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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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CHERYL LINDQUIST,	)	Appeal from the Circuit Court
	)	of McHenry County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 15-LA-88
	)	
FRANCIS XAVIER GOSSER,	)	Honorable
	)	Michael T. Caldwell,
Defendant-Appellee.	)	Judge, Presiding.

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JUSTICE BURKE delivered the judgment of the court.  
Justices Jorgensen and Schostok concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court properly dismissed plaintiff's defamation claim: as defendant was an attorney, and as the statement at issue pertained to litigation and furthered his representation of his client, the statement was protected by the absolute attorney-litigation privilege.

¶ 2 Plaintiff, Cheryl Lindquist, appeals from the judgment of the circuit court of McHenry County, which dismissed her amended defamation complaint against defendant, Francis Xavier Gosser. Because defendant was an attorney and the allegedly defamatory statement was related to litigation, the statement was privileged, and thus we affirm.

¶ 3 I. BACKGROUND

¶ 4 The following facts are taken from the allegations of the amended complaint. Plaintiff had a power of attorney on behalf of her mother, who was legally and mentally incompetent.

¶ 5 Plaintiff's mother was the beneficiary of an annuity from Lincoln Financial (Lincoln). Lincoln issued monthly annuity checks to plaintiff's mother, and plaintiff would deposit them into either her mother's account or plaintiff's account as reimbursement for expenses related to handling her mother's affairs. In 2012, plaintiff, along with her sister, petitioned to become their mother's coguardians.

¶ 6 Defendant, who was an attorney, represented the trustee of plaintiff's mother's trust. On August 15, 2012, defendant spoke on the telephone with Leslie Billingsley, a fraud investigator for Lincoln. During that conversation, defendant told Billingsley that plaintiff had "stolen (or converted) almost \$20,000.00 worth of annuity checks."

¶ 7 Also on August 15, 2012, defendant e-mailed Billingsley. The e-mail stated that defendant represented the trustee and that, pursuant to the trustee's direction and Billingsley's request, defendant had attached a list of the annuity checks in question. According to the e-mail, the trustee was "trying to get [plaintiff], through litigation, to return the \$19,885.00 to the [t]rust." The e-mail also stated that the trustee requested that Lincoln investigate and issue new annuity checks in the amount of \$19,885.

¶ 8 The amended complaint further alleged that the trustee was "attempting litigation" and that defendant's statement to Billingsley was designed "to involve [Lincoln] in the pending litigation in an attempt to prevent [plaintiff] from being appointed as a guardian of her mother's estate." The amended complaint claimed that the telephone statement that plaintiff had stolen the annuity checks was defamatory *per se*, in that it implied a criminal act and imputed a lack of integrity in plaintiff's conduct related to the power of attorney.

¶ 9 Defendant filed a motion to dismiss pursuant to section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2014)). Defendant contended that, because the allegedly defamatory statement made to Billingsley was related to pending litigation by the trustee and to proposed litigation regarding Lincoln, it fell within the absolute attorney-litigation privilege. The trial court agreed and dismissed with prejudice the amended complaint. Plaintiff, in turn, filed a timely notice of appeal.

¶ 10 II. ANALYSIS

¶ 11 On appeal, plaintiff contends that the trial court erred in dismissing her amended complaint, because the allegedly defamatory statement was not covered by the privilege. Specifically, she asserts that the privilege does not apply, because the statement was an out-of-court communication to a third party, because the statement was not connected to any litigation, and because there were no safeguards to prevent abuse.

¶ 12 A motion to dismiss filed pursuant to section 2-619 of the Code admits the legal sufficiency of the complaint but raises defects, defenses, or other affirmative matters that appear on the complaint's face or that are established by external submissions that defeat the complaint's allegations. *Guarantee Trust Life Insurance Co. v. Kribbs*, 2016 IL App (1st) 160672, ¶ 27. Our review of a section 2-619 dismissal is *de novo*. *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 368 (2003).

¶ 13 The absolute attorney-litigation privilege is based generally on the Restatement (Second) of Torts § 586 (1977)<sup>1</sup> *O'Callaghan v. Satherlie*, 2015 IL App (1st) 142152, ¶ 24. Section 586

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<sup>1</sup> We recognize that a restatement is not binding on Illinois courts unless it has been adopted by our supreme court. See *Tilschner v. Spangler*, 409 Ill. App. 3d 988, 990 (2011). Nonetheless, we opt to apply the principles of section 586 as other appellate courts have. See

provides, in pertinent part, that an attorney is absolutely privileged to publish defamatory statements preliminary to a proposed judicial proceeding or in the institution of, or during the course and as part of, a judicial proceeding in which he participates as counsel, if the statement has some relation to the proceeding. Restatement (Second) of Torts § 586 (1977).

¶ 14 The privilege is intended to provide attorneys with the utmost freedom to secure justice for their clients. *O'Callaghan*, 2015 IL App (1st) 142152, ¶ 24. In deciding whether the privilege applies, a court must consider whether a limitation on the privilege would frustrate an attorney's ability to settle or resolve a case without resorting to expensive litigation. *O'Callaghan*, 2015 IL App (1st) 142152, ¶ 24. Nonetheless, the privilege is limited to situations where the administration of justice and public service require immunity. *O'Callaghan*, 2015 IL App (1st) 142152, ¶ 24.

¶ 15 For purposes of the privilege, an attorney's motives are irrelevant. *O'Callaghan*, 2015 IL App (1st) 142152, ¶ 25. No liability will attach for defamatory statements, even at the expense of uncompensated harm. *O'Callaghan*, 2015 IL App (1st) 142152, ¶ 25. However, if the communication has no connection whatsoever with any litigation, the privilege does not apply. *Atkinson*, 369 Ill. App. 3d at 832-33.

¶ 16 The privilege applies to attorney communications made before, during, and after litigation. *O'Callaghan*, 2015 IL App (1st) 142152, ¶ 26. The same policy considerations that protect an attorney's statements made to his client during the course of a legal proceeding necessarily protect prelitigation communications to a third party. *Atkinson*, 369 Ill. App. 3d at 833. Were a court not to extend the privilege to communications to third parties before

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*O'Callaghan*, 2015 IL App (1st) 142152, ¶ 24; *Atkinson v. Affronti*, 369 Ill. App. 3d 828, 832 (2006).

litigation, it would obstruct an attorney's ability to properly represent his client and would frustrate his ability to settle or resolve cases without resorting to expensive litigation or other judicial processes. *Atkinson*, 369 Ill. App. 3d at 833. Thus, the privilege applies to an attorney's prelitigation defamatory statements made to a potential litigant. *Atkinson*, 369 Ill. App. 3d at 833.

¶ 17 For the privilege to apply, the defamatory statement must pertain to proposed or pending litigation and must further the attorney's representation. *O'Callaghan*, 2015 IL App (1st) 142152, ¶ 25. The pertinence requirement is not strictly applied, and the privilege will apply even where the defamatory communication is not confined to specific issues related to litigation. *Atkinson*, 369 Ill. App. 3d at 834. Courts must resolve any doubts in favor of pertinence. *O'Callaghan*, 2015 IL App (1st) 142152, ¶ 25.

¶ 18 Here, because the allegedly defamatory statement made to Lincoln was related to, and in furtherance of, defendant's representation of his client, it is a classic example of when the privilege should apply. Defendant represented the trustee in litigation related to plaintiff's alleged misappropriation of annuity checks issued by Lincoln. As part of that representation, defendant spoke to Billingsley, whose duties as a fraud investigator for Lincoln necessarily included concerns such as possible theft. As part of that conversation, defendant expressed the trustee's litigation position that plaintiff had taken the funds without authority. As such, the statement was pertinent to the pending litigation and furthered defendant's representation of his client.

¶ 19 The statement was also pertinent to proposed litigation involving Lincoln. The amended complaint alleged that defendant's statement was designed to involve Lincoln in the litigation. Additionally, the e-mail to Lincoln requested that it issue new checks. As the trustee's attorney,

defendant was seeking to secure justice for his client by attempting to obtain compensation from Lincoln, the entity that had issued the checks allegedly stolen by plaintiff. Thus, the statement was pertinent to the proposed litigation involving Lincoln.

¶ 20 Plaintiff relies primarily on two cases, *Thompson v. Frank*, 313 Ill. App. 3d 661 (2000), and *Kurczaba v. Pollock*, 318 Ill. App. 3d 686 (2000), in contending that the privilege does not apply because the statement was made out of court to a third party. Neither of those cases supports plaintiff.

¶ 21 In *Thompson*, the trial court dismissed a complaint for libel and intentional infliction of emotional distress, ruling that an attorney's defamatory statements, in a letter to an opposing party's spouse, that the opposing party had engaged in a sexual relationship with the attorney's client were protected by the attorney privilege. *Thompson*, 313 Ill. App. 3d at 664. After noting that the privilege had been extended to out-of-court communications between opposing counsel, between an attorney and his client related to pending litigation, and between attorneys representing different parties suing the same entity, the appellate court refused to apply it to the letter to the third-party spouse. *Thompson*, 313 Ill. App. 3d at 664.

¶ 22 Here, the allegedly defamatory statement was made to a representative of the entity that had issued the annuity checks and that had a direct interest in the outcome of the litigation. Additionally, the statement was made in the context of defendant's attempt to investigate the matter, resolve the claim, and obtain compensation on behalf of the trustee. That is materially different from the letter sent to the spouse of the opposing party in *Thompson*. Thus, *Thompson* is factually distinguishable from our case.

¶ 23 In *Kurczaba*, the issue was whether the privilege applied to an attorney's dissemination of a civil complaint within the community at large. *Kurczaba*, 318 Ill. App. 3d at 701. In

holding that the privilege did not apply, the court explained that the recipients were not litigants, were not authorized by law to receive the complaint, and had no connection to the litigation. *Kurczaba*, 318 Ill. App. 3d at 705. It added that Illinois courts had not extended the privilege to attorney communications to third parties “unrelated to a lawsuit.” *Kurczaba*, 318 Ill. App. 3d at 705.

¶ 24 Unlike the recipients in *Kurczaba*, Lincoln, as the entity that issued the annuity checks, had a significant connection to the litigation. Not only that, it had a financial interest in any litigation claiming that it was obligated to reissue the checks. Therefore, this case is distinguishable from *Kurczaba*.

¶ 25 Even if those cases were not factually distinguishable from this case, more recent decisions have expanded the application of the privilege. Indeed, even in *Kurczaba*, the court noted that Illinois had refused to extend the privilege to third-party communications “unrelated to a lawsuit.” *Kurczaba*, 318 Ill. App. 3d at 705. Therefore, *Kurczaba* recognized that the privilege might apply to statements made to third parties, if those statements were related to a lawsuit.

¶ 26 More importantly, since *Kurczaba*, courts have expanded the privilege to include attorney statements made to third parties, where the statements pertain to pending or proposed litigation and further the attorney’s representation. See *O’Callaghan*, 2015 IL App (1st) 142152, ¶ 25. We believe that the law, as it has evolved, now provides the better approach.

¶ 27 Nor are we persuaded by plaintiff’s contention that, absent a viable defamation action, there are no safeguards against abuse by defendant. An attorney is subject to the control of the Illinois Supreme Court. *People v. Finley*, 119 Ill. 2d 485, 494 (1988) (supreme court has adopted a code of professional responsibility and a comprehensive system of discipline to govern

attorney conduct). Therefore, defendant's actions in representing the trustee and conducting the litigation are subject to judicial oversight.

¶ 28 Finally, were the privilege not to apply here, the policy behind it would be thwarted. As discussed, the privilege provided defendant the utmost freedom to secure justice for his client. Indeed, defendant made the allegedly defamatory statement as part of an out-of-court conversation in which he was endeavoring to investigate the matter and obtain compensation for the trustee. Thus, a limitation on the privilege would have frustrated defendant's ability to attempt to resolve the case without resorting to expensive litigation. Under the circumstances of this case, the application of the privilege serves unquestionably its underlying policy.

¶ 29

### III. CONCLUSION

¶ 30 For the reasons stated, we affirm the judgment of the circuit court of McHenry County dismissing plaintiff's amended complaint with prejudice.

¶ 31 Affirmed.