



## Alerts

### Absolute Litigation Privilege Bars Claim for Intentional Infliction of Emotional Distress Even Where Conduct is Unreasonable

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*Goodman v. Goodman*, 2023 IL App (2d) 220086

#### Brief Summary

During the divorce proceedings of Stacy and Dru Goodman, Stacy discovered that Dru had hired investigators to surveil her for over three years. After the conclusion of divorce proceedings, Stacy filed suit against Dru alleging, *inter alia*, intentional infliction of emotional distress (IIED) and three claims related to various forms of abuse under the Illinois Domestic Violence Act of 1986 (Act). The trial court dismissed the claims of abuse based on the Act and granted summary judgment in favor of Dru on the IIED claim. Stacy appealed. The appellate court affirmed and held that her claim for IIED was barred by the absolute litigation privilege.

#### Complete Summary

Dru and Stacy Goodman married in 1996 and had three children. In 2013, Stacy filed for divorce. During the divorce proceedings, Stacy learned that between 2013 and 2017, Dru had paid \$1.5 million for investigators to surveil her for twelve hours per day.

The surveillance began in August 2013 when Dru's co-worker, Grady Vogt, hired an investigator when Dru told Vogt that he was having marital troubles. Dru indicated that he was receiving threatening phone calls and was concerned about the well-being of his children. The purpose of that surveillance changed from ensuring safety to investigating adultery when the investigator discovered that Stacy was constantly spending time with a certain individual, who later turned out to be her boyfriend.

Vogt, who hired the investigator without Dru's knowledge, then hired an attorney to oversee the investigator, review his reports, and ensure there were no problems for the company for which Dru and Vogt both worked. Dru found out about the investigator in January 2014, a few months after surveillance began. Starting in January 2014, the investigator's reports were also being forwarded to Dru's divorce attorneys. The surveillance provided evidence of continued adultery and lasted until August 2016. Thereafter, Dru's divorce counsel hired

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another investigator, and that surveillance lasted until March 2017.

The trial court in the divorce proceeding found that the surveillance was excessive and not reasonable under the circumstances and entered a plenary order of protection (OP). On appeal, the court affirmed the plenary order of protection but stressed that its conclusion did not bar a party to a divorce action from engaging a private investigator.

When the plenary OP was set to expire, Stacy filed a motion to extend it. The trial court granted her motion on the basis that it believed Dru would immediately begin surveilling Stacy if the OP was lifted. This time, the same appellate court reversed the trial court's judgment, holding that the trial court's decision was against the manifest weight of the evidence and that Stacy did not establish "good cause" to extend the OP because Dru was within his rights to hire an investigator to conduct surveillance within the bounds of reason.

In 2019, Stacy filed a five-count complaint related to Dru's past surveillance, with one of the counts being IIED. The trial court initially rejected Dru's argument in his motion to dismiss that absolute litigation privilege served as basis to dismiss the IIED claim. The court then denied cross-motions for summary judgment on the IIED claim. However, following a motion to reconsider and schedule oral argument, the trial court stated that it had erred in its previous ruling that the application of the absolute litigation privilege was a question of fact for the jury when it, in fact, was a matter that the court must decide as a matter of law. The trial court barred Stacy's IIED claim because the evidence overwhelmingly demonstrated that the surveillance and its disclosures were related to future anticipated or pending issues in the divorce proceedings.

In upholding the dismissal of the IIED claim, the appellate court noted that the privilege is based on § 586 of the Restatement (Second) of Torts, which provides an absolute privilege for an attorney to publish a defamatory matter in a proceeding in which he participates as counsel so long as it has some relation to the proceeding. However, the scope of conduct shielded by the privilege extends beyond defamatory communications and applies to claims for IIED.

For the privilege to apply, it must pertain to proposed or pending litigation, but the pertinency requirement is not strictly construed. It can be applied to statements or actions related to the subject controversy *and* those not confined to specific issues related to the litigation. The privilege applies to communications made before, during, and after litigation, regardless of the defendant's motive or the unreasonableness of his conduct. When applicable, no liability will attach even at the expense of uncompensated harm to the plaintiff.

Dru's surveillance was clearly in the course of and in furtherance of, anticipated and pending divorce proceedings. It did not matter that the surveillance was not about cohabitation until later, as it still pertained to anticipated divorce proceedings. It also did not matter that the court in *Goodman I* found that the surveillance was not necessary to accomplish a purpose, as the privilege is absolute and attaches regardless of Dru's motives and whether his conduct was reasonable.

## Significance

*Goodman* is an unequivocal affirmation of the "absoluteness" of the absolute litigation privilege. Beyond defamation, Illinois courts have expanded its applicability to claims for negligent infliction of emotional distress, intentional infliction of emotional distress, invasion of privacy, and breach of contract. Its application is a matter that must be decided by the court as a matter of law. The privilege applies to both statements and actions relating to the subject controversy *and* those not confined to specific issues related to the litigation. The privilege also attaches to communications made before, during, and after litigation, regardless of whether the communication or conduct was reasonable.