process. The magnitude of the burden on the defendants is slight because it merely requires them to provide frank appraisals regarding the qualifications and fitness of persons seeking to adopt, to provide services to correct any curable deficiencies, and to promptly apprise them of any change in their status as adoptive parents and the reasons therefor. Further, we find that there is little consequence in placing the burden on the defendants because such agencies provide information, resources, and counseling services to persons seeking to adopt and they should be answerable for their negligent acts or omissions. See *Roe*, 225 Ill. App. 3d 537-38, 588 N.E.2d at 365-66. Accepting all well-pleaded allegations as true, we find that counts V and VI adequately state a cause of action for negligence.

III. Summary and Conclusion

In summary, we find that the plaintiffs pled sufficient factual allegations to state claims for defamation *per quod* and negligence and that they failed to state claims for intentional infliction of emotional harm and for false-light invasion of privacy. Accordingly, we reverse the dismissal of counts I, II, V, and VI of the fifth amended complaint, and we affirm the dismissal with prejudice of counts III, IV, VII, and VIII of the fifth amended

with this decision.

Motion to strike portions of brief granted; motion to dismiss counts denied; judgment affirmed in part and reversed in part; cause remanded.

DONOVAN, J., with GOLDENHERSH and SPOMER, JJ., concurring.