No. 126795

IN THE SUPREME COURT OF ILLINOIS

CONSTELLATION NEWENERGY, INC.; CNE GAS SUPPLY, LLC; CONSTELLATION ENERGY GAS CHOICE, LLC; and CONSTELLATION GAS DIVISION, LLC, Respondents-Appellants, v. RICHARD DENT and RLD RESOURCES, LLC, Petitioners-Appellees.	On Petition for Leave to Appeal from the Appellate Court of Illinois, First Judicial District, No. 1-19-1652 There on Appeal from the Circuit Court of Cook County, No. 19 L 2910 Honorable Patricia O'Brien-Sheahan, Judge, presiding.

BRIEF AND SUPPORTING APPENDIX FOR RESPONDENTS-APPELLANTS CONSTELLATION NEWENERGY, INC., CNE GAS SUPPLY, LLC, CONSTELLATION ENERGY GAS CHOICE, LLC, and CONSTELLATION GAS DIVISION, LLC

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NATURE OF THE ACTION

This case arises from a confidential employer investigation into sexual harassment that occurred at an employer-sponsored social event. Constellation NewEnergy, Inc., CNE Gas Supply, LLC, Constellation Energy Gas Choice, LLC, and Constellation Gas Division, LLC, the employer ("Constellation"), interviewed the victim, witnesses, and alleged harasser, Richard Dent ("Dent"), whose business RLD Resources, Ltd. ("RLD"), was an independent contractor to Constellation. On the basis of its investigation, Constellation elected to terminate its at-will contracts with RLD.

Dent and RLD (the Appellees in this Court) then brought a petition pursuant to Ill. S. Ct. R. 224 seeking pre-suit discovery, demanding that Constellation disclose the identities of the victim, witness, and investigator, in order to sue them for defamation for statements they made during the course of the investigation. The circuit court dismissed the Rule 224 petition under 735 ILCS 2-615, but the appellate court reversed. *Richard Dent et al. v. Constellation NewEnergy, Inc., et al.*, 2020 IL App (1st) 191652 (A1-A21) ("Opinion"). The judgment is not based upon the verdict of a jury. Questions are raised on the pleadings as to whether the Rule 224 petition could withstand dismissal under section 2-615.

Under this Court's case law and the plain language of Rule 224, pre-suit discovery is permitted under Rule 224 only if it is "necessary." *Hadley v. Doe*, 2015 IL 118000, ¶ 27. Here, pre-suit discovery is not "necessary" for two

independent reasons, and therefore the Rule 224 was properly dismissed by the Circuit Court.

First, this Court has held that pre-suit discovery is not "necessary" when the claims underlying the Rule 224 petition are subject to dismissal under section 2-615. *Id.* Here, Dent's petition pleads facts establishing that the allegedly defamatory statements were all made in the context of an employer's confidential investigation concerning workplace sexual harassment. Such statements are privileged under Illinois law unless made in bad faith; otherwise, "victims of harassment and companies with a goal of preventing harassment would be handcuffed by a fear of defamation liability." *Vickers v. Abbott Laboratories*, 308 Ill. App. 3d 393, 402 (1st Dist. 1999) (internal quotation marks omitted). Dent's petition alleged in conclusory terms that the purportedly defamatory statements were false, but alleged no facts that, if true, would establish bad faith. Because Dent and RLD pleaded into the qualified privilege but failed to allege facts to overcome it, the Rule 224 petition was properly dismissed under Section 2-615. *See K. Miller Co., Inc. v. McGinnis*, 238 Ill. 2d 284 (2010).

Second, pre-suit discovery also is not "necessary" if the would-be plaintiff already knows the identity of one potential defendant and thus can file a complaint and use the regular discovery process to identify other potential defendants. *See Roth v. St. Elizabeth's Hosp.*, 241 Ill App. 3d 407, 412-13 (5th Dist. 1993); *Low Cost Movers v. Craigslist, Inc.*, 2015 IL App (1st)

143955, ¶ 17. Here, Dent attached to his petition a letter from Constellation disclosing the names of the investigators who interviewed him. Constellation confirmed their identities in its pleadings before the Circuit Court. Dent thus already knew the names of some of the parties whose identities he sought to uncover, and the purpose of Rule 224 was already served: Dent could file a complaint against those parties and, if the complaint survived dismissal, seek discovery of the others' identities.

The appellate court's decision, if upheld, would strongly undermine the State's policy against sexual harassment by making it effectively impossible for employers to ensure victims and witnesses that their identities will be kept confidential. Victims and witnesses often are reluctant to cooperate with sexual harassment investigations, even with an employer's promise of confidentiality, because they fear retaliation and publicity. The use of Rule 224 to compel disclosure of their identities to the harasser, so as to enable a retaliatory defamation claim, will only increase that reluctance and hamper employers' ability to address sexual harassment in the workplace. The appellate court's judgment should therefore be reversed.

ISSUES PRESENTED FOR REVIEW

1. When a Rule 224 petition pleads facts establishing a qualified privilege and does not plead facts to overcome that privilege, should the Rule 224 petition be dismissed upon a Section 2-615 motion to dismiss?

2. When a Rule 224 petition demonstrates that the petitioner has actual knowledge of one potential defendant, should the Rule 224 petition seeking pre-suit discovery of the identities of other potential defendants be dismissed?

JURISDICTIONAL STATEMENT

The appellate court entered its judgment and an accompanying Rule 23 Order on September 30, 2020. Petitioners moved to publish. The motion was granted on October 29, 2020. The appellate court opinion was published on November 25, 2020. 2020 IL App (1st) 191652 (A01-A21). No petition for rehearing was filed. Respondents filed a Petition for Leave to Appeal to this Court on December 29, 2020.

STATUTES, RULES, AND OTHER PROVISIONS INVOLVED

Ill. S. Ct. Rule 224. Discovery Before Suit to Identify Responsible Persons and Entities

(a) Procedure.

(1) *Petition.*

(i) A person or entity who wishes to engage in discovery for the sole purpose of ascertaining the identity of one who may be responsible in damages may file an independent action for such discovery.

(ii) The action for discovery shall be initiated by the filing of a verified petition in the circuit court of the county in which the action or proceeding might be brought or in which one or more of the persons or entities from whom discovery is sought resides. The petition shall be brought in the name of the petitioner and shall name as respondents the persons or entities from whom discovery is sought and shall set forth: (A) the reason the proposed discovery is necessary and (B) the nature of the discovery sought and shall ask for an order authorizing the petitioner to obtain such discovery. The order allowing the petition will limit discovery to the identification of responsible persons and entities and where a deposition is sought will specify the name and address of each person to be examined, if known, or, if unknown, information sufficient to identify each person and the time and place of the deposition.

* * *

STATEMENT OF FACTS

A. The Rule 224 petition

Dent is the Chief Executive Officer of RLD, which entered at-will contracts with Constellation to provide electricity and natural gas sales, marketing, and consulting services. A23 [1] On September 14, 2018, two

[1] For ease of reference, all of the documents that Constellation cites to in its brief are in the Appendix and each page in the Appendix has the corresponding common law record citation.

attorneys representing Constellation, Grace Speights and Theos McKinney, met with Dent to discuss allegations of sexual harassment that were made against him. A23; A35. The purpose of the meeting was to give Dent "an opportunity to provide his recollection of the events" surrounding the allegations. A35.

On October 1, 2018, Constellation notified Dent that it was terminating its at-will consulting agreements with RLD. A24-A25. Attached to the Petition was a termination notice dated October 1, 2018. A31-A33. The petition also included a December 2019 letter from Constellation's counsel to Dent's counsel, stating that Constellation had hired a third party to investigate the claims against Dent relating to the "inappropriate and unwanted touching of a Constellation employee and … unwelcome comments of a sexual nature to a Constellation employee." A35. The letter identified the investigators by name, noted that Dent met with them on September 14, 2018, as part of Constellation's investigation, and stated that Dent's denials were not credible and his conduct violated the company's code of conduct. A35-A36.

On March 28, 2019, Dent and RLD filed a petition in Cook County Circuit Court, pursuant to Ill. S. Ct. R. 224, demanding that Constellation identify the individuals who made those allegations, so that they could bring a defamation suit against them. A22-A36; A26. According to the petition, three unidentified persons, "A", "B", and "C", made statements "imput[ing] to Dent acts of moral turpitude and impugned his character, reputation and good

name," A25. The petition claimed that Dent and RLD were damaged as a consequence. A25-A26.

Specifically, according to the petition: (1) an unidentified person, Person A, told Constellation investigators that, in July 2018, Dent inappropriately touched her at a Constellation-sponsored pre-golf tournament party held at the Shedd Aquarium in Chicago; (2) Person A also told a Constellation investigator that, in June 2016, at another Constellation-sponsored golfing event in the Philadelphia area, Dent had said to her that she "had a butt like a sister"; (3) another individual, Person B, told the Constellation investigator that he had observed Dent collecting golf materials at the Marriott Hotel in Chicago, where Constellation had arranged for the distribution of guest passes, polo shirts, and other items for the July 2018 event, and that Dent was drunk and disorderly at that time; and (4) Constellation's outside investigator, Person C, then published to Constellation the statements of Persons A and B when relaying the findings of the investigation. A24-A26.

B. Constellation's motion to dismiss

Constellation moved to dismiss the Rule 224 petition under Section 2-615. As Constellation explained in its motion papers, Rule 224 "requires a petitioner to demonstrate the reason why the proposed discovery seeking the individual's identity is 'necessary.'" *Stone v. Paddock Pubs., Inc.*, 2011 IL App (1st) 093386, ¶ 14 (quoting Ill. S. Ct. R. 224(a)(1)(ii)). In the defamation context, this Court has held that proposed pre-suit discovery is not "necessary,"

and thus not permitted, if the defamation allegations set forth in the Rule 224 petition are subject to dismissal under Section 2-615. *Hadley*, 2015 IL 118000, ¶ 27.

Here, Constellation argued, dismissal was required because the petition pleaded facts establishing that the alleged defamatory statements were subject to the qualified privilege that applies to statements made in the course of an employer's sexual harassment investigation. *See Vickers*, 308 Ill. App. 3d at 402. Constellation also confirmed that "Person C" was the attorneys that Constellation retained to investigate the allegations, who had identified themselves to Dent during the September 14, 2018 interview, and who were identified by name in a letter that Dent attached as an exhibit to the petition. *See* A35; A41-A42.

C. The circuit court's dismissal of the Petition

The circuit court dismissed the case on the ground that Dent knew the identity of a party potentially responsible for damages, namely, Constellation and the investigating attorneys, so the purpose of Rule 224 had been accomplished. *See* A49; *Low Cost Movers v. Craigslist, Inc.*, 2015 IL App (1st) 143955, ¶ 17. With knowledge of the identity of one potential defendant, a Rule 224 petitioner can file a complaint and use the post-complaint discovery process to learn the identity of other potential defendants. *See* 735 ILCS 5/2-402; Ill. S. Ct. R. 201-224. Because the circuit court found dismissal was warranted on this basis, it did not reach the question of qualified privilege.

D. The appellate court decision

The appellate court reversed. First, it rejected the circuit court's reasoning. The appellate court acknowledged that "[o]nce a potential defendant's identity is learned, a petitioner can then file a case and use either the discovery provisions of the rules or the Code to conduct full discovery of those named as respondents-in-discovery to determine who in fact was responsible." A10. The appellate court nonetheless found that "in the instant case no potential defendant has been identified" (A14), ignoring that Dent sought the identity of Person C, who were the attorneys identified by name in the letter attached as Exhibit B to the petition.

Next, the appellate court addressed Constellation's arguments concerning qualified privilege. The appellate court acknowledged that Rule 224 allows pre-suit discovery only when such discovery is "necessary" (A17), and "[t]o ascertain whether petitioners satisfied Rule 224's necessity requirement, the court must evaluate whether they presented sufficient allegations of a defamation claim to withstand a section 2-615 motion to dismiss." *Id.* But as to Constellation's argument that the allegedly defamatory statements were made in the context of an employer's sexual harassment investigation, and thus protected by a qualified privilege, the appellate court held that dismissal was improper because "[p]rivilege is an affirmative defense that … should not be considered when resolving a section 2-615 motion to

dismiss." A18. The court then held the allegations in the petition were "sufficient to withstand dismissal under a section 2-615 analysis." A20.

STANDARD OF REVIEW

This Court reviews *de novo* the denial of a motion to dismiss under Section 2-615. *Hadley*, 2015 IL 118000, ¶ 29.

ARGUMENT

I. Rule 224 only allows pre-suit discovery that is "necessary"

Under Illinois Supreme Court Rule 224, a party may engage in pre-suit discovery "for the sole purpose of ascertaining the identity of one who may be responsible in damages…." Ill. Sup. Ct. R. 224(a)(1)(i). A petition under Rule 224 must "set forth: (A) *the reason the proposed discovery is necessary* and (B) the nature of the discovery sought and shall ask for an order authorizing the petitioner to obtain such discovery." Ill. Sup. Ct. R. 224(a)(1)(ii) (emphasis added). In essence, "Rule 224 is designed as a tool to assist a plaintiff in discovering the identity of an unidentified individual who may be liable to him." *Hadley*, 2015 IL 118000, ¶ 25.

Our courts have emphasized, however, that "the petitioner must demonstrate that discovery of the individual's identity is 'necessary.'" *Id.* (quoting Ill. S. Ct. R. 224(a)(1)(ii)); *see also Stone v. Paddock Pubs., Inc.*, 2011 IL App (1st) 093386, ¶ 18. To do so, the petitioner must show that the Rule 224 petition seeks discovery relating to a claim that could withstand dismissal under Section 2-615. *Hadley*, 2015 IL 118000, ¶¶ 27, 29-30.

"A section 2-615 motion to dismiss tests the legal sufficiency of a complaint." *Id.* ¶ 29. To evaluate such a motion, the court decides whether the allegations of the complaint, taken as true, are sufficient to establish a cause of action. The court considers all facts apparent from the face of the complaint, including attached exhibits. *Id.* As applied to the Rule 224 context, the petition must set forth allegations relating to the underlying claim for which the petitioner is pursuing pre-suit discovery. If those allegations are not sufficient to state any underlying claim, then the pre-suit discovery is not "necessary," and the Rule 224 petition should be dismissed. *Id.* ¶ 27.

Additionally, in applying Rule 224's "necessity" requirement, the appellate court has held that a Rule 224 petition should be dismissed once the plaintiff has ascertained "the identity of *one* who may be responsible in damages." Ill. Sup. Ct. R. 224(a)(1)(i) (emphasis added). Rule 224 does not allow a petitioner to continue with pre-suit discovery until it has identified all potential defendants. Rather, with knowledge of the identity of one potential defendant, the petitioner can file a case and use post-complaint discovery to learn the identity of other potential defendants. *See* 735 ILCS 5/2-402; Ill. S. Ct. R. 201-224. In that scenario, the purpose of the Rule 224 petition "has been accomplished and the action should be dismissed." 241 Ill App. 3d at 412-13; *Low Cost Movers*, 2015 IL App (1st) 143955, ¶ 17.

II. Pre-Suit discovery is not "necessary" because the underlying defamation claim is subject to dismissal under section 2-615

The Rule 224 petition in this case was properly dismissed by the circuit court because it does not plead facts sufficient to state a defamation claim. Instead, it pleads facts establishing that the alleged defamatory statements are protected by a qualified privilege governing workplace sexual harassment investigations, and it does not plead any facts sufficient to overcome that qualified privilege. The petition is therefore not "necessary."

A. A defamation claim is subject to dismissal under section 2-615 when it pleads facts establishing a qualified privilege

This Court has held in the defamation context that "to ascertain whether a petitioner has satisfied Rule 224's necessity requirement, the court must evaluate a defamation complaint to determine whether it will withstand a section 2-615 motion to dismiss." *Hadley*, 2015 IL 118000, ¶ 27. [I]n ordering the disclosure of a potential defendant's identity pursuant to Rule 224, a court must balance the potential plaintiff's right to redress for unprotected defamatory language against the danger of setting a standard for disclosure that is so low that it effectively chills or eliminates the right to speak anonymously and fails to adequately protect the chosen anonymity of those engaging in nondefamatory public discourse." *Id.* ¶ 26 (quoting *Hadley v. Doe*, 2014 IL App (2d) 130489, ¶ 17). That balance is especially important when the allegedly defamatory statements are protected by a qualified privilege due to

the critical public policy of encouraging reporting and investigation of workplace sexual harassment.

"To state a cause of action 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 the publication caused damages." *Hadley,* 2015 IL 118000, ¶ 30. However, certain publications of an otherwise defamatory statement are protected by a qualified privilege. As this Court has explained, "[a] privileged communication is one which, except for the occasion on which or the circumstances under which it is made, might be defamatory and actionable." *Kuwik v. Starmark Star Marketing & Admin., Inc.*, 156 Ill. 2d 16, 24 (1993) (quotation marks omitted).

The consequence of the qualified privilege is to:

> "enhance a defamation plaintiff's burden of proof. Where no qualified privilege exists, the plaintiff need only show that the defendant acted with negligence in making the defamatory statements to prevail.... However, once a defendant establishes a qualified privilege, a plaintiff must prove that the defendant either intentionally published the material while knowing the matter was false, or displayed a reckless disregard as to the matter's falseness." *Id.* at 24, 30.

While the existence of a privilege is a defense on which the defendant bears the burden, sometimes the plaintiff's complaint pleads facts that, if true, would satisfy that burden. The plaintiff in that circumstance must also plead specific facts to overcome the privilege in order to survive dismissal under

section 2-615. For example, in *K. Miller Co., Inc. v. McGinnis*, 238 Ill. 2d 284 (2010), this Court held that "[a]n affirmative defense may be raised in a section 2-615 motion where the defense is 'established by the facts apparent on the face of the complaint' and no other facts alleged in the complaint negate the defense." *Id.* at 292 (quoting 3 R. Michael, Illinois Practice § 27.2, at 492 (1989)). Likewise, in *Pompa v. Swanson*, 2013 IL App (2d) 120911, the appellate court dismissed a complaint under section 2-615 when its "allegations, even when viewed in the light most favorable to plaintiff, [were] insufficient to overcome the qualified privilege at issue" *Id.* ¶ 31. As the appellate court has also said:

> "[p]rivilege is an affirmative defense that may be raised as a basis for dismissal of a defamation action … even in a section 2-615 motion if the defense is apparent on the face of the complaint."

Dobias v. Oak Park & River Forest High Sch. Dist. 200, 2016 IL App (1st) 152205, ¶ 106; *see also O'Callaghan v. Satherlie*, 2015 IL App (1st) 142152, ¶ 18 (holding that "a defendant may properly raise an affirmative defense in a section 2-615 motion if the defense is apparent from the face of the complaint").

The appellate court in this case instead held, categorically, that a court cannot consider a qualified privilege on a section 2-615 motion because a qualified privilege is an affirmative defense. A18-A19. In the appellate court's view below, a qualified privilege can only be asserted in a motion under section 2-619. That rigid and overly technical holding directly conflicts with cases like the ones just cited. The appellate court's narrow and conflicting view of section

2-615 in this case is particularly problematic in the context of a Rule 224 petition, because this Court has never definitively held that a section 2-619 motion is available to dismiss a Rule 224 petition. *Cf. Hadley*, 2015 IL 118000, ¶ 27 ("[T]o ascertain whether a petitioner has satisfied Rule 224's necessity requirement, the court must evaluate a defamation complaint to determine *whether it will withstand a section 2-615 motion to dismiss*") (emphasis added). If section 2-619 is not available in the Rule 224 context, then under the appellate court's approach, there is no opportunity *at all* for the Rule 224 respondent ever to assert qualified privilege. That result is untenable as it would allow the Rule 224 petitioner to obtain pre-suit discovery on a claim that will fail as a matter of law—directly contrary to the "necessity" requirement of Rule 224.

Accordingly, this Court should use this case to not only confirm that "[a]n affirmative defense may be raised in a section 2-615 motion where the defense is established by the facts apparent on the face of the complaint and no other facts alleged in the complaint negate the defense" (*K. Miller Co.*, 238 Ill. 2d at 292 (internal quotation marks omitted), but also that a Rule 224 respondent may additionally file a motion to dismiss under Section 2-619 if affirmative matter is needed to establish the qualified privilege.

B. The Rule 224 Petition here pleads facts establishing the qualified privilege for statements made in the course of an employer's sexual harassment investigation

Here, the Petition's allegations, taken as true for purposes of the section 2-615 motion, establish that the allegedly defamatory statements are protected by a qualified privilege. The petition specifically alleges that the defamatory statements were made in the context of an employer's investigation of a report of sexual harassment. A23-A25; A35-A36.

Illinois courts recognize that a qualified privilege attaches to statements made by victims, witnesses, and investigators in the course of an employer's investigation of alleged sexual harassment. In *Vickers*, the appellate court applied the test adopted by this Court in *Kuwik* for determining whether a qualified privilege exists. Under that test, 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 to make the communication so as to make it privileged." *Kuwik*, 156 Ill. 2d at 27. Such occasions can include "(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." *Id.* at 29 (quotation marks omitted).

In *Vickers*, the appellate court reasoned that an employer's sexual harassment investigation is an occasion presenting all three of these interests:

> "First, it is clear that the [defamation defendants] had an interest in stopping harassment and abuse by plaintiff. Second, [the employer] and its agents [who investigated the claims of harassment] had an interest in investigating … employees' concerns and taking action to prevent further harassment. And third, there is a definite general public interest in eradicating sexual harassment in the workplace."

Vickers, 308 Ill. App. 3d at 402.

Indeed, the court noted an employer's failure to address workplace harassment can itself result in liability. *Id.* And to stop harassment, the court determined, there is a need to "facilitat[e] a free flow of information so that correct information may ultimately be attained." *Id.* at 401. A qualified privilege "promotes this social policy and provides protection for victims, witnesses and investigators of sexual harassment. If no privilege existed, then victims of harassment and companies with a goal of preventing harassment would be handcuffed by a fear of defamation liability." *Id.* at 402 (internal quotation marks omitted).

In other states, too, courts have afforded a qualified privilege to statements made to employers regarding sexual harassment in the workplace. *See, e.g.*, *Bierbower v. FHP, Inc.*, 70 Cal. App. 4th 1, 3 (1999) (qualified privilege covers "investigations of sexual harassment complaints by private employers when made without malice"); *Miller v. Servicemaster by Rees,* 174 Ariz. 518, 520 (Ct. App. 1992) ("a conditional privilege exists" regarding

employee reports of sexual harassment "because public policy dictates that employees must be protected from workplace sexual harassment"); *Lawson v. Boeing Co.*, 58 Wash. App. 261, 266 (1990) ("conditional privilege is routinely applied to complaints as to sexual harassment"); *Theisen v. Covenant Med. Ctr., Inc.*, 636 N.W.2d 74, 85 (Iowa 2001) (recognizing, in case involving investigation into sexual harassment allegations, a "qualified privilege for statements made by employers to employees concerning the reasons for an employee's discharge"); *Rice v. Hodapp*, 919 S.W.2d 240, 244 (Mo. 1996) (applying qualified privilege applicable to intra-corporate communications to protect allegedly defamatory statements made within company regarding sexual harassment investigation); *see also Sagaille v. Carrega*, 194 A.D.3d 92 (N.Y. App. Div. 2021) (qualified privilege applied to statements to law enforcement by victim of sexual assault).

This Court should confirm that qualified privilege here. Illinois has a strong public policy interest in combatting workplace sexual harassment. The General Assembly has found that "organizational tolerance of sexual harassment has a detrimental influence in workplaces by creating a hostile environment for employees, reducing productivity, and increasing legal liability." 775 ILCS 5/2-109(A) (Illinois Human Rights Act). Accordingly, it has stated its "intent to encourage employers to adopt and actively implement policies to ensure their workplaces are safe for employees to report concerns about sexual harassment without fear of retaliation…." *Id.*

Federal law likewise prohibits sexual harassment and obligates employers to take steps to prevent it and to adopt policies to protect employees who report harassment from retaliation. *See* 42 U.S.C. § 2000e-2(a)(1) (Title VII prohibiting sex discrimination); *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (primary objective of Title VII "is not to provide redress but to avoid harm"); *Cerros v. Steel Technologies, Inc.*, 288 F.3d 1040, 1045 (7th Cir. 2002) (explaining that sexual harassment is a form of sex discrimination, and employers violate Title VII by permitting a sexually hostile work environment).

A qualified privilege is necessary to achieve the "compelling interest in ridding workplaces of sexual harassment" (*Vickers* 308 Ill. App. 3d at 402), and to allow employers to satisfy their affirmative obligation to "take all steps necessary to prevent sexual harassment from occurring" and to "establish a complaint procedure designed to encourage victims of harassment to come forward" (*Faragher*, 524 U.S. at 806). Without a qualified privilege, the employer's complaint procedure will be ineffective, as victims and witnesses will be afraid to come forward, and employers will be stymied in their ability to eradicate sexual harassment from the workplace.

C. The Rule 224 Petition fails to plead any facts to overcome the privilege, and thus dismissal was warranted

Having pleaded facts and attached exhibits establishing that the alleged defamatory statements were made in the course of an employer's sexual harassment investigation, and were therefore protected by a qualified

privilege, Dent then had the burden to plead additional facts to overcome the privilege. Specifically, to defeat a qualified privilege, "a plaintiff must prove that the defendant either intentionally published the material while knowing the matter was false, or displayed a reckless disregard as to the matter's falseness." *Kuwik*, 156 Ill. 2d at 133.

Dent did not and could not do so. While Dent made conclusory allegations that Person A, B, and C's statements were false. (*See* A25), bare allegations are not enough to overcome the privilege. *See, e.g.*, *Colson v. Steig*, 86 Ill. App. 3d 993, 998 (2d Dist. 1980) (bare allegations of knowledge of falsity without supporting facts are insufficient to show actual malice); *Coghlan*, 2013 IL App 1st 120891, ¶ 56 (affirming dismissal of defamation action and holding insufficient plaintiff's conclusory allegations that the defendant knew the alleged defamatory statements were false). Rather, to overcome the privilege, a plaintiff must allege concrete facts establishing, for example, that the allegedly defamatory statements were fabricated, that the employer conducted an investigation that was reckless in its disregard for the truth or disregarded company policy, or that the findings of the investigation were improperly disseminated. *See, e.g.*, *Kuwik*, 156 Ill. 2d at 30 (to establish abuse of privilege, plaintiff would need to demonstrate a reckless investigation or improper dissemination of the findings); *Vickers*, 308 Ill. App. 3d at 404–05 (no abuse of the privilege where there is no "concrete evidence to support the notion that [the company's] employees fabricated stories," and where "employees

deliberately followed company personnel policies in accordance with federal law and investigated allegations into plaintiff's conduct before taking action"); *cf. Wirig v. Kinney Shoe Corp.*, 461 N.W.2d 374, 380–81 (Minn. 1990) (finding abuse of privilege where "an employer … takes no steps to investigate but relies entirely on accusations either made by employees who may be biased or on second-hand hearsay with no identification of sources").

No such facts were pleaded here, nor could they have been. Indeed, the Rule 224 petition and its exhibits show that the company conducted an investigation consistent with its policies, retained an external investigator to do so, interviewed not only the victim and witnesses but also the individual accused of harassment, found the allegations credible, and did not disseminate the findings except in attorney-client privileged communications. *See* A35-36.

In sum, Dent failed to plead facts sufficient to overcome the qualified privilege protecting the allegedly defamatory statements. The Rule 224 petition therefore is not "necessary"—because the pre-suit discovery is not in service of any claim that could survive a motion to dismiss—and the petition was properly dismissed.

D. A contrary rule will seriously undermine the state's public policy against sexual harassment

A contrary holding, allowing Dent to pursue pre-suit discovery in this case, would seriously undermine the State's public policy against sexual harassment. That is particularly so if (as the appellate court held) a court cannot consider a privilege when adjudicating a section 2-615 motion. Such a

rule would allow a sexual harasser to pierce confidentiality and obtain pre-suit discovery without needing to frame a defamation claim that could actually survive a motion to dismiss. That outcome would conflict with *Hadley* and Rule 224's necessity requirement, and as a practical matter would make it impossible for employers to assure victims and witnesses that their participation in a workplace sexual harassment investigation will remain confidential and that they will not be subject to retaliation. Anyone could use a Rule 224 petition to discover the identities of victims, witnesses, and investigators, just by asserting an underlying defamation claim, even if that underlying claim would be clearly meritless due to the qualified privilege. That, in turn, would chill participation in employer investigations and frustrate good-faith efforts to eradicate sexual harassment from the workplace.

A critically important component of an effective workplace sexual harassment policy is a reporting mechanism that allows the identities of victims and witnesses to remain confidential. Without that assurance, many victims and witnesses would be unwilling to come forward for fear that they will face retaliation, be branded with a negative reputation, or be denied promotion opportunities. "[V]ictims of harassment and companies with a goal of preventing harassment would be handcuffed by a fear of defamation liability." *Vickers*, 308 Ill. App. 3d at 402 (internal quotation marks omitted).

Empirical evidence supports this concern. A U.S. Equal Employment Opportunity Commission ("EEOC") taskforce found that the vast majority of

victims never report their experience of sexual harassment. "Employees who experience harassment fail to report the behavior or to file a complaint because they anticipate and fear a number of reactions – disbelief of their claim; inaction on their claim; receipt of blame for causing the offending actions; social retaliation (including humiliation and ostracism); and professional retaliation, such as damage to their career and reputation." Chai R. Feldblum & Victoria A. Lipnic, U.S. Equal Emp. Opportunity Comm'n, Report of the Co-Chairs of the EEOC Select Task Force on the Study of Harassment in the Workplace (June 2016), at Part II.C), *available at* https://www.eeoc.gov/select-task-force-study-harassment-workplace.

To address this chronic and widespread under-reporting of harassment, guidelines promulgated by the EEOC confirm that "[t]he employer should … have a procedure for resolving sexual harassment complaints … designed to 'encourage victims of harassment to come forward' and should not require a victim to complain first to the offending supervisor… *It should ensure confidentiality as much as possible and provide effective remedies, including protection of victims and witnesses against retaliation*." U.S. Equal Emp. Opportunity Comm'n, Notice No. 915.050, Policy Guidance on Current Issues of Sexual Harassment, Preventative and Remedial Action (emphasis added),

available at https://www.eeoc.gov/laws/guidance/policy-guidance-current-issues-sexual-harassment.

Numerous cases confirm that providing victims and witnesses with the assurance of confidentiality not only is a best practice, but also that the failure to assure confidentiality may expose an employer to liability if harassment does occur. *See, e.g.*, *Anderson v. Leigh*, No. 98 C 50169, 2000 WL 193075, at *5 (N.D. Ill. Feb. 10, 2000) (holding that company exercised reasonable care to prevent sexual harassment where, among other things, the company instructed employees to report sexual harassment and promised confidentiality with reasonable parameters); *Shaw v. Autozone, Inc.*, No. 96 C 50111, 1997 WL 587488, at *4 (N.D. Ill. Sept. 19, 1997) (same); *Roby v. CWI, Inc.*, 579 F.3d 779, 786 (7th Cir. 2009) (finding that employer exercised reasonable care where employer performed an investigation, instructed interviewees that the information was confidential, fired one employee when he breached confidentiality, and disciplined supervisor by issuing a written reprimand and ordering him to attend education and retraining classes); *see also* Workplace Disciplinary Investigations and Confidentiality: Striking the Balance, 50 PRAC. LAW 25, 27-28 (2004) (discussing the importance of confidentiality in sexual harassment investigations and explaining that

confidentiality is an influential factor in encouraging employees to report harassment).

The Court should not allow Rule 224 to become a tool used by sexual harassers to undermine the State's strong public policy against harassment. Pre-suit discovery should instead be permitted only when truly necessary: when a petitioner alleging defamation in the context of an employer's sexual harassment investigation can plead concrete facts sufficient to demonstrate abuse of the privilege. Doing so will adequately protect meritorious defamation claims, while weeding out meritless claims before the identities of victims and witnesses can be discovered. A would-be defamation plaintiff who cannot allege such facts is likely using pre-suit discovery as the preliminary step to bringing a defamation claim or other retaliatory action. Allowing pre-suit discovery under these circumstances, as the appellate court's decision does, strikes the wrong balance between "the potential plaintiff's right to redress for unprotected defamatory language against the danger of setting a standard for disclosure that is so low that it effectively chills or eliminates the right to speak anonymously." *Hadley*, 2015 IL 118000, ¶ 27.

III. Pre-suit discovery is not "necessary" because Dent already knows the identity of a potential defendant.

A. Once a would-be plaintiff knows the identity of one potential defendant, the purpose of Rule 224 has been accomplished

Rule 224 allows a party to engage in pre-suit discovery "for the sole purpose of ascertaining the identity of *one* who may be responsible in

damages…." Ill. Sup. Ct. R. 224(a)(1)(i) (emphasis added). Once the identity of a person or entity who may be responsible in damages is known, "the purpose of the rule has been accomplished and the action should be dismissed." *Roth*, 241 Ill. App. 3d at 412-13. After all, Rule 224 "was intended to *supplement*"—not supplant—"Section 2-402 of the Code" (*Id.* at 416 (emphasis added)), which allows for *post*-complaint discovery of "who should properly be named as additional defendants in the action." 735 ILCS 5/2-402. When a would-be plaintiff knows the identity of one party potentially responsible in damages, it can file a complaint and seek any additional discovery under section 2-402 or the general discovery provisions of Rules 201-224. *See Roth*, 241 Ill. App. 3d at 416. Pre-suit discovery is no longer needed.

The Committee Notes make clear that Rule 224 was adopted to "provide particular benefit in industrial accident cases where the parties responsible may be known to the plaintiff's employer, which may immunize itself from suit." Committee Notes to Rule 224 (Aug. 1, 1989). As the Fifth District explained in *Roth*, in industrial accident cases, the family members of a decedent were often unsuccessful in seeking information from the employer about the type of machine involved in the accident and its manufacturer. Faced with potential statute of limitation problems, the plaintiff's lawyer would sometimes sue the employer directly, even though it was immune under the Worker's Compensation Act, and hope that the judge would allow discovery while the motion was pending. This procedure "required plaintiff's lawyers to

file what would easily be characterized as unfounded pleadings, and even for those who were willing to do so, it did not guarantee success." *Roth*, 241 Ill. App. 3d at 418. Rule 224 was adopted in part to make this procedure unnecessary. But once a would-be plaintiff knows the identity of one potential defendant, "a case can be filed and either the general discovery provisions of Rule 201 *et seq.* or the provisions of section 2-402 can be utilized to determine who is responsible." *Id.* at 416. Discovery under Rule 224 is no longer "necessary," and thus no longer permitted.

The First District applied that principle in *Low Cost Movers v. Craigslist*, 2015 IL App (1st) 143955, where it affirmed the dismissal of a Rule 224 petition when one potential defendant was known to the petitioner. In that case, Low Cost filed a Rule 224 petition against Craigslist seeking the identities of persons who Low Cost believed had "flagged" Low Cost's advertisements on the Craigslist website, asserting that these unknown persons had thereby caused Craigslist to remove the ads from the website. *Id.* ¶ 1. Low Cost alleged that it intended to sue those persons for tortious interference with economic advantage and violation of the Illinois Consumer Fraud and Deceptive Businesses Practices Act. *Id.* ¶ 4. After the petition was filed, Craigslist informed Low Cost and the trial court that Craigslist had removed Low Cost's ads from its website in 2014 on its own initiative, for violation of its terms of use. *Id.* ¶¶ 5, 7. Low Cost nonetheless sought to take discovery from Craigslist to determine the identity of anyone who had "flagged"

its ads prior to 2014. *Id.* at ¶ 6. The appellate court affirmed the dismissal of the Rule 224 petition. Because Low Cost knew the identity of a party that was potentially responsible for its alleged injury—namely, Craigslist—the purpose of Rule 224 had been satisfied and Rule 224 was no longer needed. *Id.* ¶ 17.

Other Appellate Court cases hold or support the principle that a Rule 224 petition may be used to identify one potential defendant, but once a complaint can be filed, pre-suit discovery under Rule 224 no longer is appropriate. *See Gaynor v. Burlington N. & Santa Fe Ry.*, 322 Ill. App. 3d 288, 292, 294 (5th Dist. 2001) (finding that petition exceeded scope of Rule 224 because a potential defendant was already known, given that the petitioner filed an action against another defendant on the same day the Rule 224 petition was filed); *Malmberg v. Smith*, 241 Ill. App. 3d 428, 432 (5th Dist. 1993) (dismissing Rule 224 petition where "[f]rom the record it is apparent that plaintiff knew the identity" of a potential libel defendant); *Roth*, 241 Ill. App. 3d at 418-20 (in medical malpractice case, "[i]t was clear … from the original filing of this case that petitioner's counsel knew the identities of many of those who might be responsible for the decedent's treatment. Those identities are the only thing a Rule 224 action was intended to supply…. A plaintiff who possesses this amount of knowledge obviously does not need to utilize Rule 224 to conduct further discovery, and the court should not have allowed such use.").

This Court should affirm the principle embraced by these cases, which accords with the plain language of Rule 224: a petitioner may seek discovery

of "the identity of *one* who may be responsible in damages." Ill. Sup. Ct. R. 224(a)(1)(i) (emphasis added). But once the identity of one potential defendant is known, Rule 224 has served its purpose.

In reaching a contrary conclusion in this case, the appellate court below misread *Roth* to permit discovery of additional identities under Rule 224, even though the identities of some potential defendants were already known to the plaintiff. A10. While such discovery did occur in *Roth*, the appellate court decision in that case did not affirm that such discovery was proper; it merely reported what had transpired in the circuit court. 241 Ill. App. 3d at 419. *Roth*'s actual holding was that the purpose of Rule 224 is satisfied once the petitioner knows the identity of a party to sue: "[s]ince section 2-402 allows full discovery of those named as respondents in discovery once a lawsuit against *at least one* defendant is filed, the only use and purpose of Rule 224 is to ascertain the identity of *a* potential defendant." *Id.* at 416 (emphases added).

The appellate court also relied heavily on another First District case, *Beale v. EdgeMark Financial Corp.*, 279 Ill. App. 3d 242 (1996). *See* A10-11 In that case, Beale, the Rule 224 petitioner, wanted to bring suit against insiders who he believed had traded in EdgeMark's stock based on non-public inside information about an impending acquisition. *Beale*, 280 Ill. App. 3d at 253. Beale had already obtained a list identifying several persons who had acquired EdgeMark stock prior to public announcement of the acquisition, but he did not know which of those individuals held positions which "could make

them privy to" inside information. *Id.* In other words, Beale did not know which of those stock purchasers had a connection to his claimed injury and, thus, "may be responsible in damages." *See id.* at 252-53. In light of this, the appellate court held that the trial court acted within its discretion by allowing discovery under Rule 224 of "additional connecting facts to establish which of those individuals . . . were otherwise affiliated with EdgeMark, its officer[s], directors or representatives 'which could make them privy to non-public information.'" *Id.* at 253.

Respectfully, the court's ruling in *Beale* was incorrect. Rule 224 may be used for "the *sole purpose* of ascertaining *the identity* of one who may be responsible in damages…." Ill. Sup. Ct. R. 224(a)(1)(i) (emphasis added). Yet in *Beale*, the identities of potential defendants were known; the court authorized further discovery about those potential defendants relating to their potential liability. That was improper under the plain language of the rule. *See Shutes v. Fowler*, 223 Ill. App. 3d 342, 345 (5th Dist. 1991) ("Discovery under Rule 224 is limited to ascertaining the identities of potential defendants."); *Roth*, 241 Ill. App. 3d at 414 ("the focus is on a determination of identity and not on the determination of the responsibility of those identified"). But even if *Beale* was correctly decided, it stands at most for the proposition that Rule 224 may allow for discovery of additional information related to identity—there, the position of individuals within the company—when such information is needed to determine whether at least one potential defendant

has the requisite connection to the claimed injury. Even under *Beale*, once one potential defendant is identified, the purpose of Rule 224 has been served, and further pre-suit discovery is not permitted.

B. Dent knows the identity of person C, so the rule 224 Petition was properly dismissed

Here, Dent knows the identity of the investigators referred to in the Petition as "Person C," who Dent accuses of having published defamatory statements. Consequently, there is no need for pre-suit discovery under Rule 224, and the petition was properly dismissed.

As the petition describes, Constellation "hired a third party to investigate [the] claims against Mr. Dent." A25. The petition alleges that "Person C published or republished to [Constellation] the statements of Person A and Person B regarding Mr. Dent…" *Id.* Elsewhere, the petition identifies Constellation's investigators by name: "On or about September 14, 2018, Ms. Grace Speights and Mr. Theos McKinney III, two attorneys representing Respondents, visited Mr. Dent" and "told Mr. Dent that certain allegations had been made against him." A25. Exhibit B to the petition, a letter from Constellation's counsel to Dent's counsel, elaborates that "Mr. Dent has been the subject of an investigation conducted by a third-party hired by Constellation," and states that "on September 14, 2018, there was a meeting between" Dent and "Grace Speights [and] Theos McKinney," who represented Constellation. A35. As that letter makes clear, this meeting was *part* of Constellation's investigation: "That meeting was to allow Mr. Dent an

opportunity to provide his recollection of the events described above. The law requires Constellation to investigate reports of such behavior and the EEOC requires employers to conduct effective investigations." *Id.*

Thus, Dent knows the identity of "Party C," who the petition alleges "may be responsible in damages." A26. The appellate court was wrong to conclude that "no potential defendant has been identified." A14. The face of the petition and its exhibits identified the investigators who Dent claims defamed him. No further discovery under Rule 224 was permitted.

To the extent Dent still claims confusion over the identity of "Person C," and uncertainty as to whether Person C really was among the investigators who came to meet with him, Constellation has confirmed that this is so. *See* A41 (stating that Person C was "the attorneys retained by Constellation to investigate Person A's allegations"). Dent should not be able to maintain a Rule 224 action on the ground that his petition feigns ignorance as to the identity of Constellation's investigators, when Constellation has confirmed their identities. To hold otherwise would allow would-be plaintiffs to use Rule 224 to conduct a fishing expedition into the identities of all possible defendants, merely by professing uncertainty as to the identity of some. Once a potential defendant is identified, as happened here, the Rule 224 petitioner can bring suit and, if the claim is viable, pursue further discovery under Rule 2-402 or the general discovery rules. "[T]he purpose of [Rule 224] has been

accomplished and the action should be dismissed." *Roth*, 241 Ill. App. 3d at 412-13.

CONCLUSION

For the foregoing reasons, the appellate court's decision should be reversed, and the matter remanded to the circuit court with instructions to dismiss the Rule 224 petition.

Dated: May 26, 2021

Respectfully submitted,

CONSTELLATION NEWENERGY, INC., CNE GAS SUPPLY, LLC, CONSTELLATION ENERGY GAS CHOICE, LLC, AND CONSTELLATION GAS DIVISION, LLC

By: */s/ J. Timothy Eaton*
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CERTIFICATE OF COMPLIANCE

I, J. Timothy Eaton, an attorney, hereby certify that the foregoing Brief and Supporting Appendix for Respondents-Appellants Constellation NewEnergy, Inc., CNE Gas Supply, LLC, Constellation Energy Gas Choice, LLC, and Constellation Gas Division, LLC conforms to the requirements of Illinois Supreme Court Rule Rules 341(a) and (b). The length of this Brief contains 7,725 words, excluding the words contained in the Rule 341(d) cover, the Rule 341 (h)(1) Table of Contents and Statement of Points and Authorities, the Rule 341(c) certificate of compliance, those matters to be appended to the Brief under Rule 342(a), and the certificate of service.

Dated: May 26, 2021

/s/ J. Timothy Eaton

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No. 126795

IN THE SUPREME COURT OF ILLINOIS

CONSTELLATION NEWENERGY, INC.; CNE GAS SUPPLY, LLC; CONSTELLATION ENERGY GAS CHOICE, LLC; and CONSTELLATION GAS DIVISION, LLC, Respondents-Appellants, v. RICHARD DENT and RLD RESOURCES, LLC, Petitioners-Appellees.	On Petition for Leave to Appeal from the Appellate Court of Illinois, First Judicial District, No. 1-19-1652 There on Appeal from the Circuit Court of Cook County, No. 19 L 2910 Honorable Patricia O'Brien-Sheahan, Judge, presiding.

NOTICE OF FILING

TO: *All Parties on the Attached Service List*

PLEASE TAKE NOTICE THAT on **May 26th, 2021**, we caused to be filed (electronically submitted), with the Clerk of the Supreme Court of Illinois, **Brief and Supporting Appendix for Respondents-Appellants Constellation NewEnergy Inc., CNE Gas Supply, LLC, Constellation Energy Gas Choice, LLC, and Constellation Gas Division, LLC**, which is hereby served upon you.

Dated: May 26, 2021

Respectfully submitted,

CONSTELLATION NEWENERGY, INC., CNE GAS SUPPLY, LLC, CONSTELLATION ENERGY GAS CHOICE, LLC, AND CONSTELLATION GAS DIVISION, LLC

By: */s/ J. Timothy Eaton*
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CERTIFICATE OF SERVICE

The undersigned, pursuant to the provisions of 1-109 of the Illinois Code of Civil Procedure, and Ill. S. Ct. R. 12, hereby certifies and affirms that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that the verily believes the same to be and that he caused the foregoing **Notice of Filing** and **Brief and Supporting Appendix for Respondents-Appellants Constellation NewEnergy Inc., CNE Gas Supply, LLC, Constellation Energy Gas Choice, LLC, and Constellation Gas Division, LLC**, to be sent to the party listed below on this 26th day of May, 2021, by *electronic mail* from the offices of Taft Stettinius & Hollister LLP before the hour of 5:00 p.m.:

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/s/ J. Timothy Eaton

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APPENDIX

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2020 IL App (1st) 191652

No. 1-19-1652

Opinion filed November 25, 2020

Fourth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

RICHARD L. DENT and RLD RESOURCES, LLC,	)	Appeal from the
	)	Circuit Court of
Petitioners-Appellants,	)	Cook County.
	)	
v.	)	No. 19 L 2910
	)	
CONSTELLATION NEWENERGY, INC.; CNE GAS SUPPLY, LLC; CONSTELLATION ENERGY GAS CHOICE, LLC; and CONSTELLATION NEW ENERGY-GAS DIVISION, LLC,	)	Honorable
	)	Patricia O'Brien-Sheahan,
Respondents-Appellees.	)	Judge, presiding.

JUSTICE LAMPKIN delivered the judgment of the court, with opinion.
Presiding Justice Gordon and Justice Reyes concurred in the judgment and opinion.

OPINION

¶ 1 Petitioners, Richard Dent and RLD Resources, LLC (RLD), appeal the circuit court's dismissal with prejudice of their petition for presuit discovery pursuant to Illinois Supreme Court Rule 224 (eff. Jan. 1, 2018). The petition sought disclosure from respondents, Constellation NewEnergy, Inc.; CNE Gas Supply, LLC; Constellation Energy Gas Choice, LLC; and Constellation New Energy-Gas Division, LLC (collectively, Constellation), of the names and

addresses of three unidentified people who published allegedly defamatory statements about Dent that caused respondents to terminate their contractual arrangements with petitioners.

¶ 2 On appeal, petitioners argue that the dismissal of their petition should be reversed because the trial court misapplied the law and erroneously treated respondents' motion to dismiss for failure to state a claim as a motion for summary judgment. Specifically, petitioners argue that they met their burden to show this discovery was necessary because they pled sufficient allegations of a defamation claim to overcome a motion to dismiss for failure to state a claim.

¶ 3 For the reasons that follow, we reverse the judgment of the circuit court.[1]

¶ 4 I. BACKGROUND

¶ 5 On March 18, 2019, petitioners filed a verified petition for presuit discovery against Constellation. Petitioners alleged that prior to October 2018, they were party to several energy supply and marketing contracts with Constellation and all of these contracts were terminable at will.

¶ 6 Petitioners alleged that, in September 2018, two attorneys representing Constellation—Grace Speights and Theos McKinney III—visited petitioners' office and told Dent that certain allegations had been made against him. Specifically, a woman, who was a Constellation employee and whom Constellation's attorneys refused to identify (Person A), alleged that Dent, in June 2016 at a Constellation-sponsored golfing event in the Philadelphia area, said to her that "she had a butt like a sister." Person A also alleged that Dent, in July 2018 at another Constellation-sponsored pregolf party on the patio of the Chicago Shedd Aquarium, groped her. Furthermore, in connection

[1]In adherence with the requirements of Illinois Supreme Court Rule 352(a) (eff. July 1, 2018), this appeal has been resolved without oral argument upon the entry of a separate written order.

with the same July 2018 golf event, Constellation had arranged for the distribution of guest passes, polo shirts and similar items at the Marriott Hotel on Adams Street in Chicago, and a man, whom Constellation's attorneys refused to identify (Person B), told Constellation that he had observed Dent at the hotel collecting the golf materials and that Dent was drunk and disorderly at that time.

¶ 7 The petition alleged that Dent told Constellation's attorneys at that September 2018 meeting that all of these allegations were completely false and that the attorneys responded that Constellation would review its contractual arrangements with Dent and RLD as a result of these allegations. On October 1, 2018, Constellation sent Dent and RLD a notice terminating all of Constellation's contracts with them. This termination notice was included as an exhibit to the petition. Another petition exhibit, a December 2019 letter from Constellation's counsel to petitioners' counsel, stated that Constellation had hired a third party, whom Constellation refused to identify (Person C),[2] to investigate the claims against Dent. This letter also stated that Dent's denials were not credible and that the investigation concluded that the reports accurately described behavior that violated the company's code of conduct, was outside the norms of socially acceptable behavior, and demeaned Constellation employees. The petition alleged, on information and belief, that Person C investigated the claims against Dent before the termination notice was issued and that Person C published or republished to Constellation the statements of Persons A and B.

¶ 8 The petition concluded with allegations that the statements published by Persons A, B, and C concerning Dent were made as statements of fact, were false, were not privileged, and were the cause in fact and proximate cause of Constellation's termination of all its contractual arrangements with petitioners. Furthermore, the statements imputed to Dent acts of moral turpitude and

[2]Person C was revealed in later proceedings to be multiple people, Persons C.

impugned his character, reputation and good name. The petition asserted that Persons A, B, and C may be responsible in damages to petitioners and that this presuit discovery was necessary because Constellation refused to provide to petitioners the names and addresses of Persons A, B, and C.

¶ 9 Constellation moved to dismiss the petition under section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2018)), arguing that the petition was substantially insufficient because the alleged defamatory statements were qualifiedly privileged and that petitioners failed to allege facts showing that the privilege was abused. In this motion, Constellation disclosed that Person B was an employee and made the alleged defamatory statements, which described his observations of Dent on the day in question, in the course of Constellation's investigation of Person A's allegations. Constellation also disclosed that Persons C were the attorneys Constellation retained to investigate Person A's allegations.

¶ 10 Specifically, Constellation argued that the alleged defamatory statements were qualifiedly privileged as a matter of law as statements made to an employer by a victim of sexual harassment concerning inappropriate touching experienced while at work (Person A), statements made to the employer by a witness (Person B) as part of Constellation's investigation consistent with its legal obligations, and statements of the investigators/lawyers (Persons C) relating their findings to Constellation. Constellation also argued that petitioners failed to allege facts sufficient to overcome this qualified privilege, *i.e.*, by alleging facts that, if true, would suffice to demonstrate a direct intent to injure petitioners or a reckless disregard for their rights.

¶ 11 Furthermore, Constellation urged the court to dismiss the petition with prejudice and not allow petitioners leave to replead because, according to Constellation, any amendment would be futile where Constellation had retained third-party counsel to conduct an independent, attorney-

client privileged investigation of the allegations, that investigation included meeting with Dent to inform him of the allegations and obtain his side of the story, Constellation weighed the evidence and decided in good faith to credit its employees' version of events, there was no basis to infer any knowledge of falsity or reckless disregard for the truth, and Constellation did not disclose the findings of the investigation to any third party, other than in privileged communications with its lawyers.

¶ 12 In their response, petitioners argued that Constellation's section 2-615 motion to dismiss should be denied on procedural and substantive grounds. First, although Constellation presented its motion as a section 2-615 motion to dismiss, which attacks only the legal sufficiency of the complaint and defects apparent on the face of the complaint, Constellation improperly introduced new facts regarding Persons B and C and evidence that attacked the factual, rather than the legal, sufficiency of the Rule 224 petition. Constellation also improperly raised the affirmative defense of qualified privilege in its section 2-615 motion to dismiss. Second, Constellation's motion failed under section 2-615 of the Code because the court must accept as true all well-pleaded facts and any reasonable inferences arising therefrom and should not dismiss the Rule 224 petition unless it was apparent that no set of facts could be proved that would entitle petitioners to a judgment in their favor. Petitioners argued that their alleged facts—that three unidentified people fabricated and published completely false and defamatory stories about Dent and then published those stories to a third-party—are more than sufficient to state a *prima facie* defamation case and defeat any qualified privilege claim.

¶ 13 In its reply, Constellation argued that petitioners' allegations, taken as true, established that the allegedly defamatory statements were qualifiedly privileged because all of the statements were

made by an employee victim, a witness, and investigators as part of an employer's sexual harassment investigation and that petitioners failed to plead facts showing that the alleged defamatory statements were intentionally false.

¶ 14 In June 2019, the trial court dismissed petitioners' Rule 224 petition with prejudice, determining *sua sponte* to dispose of the petition for failure to comply with Rule 224. Specifically, the court, citing *Low Cost Movers, Inc. v. Craigslist, Inc.*, 2015 IL App (1st) 143955, found that a Rule 224 petition was an inappropriate vehicle to attempt to learn the names of Persons A, B, and C because petitioners knew the identities of the Constellation respondents and their attorneys, Rule 224 was satisfied once a petitioner has identified someone who may be sued, and the Constellation respondents may be liable for damages.

¶ 15 Petitioners moved the court to reconsider its dismissal of the petition with prejudice, arguing that their Rule 224 petition was not the type of impermissible fishing expedition disfavored by the law because petitioners knew everything necessary to bring a defamation action against Persons A, B, and C except their identities. Furthermore, the Constellation respondents-in-discovery did not identify themselves or anyone else as a party who had engaged in the defamation of Dent.

¶ 16 In its response, Constellation argued that the trial court's dismissal of the Rule 224 petition with prejudice was correct because, in accordance with relevant case law, Rule 224's purpose was satisfied since petitioners already knew the identity of a party—namely, Constellation—that was involved in the events that gave rise to the termination of the at-will contracts between petitioners and Constellation. Constellation argued that the absence of a viable claim against it did not mean that Rule 224 discovery continued until petitioners ascertained the identity of a party that engaged

in the wrongdoing that coincided with petitioners' defamation cause of action. In addition, Constellation argued that dismissal of the Rule 224 petition was also proper based on the qualified privilege that covers statements made during the course of an employer's sexual harassment investigation and that petitioners failed to overcome this privilege by alleging facts demonstrating an abuse of that privilege.

¶ 17 After hearing oral argument, the trial court issued a July 2019 written order denying petitioners' motion to reconsider the dismissal. The court stated that the specific, narrow purpose of Rule 224 allows a petitioner to obtain the identity of a potential defendant when the petitioner lacks knowledge of anyone who may be liable in damages but the record here established that petitioners had knowledge that Constellation may be liable in damages based on the terminated contracts.

¶ 18 Petitioners appealed.

¶ 19 II. ANALYSIS

¶ 20 A. Presuit Discovery Under Rule 224

¶ 21 Petitioners argue the trial court erred in ruling that *Low Cost Movers, Inc.* required dismissal with prejudice of their Rule 224 petition. Specifically, petitioners argue that the trial court's ruling undermined the purpose of Rule 224, the alleged facts in their petition showed that no cause of action lies against Constellation or its attorneys for either defamation or breach of contract, and *Low Cost Movers, Inc.* was distinguishable from this case.

¶ 22 This court generally reviews the trial court's ruling pursuant to Rule 224 for an abuse of discretion. *Maxon v. Ottawa Publishing Co.*, 402 Ill. App. 3d 704, 711 (2010). However, statutory construction constitutes a question of law, which we review *de novo*. *Sardiga v. Northern Trust*

Co., 409 Ill. App. 3d 56, 61 (2011); see also *Thomas v. Weatherguard Construction Co.*, 2015 IL App (1st) 142785, ¶ 63 (*de novo* consideration means the appellate court performs the same analysis that a trial judge would perform). Rule 224, titled "Discovery Before Suit to Identify Responsible *Persons* and *Entities*," provides in pertinent part as follows:

> "(a) Procedure.
>
> (1) Petition.
>
> (i) A person or entity who wishes to engage in discovery for the sole purpose of ascertaining the identity of one who may be responsible in damages may file an independent action for such discovery.
>
> (ii) The action for discovery shall be initiated by the filing of a verified petition in the circuit court of the county in which the action or proceeding might be brought or in which one or more of the persons or entities from whom discovery is sought resides. The petition shall be brought in the name of the petitioner and shall name as respondents the persons or entities from whom discovery is sought and shall set forth: (A) the reason the proposed discovery is necessary and (B) the nature of the discovery sought and shall ask for an order authorizing the petitioner to obtain such discovery. The order allowing the petition will limit discovery to the identification of responsible *persons* and *entities* and where a deposition is sought will specify the name and address of *each person* to be examined, if

> known, or, if unknown, information sufficient to identify *each person* and the time and place of the deposition." (Emphases added.) Ill. S. Ct. R. 224(a)(1) (eff. Jan. 1, 2018).

¶ 23 It is well settled that our rules are to be construed in the same manner as statutes (Ill. S. Ct R. 2 (eff. July 1, 2017); *People v. Norris*, 214 Ill. 2d 92, 97 (2005)), and the cardinal rule of interpreting statutes is to ascertain and give effect to the intent of the legislature (*McNamee v. Federated Equipment & Supply Co.*, 181 Ill. 2d 415, 423 (1998)). The best evidence of such intent is the statutory language itself, which is to be given its plain meaning. *Johnston v. Weil*, 241 Ill. 2d 169, 175 (2011). Where the meaning is unclear, courts may consider the law's purpose and the evils the law was intended to remedy. *Id.* at 175-76. A statute's language is ambiguous when it is capable of being understood by reasonably well-informed individuals in multiple ways. *MD Electrical Contractors, Inc. v. Abrams*, 228 Ill. 2d 281, 288 (2008). Although a court should first consider the language of the statute or rule, a court must presume that the court in promulgating a rule, like the legislature in enacting a statute, did not intend absurdity or injustice. See *State Farm Fire & Casualty Co. v. Yapejian*, 152 Ill. 2d 533, 540-41 (1992).

¶ 24 The plain language of Rule 224 allows a petitioner to engage in discovery to ascertain the identity of multiple persons and entities who may be responsible in damages. The court's clear intent in promulgating Rule 224 was to provide a mechanism to enable a person or entity, before filing a lawsuit and with leave of court, to identify parties who may be responsible in damages; however, the court's order allowing the petition will limit discovery to the identification of responsible persons and entities. *Roth v. St. Elizabeth's Hospital*, 241 Ill. App. 3d 407, 414 (1993) (citing Ill. S. Ct. R. 224, Committee Comments (adopted Aug. 1, 1989)); see also *Shutes v. Fowler*,

223 Ill. App. 3d 342, 345-46 (1991) (Rule 224 allows a party to engage in limited presuit discovery about the identity of those who may be responsible in damages "to streamline the court process").

¶ 25 "[T]he only use and purpose of Rule 224 is to ascertain the identity of a potential defendant." (Emphasis omitted.) *Roth,* 241 Ill. App. 3d at 416. Once a potential defendant's identity is learned, a petitioner can then file a case and use either the discovery provisions of the rules or the Code to conduct full discovery of those named as respondents-in-discovery to determine who in fact was responsible, *i.e.*, liable. *Id.* In *Roth*, the petitioner already knew the identity of several healthcare providers who might have been responsible in damages for the decedent's treatment. *Id.* at 419. Nevertheless, the petitioner was still allowed under Rule 224 to obtain the name of an additional doctor who acted as a consultant but whose identity was not revealed by the hospital records. *Id.* The court, however, ruled that the petitioner was not allowed to use Rule 224 to conduct a fishing expedition for information about a physician's impressions of the decedent's medical conditions and whether the physician had ordered tests to determine whether the decedent had sepsis. *Id.* at 420.

¶ 26 In *Beale v. EdgeMark Financial Corp.*, 279 Ill. App. 3d 242, 244 (1996), a stock pledger, who claimed that his stock was sold at a time when the directors had reason to believe that the sale of the corporation was imminent, filed a Rule 224 petition for presuit discovery that went beyond the names and addresses of people who could be responsible in damages. When he filed his petition, he knew the identity of at least one defendant. *Id.* The trial court ruled that the petitioner was entitled to discovery of a document that constituted the corporation's full response to an inquiry from its regulatory agency because the court believed the document would identify certain people who could be responsible in damages. *Id.* at 245. Specifically, the agency had sent the corporation a list of the names and addresses of 36 individuals and married couples and asked the

corporation to identify whether the listed people had any affiliation with the corporation that could have made them privy to nonpublic information about the corporation's activities regarding the issue in question. *Id.* at 247.

¶ 27 This court affirmed the trial court, stating that the document was within the scope of Rule 224 because the mere list of 36 names and addresses did little if anything to narrow the universe of potential defendants from the general members of the stock-purchasing public and the document included additional connecting facts to establish which people were affiliated with the corporation without disclosing specific facts of insider trading or actual acts of wrongdoing. *Id.* at 253-54. Moreover, this court rejected the argument that the petitioner was not entitled to use Rule 224 because he already knew the identity of some defendants and had even filed a federal lawsuit against them, which was pending at the time the trial court ruled on the Rule 224 petition. *Id.* at 251 n.3. This court explained that "*Roth* did not hold that Rule 224 discovery [was] not permitted where the petitioner knows the name of a potential defendant"; rather, the petition in *Roth* was denied because it sought specific information concerning actual liability. *Id.*; see also *Malmberg v. Smith*, 241 Ill. App. 3d 428 (1993) (petitioner, who already knew the identity of the potential libel defendant, a coemployee, and knew that he had accused the petitioner of illegal drug use while on duty, could not use Rule 224 to discover the contents of the coemployee's statement); *Guertin v. Guertin*, 204 Ill. App. 3d 527, 531 (1990) (petitioners, who speculated that their sister-in-law had exerted undue influence in the execution of a will by a deceased relative, could not use Rule 224 to depose the sister-in-law and bank officials before the filing of a complaint because the identity of the defendant was already known).

¶ 28 Based on the plain language of Rule 224 and the relevant caselaw, we find that the trial court abused its discretion when it *sua sponte* dismissed the petition with prejudice based on the

trial court's determination that presuit discovery of the identity of Persons A, B, and C was not necessary because petitioners knew the identity of Constellation and its attorneys. The trial court's ruling does not comport with the intent of Rule 224 to assist a potential plaintiff in seeking redress against people or entities if the potential plaintiff meets the requirement to demonstrate the reason why the proposed discovery seeking the identity of certain individuals is necessary. Here, petitioners met that requirement, alleging that Persons A and B made completely false defamatory statements about Dent and then published those statements to Person C, an investigator, who then reported the defamatory statements to Constellation, which terminated its at-will contracts with petitioners. As discussed below, at this phase of the proceedings, any affirmative defense of a qualified privilege was not relevant in determining whether petitioners met the requirement to show the necessity of presuit discovery under Rule 224. Under the facts as alleged by petitioners and contrary to the trial court's ruling, Constellation and its attorneys were not "individuals or entities who stand in the universe of potential defendants" responsible in damages for defamation or breach of contract. *Beale*, 279 Ill. App. 3d at 252. Constellation and its attorneys were not the entity or people who made the alleged false and defamatory statements about Dent's conduct at the events sponsored by Constellation; they were merely participants in the subsequent investigation of the alleged defamatory statements that resulted in the termination of petitioners' at-will contracts.

¶ 29 The extent of a petitioner's permissible inquiry to limit or define the universe of potential defendants "must be determined by the trial judge on a case-by-case basis and in consideration of the cause of action alleged. When in the trial court's discretion the petitioner seeks to establish actual liability or responsibility rather than potentiality for liability, discovery should be denied." *Id.* at 252-53. Here, however, since the sought-after information of the identity of Persons A, B,

and C pertained only to their potential for liability and not to actual liability, the allowance of that discovery would not have exceeded the scope of Rule 224. Therefore, it was an abuse of discretion for the trial court to *sua sponte* dismiss with prejudice petitioners' Rule 224 petition. "In reaching this conclusion, we are mindful of concerns regarding [the] use of Rule 224 to conduct fishing expeditions" (*id.* at 254) and opening the lid to Pandora's box to enable every potential plaintiff with competent counsel to push the limits of permissible presuit discovery beyond the identity of responsible persons (*Roth*, 241 Ill. App. 3d at 421 (Lewis, J., specially concurring)). "However, we correspondingly recognize the need to allow the trial court to exercise its discretion within the scope and latitude of the rule, to establish boundaries, given the nature of the case before it, and to grant limited discovery to acquire information which would suggest the potentiality of liability so as to make the subsequent filing of a lawsuit a fruitful pursuit." *Beale*, 279 Ill. App. 3d at 254.

¶ 30 Finally, *Low Cost Movers, Inc.*, does not support the trial court's determination that presuit discovery under Rule 224 was not necessary based on petitioners' knowledge of the identity of Constellation, the respondent-in-discovery, and its attorneys. In *Low Cost Movers, Inc.*, the petitioner, an online advertiser alleged that its ads had been flagged and deleted from a website since 2011 and sought presuit discovery from the respondent-in-discovery, the website operator, to obtain the identity of anyone who had flagged the advertiser's advertisements for removal from the website. 2015 IL App (1st) 143955, ¶ 4. The respondent disclosed that since 2014 it had removed, on its own initiative, all of the advertiser's ads based on violations of respondent's terms of use. *Id.* ¶ 5. The respondent asked the petitioner to propose a limited date range so that respondent could assess the cost and feasibility of running a search to identify who had flagged petitioner's ads before 2014. *Id.* ¶ 6. After the petitioner failed to provide any proposed dates, the

respondent argued that it had complied with its obligations under Rule 224, and the trial court *sua sponte* dismissed the petitioner's Rule 224 petition. *Id.*

¶ 31 Thereafter, the petitioner moved to vacate the dismissal, conceding that the respondent had identified itself as one potential defendant but arguing that petitioner should still be allowed to discover if others might have flagged its ads before 2014. *Id.* ¶ 7. The respondent argued that there was every reason to believe it had removed the ads before 2014. *Id.* The trial court denied the motion to vacate, finding that the purpose of Rule 224 had been satisfied because at least one potential defendant had been identified. *Id.* The reviewing court stated that "Rule 224 was not intended to permit a party to engage in a wide-ranging, vague, and speculative quest to determine whether a cause of action actually exist[ed]" and held that the trial court's dismissal of the petition was not an abuse of discretion based on the respondent's disclosure of itself as a potential defendant and the petitioner's failure to provide any date range to limit the respondent's search. *Id.* ¶¶ 17-18.

¶ 32 Unlike *Low Cost Movers, Inc.*, in the instant case no potential defendant has been identified. Furthermore, petitioners' discovery request was not a wide-ranging, vague, and speculative quest to determine whether a cause of action actually existed. Petitioners are not speculating that someone may have defamed Dent; Constellation told petitioners that three specific although unnamed people had made specific factual allegations about Dent.

¶ 33 For the foregoing reasons, we reverse the trial court's dismissal with prejudice of petitioners' Rule 224 petition to discover the identity of Persons A, B, and C.

¶ 34 B. Sufficiency of the Rule 224 Petition

¶ 35 Petitioners contend that Constellation improperly cloaked a motion for summary judgment as a section 2-615 motion to dismiss and introduced new facts not contained in the Rule 224 petition or its exhibits to assert affirmative defenses based on claims of attorney-client privilege and the qualified privilege of an employee to report harassment to an employer. These new facts included Person B's status as a Constellation employee, Person B somehow witnessing the alleged sexual harassment of Person A even though they were at different locations at the time in question, and Person C's status as an attorney.

¶ 36 Petitioners argue that, for purposes of withstanding a 2-615 motion to dismiss, their petition sufficiently alleged all the required elements of a defamation claim against Persons A, B, and C where petitioners alleged that the statements about Dent were defamatory because they imputed to him acts of moral turpitude and impugned his character, good name, and reputation; the statements were completely false, were made as statements of fact, and were not privileged; and the statements caused Constellation to terminate several contracts with petitioners, who suffered damages as a result. Petitioners also argue that, in the context of a section 2-615 motion to dismiss, the issue of the existence of a qualified privilege for the defamatory statements must be determined based on the facts alleged in their Rule 224 petition and the court must interpret the allegations in the light most favorable to petitioners and accept as true all well-pleaded facts and reasonable inferences that can be drawn from those facts.

¶ 37 Constellation does not challenge petitioners' allegations on the bases that either the alleged defamatory statements did not harm Dent's reputation or that the harm was not obvious and apparent on the face of the statements or that Dent admitted committing the acts alleged in the

statements or that the statements were reasonably capable of an innocent construction or the statements were merely expressions of opinion.

¶ 38 Instead, Constellation argues that the discovery petitioners seek is not necessary because the petition does not state a claim for defamation. Specifically, Constellation argues that the alleged defamatory statements were all qualifiedly privileged and that petitioners failed to overcome that privilege by pleading sufficient facts to demonstrate that the privilege was abused. Constellation asserts that (1) Person A's statements were qualifiedly privileged as statements by a victim of sexual harassment to an investigator engaged by her employer, (2) Person B's statements were qualifiedly privileged because he was a witness who related to the investigator observations of Dent at an event during the same July 2018 golf outing where one of the alleged incidents of harassment occurred, and (3) the statements by Person C, the investigator hired by Constellation, relating the findings of that investigation to Constellation were also qualifiedly privileged.

¶ 39 Constellation argues that petitioners' conclusory allegation that the statements were false does not meet their burden to allege specific facts showing abuse of the privilege. According to Constellation, the facts alleged in the petition tended to show that Constellation and the alleged speakers did not recklessly disregard the truth or falsity of the statements because Constellation retained an outside investigator to investigate the allegations of sexual harassment, the investigator interviewed the victim and witness and then met with Dent and gave him the opportunity to explain his side of the story, Dent's denial of the allegations was found not credible, and Constellation kept the findings of the investigation confidential, disclosing them only in privileged communications with its lawyers.

¶ 40 Although the issue of whether a qualified privilege exists is a question of law for the court, the issue of whether the privilege was abused is a question of fact for the jury. See *Kuwik v. Starmark Star Marketing & Administration, Inc.*, 156 Ill. 2d 16, 25 (1993). Statements covered by a qualified privilege may still be actionable if the privilege is abused. *Gibson v. Philip Morris, Inc.*, 292 Ill. App. 3d 267, 275 (1997). An abuse of a qualified privilege may consist of any reckless act that shows a disregard for the defamed party's rights, including the failure to properly investigate the truth of the matter, to limit the scope of the material, or to send the material to only the proper parties. *Kuwik*, 156 Ill. 2d at 31-32.

¶ 41 Rule 224 requires petitioners to demonstrate that discovery of the identity of the individuals designated as Persons A, B, and C was necessary. See *Hadley v. Subscriber Doe*, 2015 IL 118000, ¶ 25. To ascertain whether petitioners satisfied Rule 224's necessity requirement, the court must evaluate whether they presented sufficient allegations of a defamation claim to withstand a section 2-615 motion to dismiss. See *id.* at 27. In the context of a Rule 224 petition, a section 2-615 motion to dismiss tests the legal sufficiency of a petition by asking whether the allegations of that petition, when viewed in the light most favorable to the petitioner, state sufficient facts to establish a cause of action upon which relief may be granted. See *id.* ¶ 29.

> "All facts apparent from the face of the [petition], including any attached exhibits, must be considered. A circuit court should not dismiss a [petition] under section 2-615 unless it is clearly apparent no set of facts can be proved that would entitle the [petitioner] to recovery. [Citation.] The standard of review is *de novo*. [Citation.]
>
> To state a cause of action for defamation, a [petitioner] must present facts showing the [potential] defendant made a false statement about the [petitioner], the

> [potential] defendant made an unprivileged publication of that statement to a third party, and the publication caused damages. [Citation.] A defamatory statement is one that harms a person's reputation because it lowers the person in the eyes of others or deters others from associating with her or him. [Citation.]" *Id.* ¶¶ 29-30.

¶ 42 Constellation brought its motion to dismiss pursuant to section 2-615 of the Code, but its arguments rest on its contention that the alleged defamatory statements are protected by a qualified privilege for statements made in the reporting and investigation of sexual harassment in the workplace. Constellation argues this privilege should bar disclosure of the identity of Persons A, B, and C because petitioners failed to overcome this privilege by alleging facts showing an abuse of that privilege. We disagree.

¶ 43 Facts not alleged in or attached to the complaint cannot support a section 2-615 motion. *Gilmore v. Stanmar, Inc.*, 261 Ill. App. 3d 651, 654 (1994). In essence, Constellation's argument raises an affirmative defense and improperly attempts to introduce at this presuit stage new facts to support its affirmative defense of a qualified privilege. If allowed, such a maneuver would prejudice petitioners, whose response to the affirmative defense would be hindered based on their inability to conduct any discovery without knowing the identity of Persons A, B, and C.

¶ 44 Privilege is an affirmative defense that may be susceptible to resolution by a motion for summary judgment or a motion to dismiss under section 2-619 of the Code (735 ILCS 5/2-619 (West 2018)) (see *Johnson v. Johnson & Bell, Ltd.*, 2014 IL App (1st) 122677, ¶ 15), but privilege should not be considered when resolving a section 2-615 motion to dismiss (see *Becker v. Zellner*, 292 Ill. App. 3d 116, 122 (1997) (generally, "affirmative defenses may not be raised in a section 2-615 motion"); *Maxon*, 402 Ill. App. 3d at 712 (an affirmative defense is not considered under a

section 2-615 analysis)). We will confine our review to the standards for reviewing section 2-615 motions and not consider alleged facts not shown on the face of the petition or in its attached exhibits. See *Visvardis v. Ferleger*, 375 Ill. App. 3d 719, 724 (2007).

¶ 45 "[A] court must take as true all well-pled allegations of fact contained in the complaint and construe all reasonable inferences therefrom in favor of the plaintiff." *Vernon v. Schuster*, 179 Ill. 2d 338, 341 (1997). In ruling on a motion to dismiss, the court will construe pleadings liberally. *Pfendler v. Anshe Emet Day School*, 81 Ill. App. 3d 818, 821 (1980). However, the court will not admit conclusions of law and conclusory allegations not supported by specific facts. *Village of South Elgin v. Waste Management of Illinois, Inc.*, 348 Ill. App. 3d 929, 930-31 (2004). "A plaintiff is not required to prove his case in the pleading stage; rather, he must merely allege sufficient facts to state all the elements which are necessary to constitute his cause of action." *Claire Associates v. Pontikes*, 151 Ill. App. 3d 116, 123 (1986).

¶ 46 Defamation can be either defamation *per se* or defamation *per quod. Stone v. Paddock Publications, Inc.*, 2011 IL App (1st) 093386, ¶ 24. A statement is defamatory *per se* if its harm is obvious and apparent on its face. *Id.* ¶ 25. When a statement is defamatory *per se*, a plaintiff need not plead actual damage to his or her reputation because the statement is deemed to be so obviously and materially harmful that injury to the plaintiff's reputation is presumed. *Id.* However, because a claim of defamation *per se* relieves a plaintiff of the obligation to prove actual damages, it must be pled with a heightened level of precision and particularity. *Id.* Illinois recognizes five categories of statements that are defamatory *per se:* (1) words imputing the commission of a criminal offense, (2) words imputing an infection with a loathsome communicable disease, (3) words imputing an individual's inability to perform his employment duties or a lack of integrity in performing those

duties, (4) words imputing a lack of ability in an individual's profession or prejudicing an individual in his or her profession, and (5) words imputing an individual's engagement in fornication or adultery. *Id.* The third and fourth categories are generally relevant here: words prejudicing Dent in his profession and imputing a lack of integrity based on his alleged drunk and disorderly condition at an event sponsored by Constellation, a party engaged in several contracts with Dent and his firm, and his alleged sexual harassment of a Constellation employee at that event.

¶ 47 Petitioners alleged that Person A falsely stated that Dent verbally and physically sexually harassed her at two events sponsored by her employer, Constellation. Additionally, petitioners alleged that Person B falsely stated that Dent was drunk and disorderly at the Constellation-sponsored event in Chicago. Persons A and B then reported these false statements to Person C, an unknown investigator, who then reported this information to Constellation, which decided to terminate its contracts with petitioners based on its investigation regarding the false statements. These allegations are sufficient to withstand dismissal under a section 2-615 analysis, which does not consider affirmative defenses like the alleged existence of a qualified privilege.

¶ 48 III. CONCLUSION

¶ 49 For the foregoing reasons, we reverse the judgment of the circuit court that dismissed with prejudice petitioners' Rule 224 presuit discovery petition and remand this cause for further proceedings consistent with this order.

¶ 50 Reversed and remanded.

No. 1-19-1652

No. 1-19-1652	
Cite as:	*Dent v. Constellation NewEnergy, Inc.*, 2020 IL App (1st) 191652
Decision Under Review:	Appeal from the Circuit Court of Cook County, No. 19-L-2910; the Hon. Patricia O'Brien Sheahan, Judge, presiding.
Attorneys for Appellant:	Paul G. Neilan, of Law Offices of Paul G. Neilan, P.C., of Highland Park, for appellants.
Attorneys for Appellee:	Terri L. Mascherin and Christian L. Plummer, of Jenner & Block LLP, of Chicago, for appellees.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

Richard L. Dent and RLD Resources, L.L.C.,

Petitioners,

v.

Constellation NewEnergy, Inc.; CNE Gas Supply, LLC; Constellation Energy Gas Choice, LLC; and Constellation NewEnergy - Gas Division, LLC,

Respondents in Discovery.

Verified Petition Under Supreme Court Rule 224 for Discovery Before Suit to Identify Responsible Persons

NOW COME Petitioners, Richard L. Dent ("Dent") and RLD Resources, L.L.C., a Delaware limited liability company ("RLD Resources") (collectively, "Petitioners"), by and through their attorney, Law Offices of Paul G Neilan, P.C., with their Verified Petition Under Supreme Court Rule 224 for Discovery Before Suit to Identify Responsible Persons (this "Petition"), and in support hereof Petitioners state as follows:

1. Mr. Dent is the Chief Executive Officer of, and owns all of the membership interests in, RLD Resources.

2. RLD Resources is a Delaware limited liability company, and is qualified to do business in Illinois as a foreign limited liability company.

3. RLD Resources' offices are located at 333 North Michigan Avenue, Suite 1810, Chicago, Cook County, Illinois.

4. Each of Respondents maintains a registered agent at c/o Corporate Creations Network, Inc., 350 S. Northwest Highway, #300, Park Ridge, Cook County, Illinois.

5. Prior to October 2018 Petitioners were party to several contracts with Constellation NewEnergy, Inc., a Delaware corporation ("CNE"); CNE Gas Supply, LLC, a Delaware limited liability company ("CNE Gas Supply"); Constellation Energy Gas Choice, LLC, a Delaware limited liability company ("CNE Gas Choice"); and Constellation NewEnergy - Gas Division, LLC, a Kentucky limited liability company ("CNE Gas Division") (CNE, CNE Gas Supply, CNE Gas Choice, and CNE Gas Division being collectively referred to as "Respondents") regarding electricity and natural gas sales, marketing and consulting.

6. On or about September 14, 2018, Ms. Grace Speights and Mr. Theos McKinney III, two attorneys representing Respondents, visited Mr. Dent at RLD Resources' offices in Chicago.

7. At this September 14, 2018 meeting, Ms. Speights and Mr. McKinney told Mr. Dent that certain allegations had been made against him, namely:

a. As part of a Senior-Pro Tour golf outing sponsored by Respondents in or about July 2018 in the Chicago area, Mr. Dent was one of a large number of guests at a pre-golf party held on the patio of the Shedd Aquarium in Chicago. Ms. Speights and Mr. McKinney told Mr. Dent that a woman alleged that at this event Mr. Dent groped her.

b. Mr. Dent asked Ms. Speights and Mr. McKinney who this person was; they refused to name her, and in this Petition she is referred to as "Person A."

c. In connection with this same July 2018 golf outing, Respondents had arranged to distribute to their golfing guests passes, polo shirts and similar items at the Marriott Hotel on Adams Street in Chicago. Ms. Speights and Mr. McKinney told Mr. Dent that a gentleman told Respondents that he had observed Mr. Dent collecting these golf materials at the Marriott Hotel. This gentleman had stated that he, Mr. Dent, was drunk and disorderly at that time.

d. Mr. Dent asked Ms. Speights and Mr. McKinney who this person was; they refused to name him, and in this Petition he is referred to as "Person B."

e. Ms. Speights and Mr. McKinney also told Mr. Dent that Person A – the same unnamed woman who alleged that Mr. Dent groped her at the July 2018 Shedd Aquarium golf party – also alleged that, at a similar golf party at a Constellation Pro-Am golf outing in the Philadelphia, Pennsylvania area in or about June 2016, Mr. Dent had said to her that "she had a butt like a sister."

8. At the September 14, 2018 meeting, Mr. Dent told Ms. Speights and Mr. McKinney that all of these allegations were completely false.

9. At the September 14, 2018 meeting, Ms. Speights and Mr. McKinney told Mr. Dent that because of these allegations Constellation would be reviewing its contractual arrangements with him and RLD Resources.

10. On or about October 1, 2018, Petitioners received from Respondents correspondence, a copy of which is attached as Exhibit A to this Petition (the "Termination Notice").

11. Pursuant to the Termination Notice, Respondents terminated all contracts

between Petitioners and Respondents.[1]

12. In correspondence dated December 19, 2019 from Respondents's counsel, a copy of which is attached as Exhibit B to this Petition, Respondents informed Petitioners that Respondents had hired a third party to investigate these claims against Mr. Dent.

13. Respondents refused to identify this third party, who is referred to in this Petition as "Person C."

14. On information and belief, Person C investigated the claims made against Mr. Dent prior to Respondents' issuance of the Termination Notice on October 1, 2018.

15. On information and belief, Person C published or republished to Respondents the statements of Person A and Person B regarding Mr. Dent described above.

16. The statements concerning Mr. Dent published by Persons A, B and C were:

a. made as statements of fact;

b. false; and

c. not privileged.

17. The statements concerning Mr. Dent published by Persons A, B and C imputed to Mr. Dent acts of moral turpitude and impugned his character, reputation and good name.

18. Respondents' termination of all contractual arrangements with Petitioners

[1]Certain of these contracts are master agreements under which individual transaction confirmations are entered into for forward sales of commodity natural gas and electricity supply. While Respondents have stated that they will honor existing transaction confirmations, Respondents terminated all of the master agreements and will enter into no new transaction confirmations with Petitioners.

damaged Petitioners.

19. In correspondence dated December 19, 2018 from Respondents' counsel attached as Exhibit B to this Petition, Respondents admit that the statements concerning Mr. Dent published by Persons A, B and C were both the cause in fact and proximate cause of Respondents' termination of all contractual arrangements between Respondents and Petitioners.

20. Persons A, B and C may be responsible in damages to Petitioners

21. Petitioners wish to engage in discovery for the sole purpose of ascertaining the identiities and whereabouts of Persons A, B and C.

22. The discovery sought by Petitioners is necessary because Respondents have refused, and continue to refuse, to provide to Petitioners the identities and addresses of Persons A, B and C.

23. Because Respondents' refuse to provide to Petitioners the names and addresses of Persons A, B and C, Petitioners are unable to prosecute against the latter appropriate legal action for recovery of damages.

WHEREFORE, Petitioners respectfully request this court to enter an order authorizing Petitioners to conduct discovery before suit against Respondents pursuant to Illinois Supreme Court Rule 224 solely for the purpose of ascertaining the identities and whereabouts of Persons A, B and C as parties who may be responsible in damages to Petitioners because of their publication of false and defamatory statements about them.

Dated this 15th day of March, 2019

By : _____
Paul G. Neilan
#49710
1954 First Street, #390

Highland Park, IL 60035
T 847 266 0464
F 312 674 7350
C 312 580 5483
pgneilan@energy.law.pro

Exhibit A – Termination Notice dated October 1, 2018 from Respondents to Petitioners
Exhibit B – Letter dated December 19, 2018, from Respondents' Counsel

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

Richard L. Dent and RLD Resources, LLC

Petitioners,

and

Constellation NewEnergy, Inc.; CNE Gas Supply, LLC; Constellation Energy Gas Choice, LLC; and Constellation NewEnergy Gas Division, LLC

Respondents.

Verification of Rule 224 Petition

I, Richard L. Dent, certify that I have knowledge of the matters and things stated in the foregoing Verified Petition Under Supreme Court Rule 224 for Discovery Before Suit to Identify Responsible Persons, and under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, 735 ILCS 5/1-109, the undersigned certifies that the statements set forth in said instrument are true and correct, except as to matters therein stated to be on

information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

Dated this 15th day of March, 2019

By: _____
Richard L. Dent

333 North Michigan Avenue
Suite 1810
Chicago, IL 60601
(312) 795-0798

Civil Action Cover Sheet - Case Initiation **(05/27/16) CCL 0520**

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

Richard L. Dent and RLD Resources, L.L.C.

v.

Constellation NewEnergy, Inc.; CNE Gas Supply, LLC, et al.

No. _____

CIVIL ACTION COVER SHEET - CASE INITIATION

A Civil Action Cover Sheet - Case Initiation shall be filed with the complaint in all civil actions. The information contained herein is for administrative purposes only and cannot be introduced into evidence. Please check the box in front of the appropriate case type which best characterizes your action. Only one (1) case type may be checked with this cover sheet.

Jury Demand ☐ Yes ■ No

(FILE STAMP)

PERSONAL INJURY/WRONGFUL DEATH

CASE TYPES:

- ☐ 027 Motor Vehicle
- ☐ 040 Medical Malpractice
- ☐ 047 Asbestos
- ☐ 048 Dram Shop
- ☐ 049 Product Liability
- ☐ 051 Construction Injuries (including Structural Work Act, Road Construction Injuries Act and negligence)
- ☐ 052 Railroad/FELA
- ☐ 053 Pediatric Lead Exposure
- ☐ 061 Other Personal Injury/Wrongful Death
- ☐ 063 Intentional Tort
- ☐ 064 Miscellaneous Statutory Action (Please Specify Below**)
- ☐ 065 Premises Liability
- ☐ 078 Fen-phen/Redux Litigation
- ☐ 199 Silicone Implant

TAX & MISCELLANEOUS REMEDIES

CASE TYPES:

- ☐ 007 Confessions of Judgment
- ☐ 008 Replevin
- ☐ 009 Tax
- ☐ 015 Condemnation
- ☐ 017 Detinue
- ☐ 029 Unemployment Compensation
- ☐ 031 Foreign Transcript
- ☐ 036 Administrative Review Action
- ☐ 085 Petition to Register Foreign Judgment
- ☐ 099 All Other Extraordinary Remedies

COMMERCIAL LITIGATION

CASE TYPES:

- ☐ 002 Breach of Contract
- ☐ 070 Professional Malpractice (other than legal or medical)
- ☐ 071 Fraud (other than legal or medical)
- ☐ 072 Consumer Fraud
- ☐ 073 Breach of Warranty
- ☐ 074 Statutory Action (Please specify below.**)
- ☐ 075 Other Commercial Litigation (Please specify below.**)
- ☐ 076 Retaliatory Discharge

OTHER ACTIONS

CASE TYPES:

- ☐ 062 Property Damage
- ☐ 066 Legal Malpractice
- ☐ 077 Libel/Slander
- ☐ 079 Petition for Qualified Orders
- ☐ 084 Petition to Issue Subpoena
- ■ 100 Petition for Discovery

By: Paul G. Neilan #49710
(Attorney) (Pro Se)

** Law Offices of Paul G. Neilan, P.C., 1954 1st St, #390
Highland Park, IL 60035

Primary Email: pgneilan@energy.law.pro

Secondary Email: pgneilan@neilanlaw.com

Tertiary Email: _____

Pro Se Only: ☐ I have read and agree to the terms of the *Clerk's Office Electronic Notice Policy* and choose to opt in to electronic notice form the **Clerk's Office** for this case at this email address: _____

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

EXHIBIT A TO S. CT. RULE 224 PETITION

Constellation.
An Exelon Company

1310 Point Street – 9th Floor
Baltimore, MD 21231
www.constellation.com

October 1, 2018

TERMINATION NOTICE

2019L002910

VIA FEDEX AND E-MAIL

RLD Resources, LLC
333 North Michigan Avenue, Suite 1810
Chicago, IL 60601
Attn: Richard Dent

Dear Richard:

Consistent with our conversations, Constellation NewEnergy, Inc. (on behalf of itself and together with the retail affiliates identified in this letter, "Constellation") has elected to terminate its master agreements with RLD Resources, LLC ("RLD") going forward. Constellation and RLD will continue to honor our obligations under existing confirmations and statements of work tied to customer agreements for the remainder of the respective terms of those customer agreements, but the confirmations and statements of work will not be renewed or extended. (See attached listing.)

I have outlined our existing agreements and termination logistics as follows:

1) **Agreement for Consulting Services between Constellation and RLD dated May 11, 2016 (as amended January 9, 2017, the "Consulting Agreement"):** Pursuant to Section 2 of the Consulting Agreement, this letter shall serve as Constellation's notice of termination of the Consulting Agreement effective immediately. As more fully described in the Consulting Agreement, with respect to the Exhibit As currently in effect:
    a. Exhibit A-1 is hereby terminated effective as of the date of this letter. The performance of the Services described in Exhibit A-1 shall terminate immediately and no payment shall be made for the month of October 2018; and
    b. Exhibit A-2 will terminate effective as of the End Use Customer's December 2018 meter reads, as defined in Exhibit A-2 to the Consulting Agreement ("A-2 End Date"). The performance of the Services described in Exhibit A-2 shall terminate as of the A-2 End Date and payments will continue until such time as payment is collected from the End Use Customer for the December 2018 billing cycle and then remitted to RLD.

Additionally, pursuant to Section 13 of the Consulting Agreement, Constellation hereby requests the return of all papers, materials and property of Constellation held by RLD.

2) **Base Contract for Sale and Purchase of Natural Gas between CNE Gas Supply, LLC and RLD dated August 26, 2014 (as amended, the "NAESB"):** Pursuant to Section 12 of the NAESB, Constellation hereby provides thirty (30) days' prior written notice of termination of the NAESB. This termination shall not affect or excuse the performance of Constellation or RLD under any provision of the NAESB that by its terms survives Constellation's termination. Any existing Transaction Confirmations shall continue until the end of the Delivery Periods identified therein and are not terminated by means of this letter.

3) **Master Power Purchase and Sale Agreement between Constellation and RLD dated December 19, 2012 (as amended, the "EEI"):** Pursuant to Section 10 of the EEI, Constellation hereby provides thirty (30) days' prior written notice of termination of the EEI. Notwithstanding the foregoing, this termination shall not affect or excuse the performance of Constellation or RLD under any provision of the EEI that by its terms survives Constellation's termination. The EEI shall remain in effect with respect to Transactions entered into prior to the effective date of this termination until both RLD and Constellation have fulfilled all of their obligations with respect to the Transactions. For clarity, any existing Confirmations shall continue until the end of the Delivery Periods identified therein and are not terminated by means of this letter.

4) **Master Broker Agreements between RLD and each of (a) Constellation Energy Gas Choice, LLC dated May 27, 2017, (b) Constellation NewEnergy, Inc. dated June 7, 2016; and (c) Constellation NewEnergy – Gas Division, LLC dated May 27, 2017:** Pursuant to Section 8 of each Master Broker Agreement, this letter shall serve as Constellation's written notice to RLD terminating such agreement. This termination shall be effective ninety (90) days from the above date. Any Compensation Schedules currently in effect will remain in effect until such Compensation Schedules expire or are separately terminated and will be governed by the terms of the applicable Master Broker Agreement. Please note that RLD remains bound by sections 6(j), 10, 11, 12, 15, 16, 17, and 20 of each Master Broker Agreement subsequent to termination. Additionally, pursuant to Section 10 of each such Master Broker Agreement, Constellation hereby requests the return of all Confidential Information.

EXHIBIT A TO S. CT. RULE 224 PETITION

We appreciate our past business dealings with RLD and wish you well in your future endeavors.

Sincerely,
Constellation NewEnergy, Inc.

Mark P. Huston
President, Retail

cc: Nina Jezic (Constellation - VP & Deputy General Counsel, Retail)
Carol Freeman (RLD Resources, LLC)

Customer Agreements

Customer	RLD Product	End Date
Board of Trustees of the Community College District No. 508	Bill audit services	December 2018
State of Illinois	Wholesale Power	December 2019
State of Illinois	Wholesale Gas	June 2019
Cook County	Wholesale Gas	April 2021

EXHIBIT B TO S. CT. RULE 224 PETITION

1221 Lamar St., Suite 750
Houston, TX 77010
www.constellation.com

December 19, 2018

VIA E-MAIL

Law Offices of Paul G. Neilan, P.C.
1954 First Street #390
Highland Park, IL 60035
pgneilan@energy.law.pro

RE: October 23, 2018 Correspondence from Paul Neilan to Nina Jezic ("PGN October Letter") and December 17, 2018 Correspondence from Paul Neilan to Nina Jezic and Joseph Kirwan ("PGN December Letter")

Dear Mr. Neilan:

This letter responds to the PGN October Letter and the PGN December Letter, and memorializes prior information that has been provided to you and to your client, Richard L. Dent.

Mr. Dent has been the subject of an investigation conducted by a third-party hired by Constellation to investigate reports that Mr. Dent engaged in grossly inappropriate behavior during the 2016 and 2018 Pro-Am Tournament events where Mr. Dent was a guest of Constellation. The reports regarding Mr. Dent's behavior include among other things that Mr. Dent engaged in an inappropriate and unwanted touching of a Constellation employee and that Mr. Dent made unwelcome comments of a sexual nature to a Constellation employee. As you note in the PGN October Letter, on September 14, 2018, there was a meeting between Richard L. Dent, Grace Speights, Theos McKinney and Timothy W. Wright. That meeting was to allow Mr. Dent an opportunity to provide his recollection of the events described above. The law requires Constellation to investigate reports of such behavior and the EEOC directs employers to conduct effective investigations. Although Mr. Dent denied the allegations, his denials were not credible and the investigation concluded that the reports accurately described behaviors that were, at a minimum, in violation of Exelon's code of business conduct, completely outside the norms of socially acceptable behavior, and demeaning to Constellation employees. To date, neither Exelon nor Constellation has disclosed the findings of the investigation to any third-party, other than in privileged communications with its lawyers.

EXHIBIT B TO S. CT. RULE 224 PETITION

Given Constellation's legal obligation to investigate such allegations and the protected nature of its findings, any claim that Constellation has "impugn[ed] Mr. Dent's ... name and reputation" is frivolous.

With respect to the PGN December Letter, you allege that the natural gas confirmations NGIDX23877443 and NGIDX23877432, evidencing winter gas supply transactions documented in emails among RLD, Constellation and BP (the "Winter Trades"), are nullities because of the termination of the master agreement between RLD and Constellation. This is an incorrect understanding of the law of contracts. Contrary to your assertion, the existence of a master NAESB agreement is not a pre-requisite to parties entering into binding gas transactions. The written communications documenting the Winter Trades with explicit terms and conditions are valid agreements. Nonetheless, we agree to unwind the Winter Trades as you have requested.

Contrary to your assertions, Constellation's agreement to unwind the Winter Trades and its termination of its relationship with RLD, do not affect Constellation's ability to meet its obligations to the State of Illinois or Cook County. Your statements suggesting otherwise during our December 10, 2018 phone conversation and in the PGN December Letter are baseless. We strongly caution you and your client against making any statements to third parties that seek to interfere in any way with Constellation's customer relationships or that in any way suggest that Constellation has breached any of its contractual obligations or misrepresented information.

Exelon/Constellation stands firm in its decision to terminate its contractual relationship and commercial dealings with RLD and Mr. Dent pursuant to the October 1, 2018 Termination Notice (as defined in the PGN December Letter).

We hope that this letter will allow both parties to put this matter to rest.

Sincerely,
Constellation NewEnergy, Inc.

Nina Jezic
Constellation VP & Deputy General Counsel, Retail

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

Richard L. Dent and RLD Resources, L.L.C.,	)	
	)	
	)	
Petitioners,	)	
	)	No. 2019 L 002910
v.	)	Calendar D
	)	
Constellation NewEnergy, Inc.; CNE Gas Supply, LLC; Constellation Energy Gas Choice, LLC; and Constellation NewEnergy – Gas Division, LLC,	)	
	)	
Respondents in Discovery.	)	

MEMORANDUM IN SUPPORT OF CONSTELLATION'S MOTION TO DISMISS VERIFIED PETITION UNDER SUPREME COURT RULE 224 FOR DISCOVERY BEFORE SUIT TO IDENTIFY RESPONSIBLE PERSONS

Under well-established law, a victim of sexual harassment can report the harassment to his or her employer, and the employer can investigate the allegations and take appropriate action, without risking liability for defamation. Otherwise, "victims of harassment and companies with a goal of preventing harassment would be 'handcuffed' by a fear of defamation liability," *Vickers v. Abbott Laboratories*, 308 Ill. App. 3d 393, 402 (1st Dist. 1999), and the important public policy goal of combating harassment would be frustrated.

The Petition defies this law. Petitioner Richard Dent ("Dent") is the Chief Executive Officer of RLD Resources, Ltd. ("RLD") (collectively, "Petitioners"), which was a vendor of Respondents (collectively, "Constellation"). Constellation retained outside employment counsel to conduct an investigation into allegations that Dent inappropriately touched a Constellation employee at an event sponsored by Constellation for its employees and contractors. Petitioners now seek pre-complaint discovery to determine the identities of the employee who reported

harassment, a witness, and the lawyers retained by Constellation, so that Petitioners can sue them for defamation.

That is exactly the kind of lawsuit the law does not allow. A qualified privilege protects against defamation liability when an employee reports harassment to her employer, and when the employer undertakes an investigation. *See Vickers*, 308 Ill. App. 3d at 401-02. That qualified privilege can be overcome at the motion-to-dismiss stage only if the petitioner alleges facts that, if true, would suffice to demonstrate a direct intent to injure petitioners or a reckless disregard for their rights. *Id.* at 404. The Petition does not and cannot allege any such facts. Accordingly, Petitioners establish no basis for discovery before suit. The Petition does not set forth allegations sufficient to withstand a motion to dismiss, and should be dismissed with prejudice. *See Hadley v. Doe*, 2015 IL 118000, ¶ 27.

FACTUAL BACKGROUND

Dent, as Chief Executive Officer of RLD, contracted with Constellation to provide electricity and natural gas sales, marketing and consulting services. Petition ¶ 5. On September 14, 2018, attorneys representing Constellation met with Dent to advise him that certain allegations had been made against him. Petition ¶ 6. Dent alleges in his Petition that the allegations included the following: (1) that a Constellation employee, Person A, alleged that in July 2018, Dent inappropriately touched her at a Constellation-sponsored pre-golf tournament party held at the Shedd Aquarium; (2) that Person A also alleged that in June 2016, Dent had told her that "she had a butt like a sister"; (3) that during the course of Constellation's investigation of these harassment allegations, another individual, also employed by Constellation, Person B, had allegedly stated that Dent was drunk and disorderly; and (4) that a third party retained by Constellation to investigate the claims against Dent, Person C, had published to Constellation the statements of Persons A and

B regarding Dent when relaying the findings of the investigation. Petition ¶¶ 7, 12-14. After Constellation completed its investigation, which included the September 14, 2018 interview with Dent (the purpose of which was to give Dent "an opportunity to provide his recollection of the events" described above, Ex. B at 1), Constellation notified Dent that it was terminating its consulting agreements with RLD. Petition ¶¶ 6, 8, 10-11, 14 & Exhs. A, B.

The Petition, filed under Illinois Supreme Court Rule 224, seeks pre-suit discovery to uncover the identity of Persons A, B, and C, so that Dent and RLD can file a defamation lawsuit against them. It alleges that Persons A, B, and C published statements "imput[ing] to Dent acts of moral turpitude and impugned his character, reputation and good name," Petition ¶ 17, and that Dent and RLD were damaged as a consequence. Petition ¶ 18.

LEGAL STANDARD

A. A Petition Under Rule 224 Must State a Viable Claim for Relief.

Under Illinois Supreme Court Rule 224, a party may engage in discovery "for the sole purpose of ascertaining the identity of one who may be responsible in damages…" Ill. Sup. Ct. R. 224(a)(1)(i). However, Rule 224 "requires a petitioner to demonstrate the reason why the proposed discovery seeking the individual's identity is 'necessary.'" *Stone v. Paddock Pubs., Inc.*, 2011 IL App (1st) 093386, ¶ 14 (quoting Ill. S. Ct. Rule 224(a)(1)(ii)).

Accordingly, the Illinois Supreme Court has held that "to ascertain whether a petitioner has satisfied Rule 224's necessity requirement, the court must evaluate a defamation complaint to determine whether it will withstand a section 2-615 motion to dismiss." *Hadley*, 2015 IL 118000, ¶ 27; *Stone*, 2011 IL App (1st) 093386, ¶18 ("[I]f a petitioner cannot satisfy the section 2-615 standard, it is clear that the unidentified individual is not responsible for damages and the proposed discovery is not 'necessary.'").

"In considering whether to grant or deny a motion to dismiss, the court must determine whether the complaint standing alone has stated sufficient facts to demonstrate a cause of action pursuant to which relief may be granted." *Stone*, 2011 IL App (1st) 093386, ¶ 17. To satisfy this standard, a complaint must "allege facts, rather than mere conclusions." *Id.* ¶ 21. Indeed, "the plaintiff must allege specific facts supporting *each element of his cause of action* and the trial court will not admit conclusory allegations and conclusions of law that are not supported by specific facts." *Id.* (emphasis in original).

B. To State a Defamation Claim Concerning a Privileged Communication, A Plaintiff Must Allege Facts Showing Intent to Injure or Reckless Disregard of the Truth.

To state a cause of action for defamation, the plaintiff must allege facts showing "that the defendant [1] made a false statement about him, [2] that there was an unprivileged publication to a third party with fault by the defendant, and [3] that the publication damaged plaintiff." *Vickers*, 308 Ill. App. 3d at 400.

Certain communications are protected by a qualified privilege, which "effectuates the policy of facilitating a free flow of information so that correct information may ultimately be attained." *Id.* at 401; *Kuwik v. Starmark Star Marketing and Admin., Inc.*, 156 Ill. 2d 16, 24 (1993). Courts have in general recognized three classes of communications as qualifiedly privileged: "(1) those involving some interest of the person who published the [allegedly] defamatory matter; (2) those involving some interest of the person to whom the matter is published . . . ; and (3) those involving a recognized public interest." *Vickers*, 308 Ill. App. 3d at 401.

If the allegations of the complaint establish that the communications are qualifiedly privileged, then the plaintiff, to survive a motion to dismiss, must allege facts sufficient to show that the privileged was "abused," *id.* at 404—specifically, that "the defendant either intentionally

published the material in question and knew the matter was false, or displayed a reckless disregard as to the falsity of the matter." *Id.* at 401. Again, "conclusory assertion[s]" and "bare allegation[s]" do not suffice to meet the plaintiff's pleading burden. *Coghlan v. Beck*, 2013 IL App (1st) 120891, ¶ 65.

ARGUMENT

The Petition should be dismissed because Dent and RLD have failed to allege facts stating a claim for defamation. The allegations establish, as a matter of law, that the communications at issue were qualifiedly privileged. *See Vickers*, 308 Ill. App. 3d at 401-02. Thus, Dent and RLD bear the burden of alleging specific facts showing that the privilege was abused. The Petition alleges no such facts and thus fails to satisfy that burden.

I. The Petition Identifies No Allegedly Defamatory Statement Concerning RLD.

As an initial matter, the Court should dismiss the Petition as it relates to RLD, because the Petition identifies no allegedly defamatory statement concerning RLD. Accordingly, RLD cannot state a claim for defamation. *See id.* at 400 (defamation plaintiff must allege "a false statement *about him*") (emphasis added).

II. The Petition Should Be Dismissed in its Entirety Because the Statements in Question Were Privileged and Petitioners Have Not Alleged Facts Showing That the Privilege Was Abused.

A. The Alleged Communications Were Privileged as a Matter of Law.

The Petition identifies three sets of allegedly defamatory statements: (1) statements made by Person A reporting alleged sexual harassment to her employer; (2) statements made by Person B, in the course of Constellation's investigation of Person A's allegations, describing Person B's observations of Dent on the day in question; and (3) statements made by Person C, the attorneys retained by Constellation to investigate Person A's allegations, in reporting to Constellation on the

investigation's findings. Petition ¶¶ 7, 14-15. All of these communications were qualifiedly privileged, as a matter of law.

This case is controlled by *Vickers*. There, the First District rejected a defamation claim based on statements made by a victim of sexual harassment reporting the harassment to her employer, and statements made by witnesses to the investigator retained by the employer to investigate the victim's allegations. *Vickers,* 308 Ill. App. 3d at 397, 401. The court reasoned that "these communications are privileged because all three interests" justifying a qualified privilege "arise in the case at bar." *Id.* at 402. The court elaborated: "First, it is clear that the [victim] had an interest in stopping harassment and abuse by plaintiff. Second, [the employer] had an interest in investigating [its] employees' concerns and taking action to prevent further harassment. And third, there is a definite general public interest in eradicating sexual harassment in the workplace." *Id.*

As the court further explained, the United States Supreme Court has recognized "a compelling interest in ridding workplaces of sexual harassment," and employers have an affirmative obligation to "'take all steps necessary to prevent sexual harassment from occurring'" and "'to establish a complaint procedure designed to encourage victims of harassment to come forward.'" *Id.* at 402 (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998)). As the court recognized, a qualified privilege "promotes this social policy and provides protection for the victims, witnesses and investigators of sexual harassment." *Id.* Indeed, in the absence of a privilege, "victims of harassment and companies with a goal of preventing harassment would be 'handcuffed' by a fear of defamation liability." *Id.*

The statements alleged in the Petition are exactly the kind of statements that fall squarely within the holding of *Vickers*: they are statements made to an employer by a victim of sexual

harassment concerning inappropriate touching experienced while at work (Person A); statements made to the employer by a witness (Person B), as part of Constellation's investigation consistent with its legal obligations; and statements of the investigator/lawyer (Person C) relating its findings to Constellation. The law protects statements such as these from potential defamation liability, in order to ensure that employees can report sexual harassment and employers are able to investigate it without fear of retaliatory litigation. *See* Ex. B to Pet. (letter from Constellation to Dent's counsel, noting that "the law requires Constellation to investigate reports of such behavior and the EEOC directs employers to conduct effective investigations."); *Vickers*, 308 Ill. App. 3d at 402; *see also Wexler v. Morrison Knudsen Corp.*, No. 99 C 6522, 2000 WL 1720344, at *7 (N.D. Ill. Nov. 15, 2000) (applying *Vickers* to hold that a qualified privilege protected statements made in the course of an employer's investigation of racial harassment in the workplace); *Scherer v. Rockwell Intern. Corp.*, 766 F. Supp. 593, 607 (N.D. Ill. 1991) (statements made during employer's investigation of sexual harassment, including affidavits and investigator's communication of its findings to employer, are protected by the qualified privilege); *Achanzar v. Ravenswood Hospital*, 326 Ill. App. 3d 944, 948-49 (1st Dist. 2001) (qualified privilege covered statement made by hospital employee to supervisor that another employee threatened to kill someone at the hospital); *Gibson v. Phillip Morris, Inc.*, 292 Ill. App. 3d 267, 276 (5th Dist. 1997) (qualified privilege covered statements made by coworkers during course of employer's investigation into misconduct by an employee).

B. Petitioners Have Failed to Allege Any Abuse of the Privilege.

"Once a qualified privilege is established, as it has been in this case" based on the allegations in the complaint, "a communication is only actionable if the plaintiff" can allege facts that would establish an "abuse[of] the privilege." *Vickers*, 308 Ill. App. 3d at 404. Specifically, Petitioners must allege not only that the statements were false, but that they were made with

knowledge of falsity or "reckless disregard" for the truth. *Id.* at 401. Moreover, the allegation of such knowledge or reckless disregard cannot be conclusory, but instead must be supported with specific factual allegations. For example, in *Coghlan*, the First District affirmed the dismissal of a defamation claim where the plaintiff had conclusorily alleged that the defendants knew that statements they had made were false. The court held that "the bare conclusory allegation" was insufficient, because the plaintiffs "have alleged *no facts* from which actual malice may be inferred, *i.e.* … [that the statement was made] with a high degree of awareness of its probable falsity or that [the defendant] had serious doubts as to its truth." *Coghlan*, 2013 IL App (1st) 120891, ¶ 56; *see also Kuwik*, 156 Ill. 2d at 24.

This case is even easier than *Coghlan*, because the Petition does not even allege facts supporting an abuse of the privilege—it only alleges (conclusorily) that the statements at issue were false. That falls far short of what is needed to plead an abuse of the privilege. *Coghlan*, 2013 IL App (1st) 120891, ¶ 56; *Vickers*, 308 Ill. App. 3d at 401; *see also Muthuswamy v. Burke*, 269 Ill. App. 3d 728, 732 (1993) ("In order to overcome privilege knowledge or reckless disregard as to falsity *must be sufficiently pled* and proven." (emphasis added)); *Quinn v. Jewel Food Stores, Inc.*, 276 Ill. App. 3d 861, 872 (1st Dist. 1995) (affirming dismissal of defamation action because plaintiff failed to allege that the defendant had abused the qualified privilege).[1] Accordingly, the Petition must be dismissed.

The Court, moreover, should dismiss the Petition with prejudice and not allow Petitioners leave to replead. The Petition and attached exhibits definitively refute any allegation that the privilege was abused, so that amendment would be futile. As the Petition recounts, Constellation retained third-party counsel to conduct an independent, attorney-client privileged investigation of

[1] Indeed, rather than attempt to establish any abuse of privilege, the Petition instead simply alleges, conclusorily and incorrectly for the reasons given above, that the statements in question were "not privileged." Petition ¶ 16(c).

the allegations, and that investigation included meeting with Dent to inform him of the allegations against him and to obtain his side of the story. Petition ¶¶ 7-8, 12-14; Ex. B at 1 (letter from Constellation to Dent's counsel explaining that the purpose of meeting with Dent was "to allow Mr. Dent an opportunity to provide his recollection of the events described above").

The Petition's exhibits further state that Constellation and its investigators considered Dent's denials in light of the other evidence that the investigation uncovered and concluded that the denials were "not credible." Ex. B at 1. Constellation was entitled to weigh evidence it had gathered and decide in good faith to credit its employees' version of events; there is no basis for inferring any knowledge of falsity or reckless disregard for the truth.

Furthermore, Constellation emphasized that "neither Exelon [Constellation's parent company] nor Constellation has disclosed the findings of the investigation to any third-party, other than in privileged communications with its lawyers." *Id.* Constellation's efforts to preserve the confidentiality of its findings further confirms its good faith use of the privilege. *See Vickers*, 308 Ill. App. 3d at 404-05 (no abuse of the privilege where there is no "concrete evidence to support the notion that [the company's] employees fabricated stories," and where "employees deliberately followed company personnel policies in accordance with federal law and investigated allegations into plaintiff's conduct before taking action"); *Kuwik*, 156 Ill. 2d at 30 (suggesting that, to find an abuse of privilege, plaintiff would need to demonstrate a reckless investigation or improper dissemination of the findings).[2]

In light of the allegations presented in the Petition and the exhibits accompanying it, Dent could not amend the Petition so as to survive a motion to dismiss. Thus, the Petition should be

[2] Ironically, by filing this Petition, Dent is the one responsible for publicly disseminating the allegations against him. As Constellation explained in its letter, it did not disclose the findings of its investigation to any third party, except in attorney-client privileged communications. Pet. Ex. B at 1.

dismissed with prejudice. *See, e.g., Bruss v. Przybylo*, 385 Ill. App. 3d 399, 405 (2d Dist. 2008) (a complaint should be dismissed with prejudice if a plaintiff can prove no set of facts that will entitle the plaintiff to recovery).

CONCLUSION

For the foregoing reasons, the Petition should be dismissed with prejudice.

Respectfully submitted,

CONSTELLATION NEW ENERGY, INC, CNE GAS SUPPLY, LLC, CONSTELLATION ENERGY GAS CHOICE, LLC, and CONSTELLATION NEW ENERGY-GAS DIVISION, LLC

By: Terri L. Mascherin
One of Their Attorneys

Dated: April 29, 2019

Terri L. Mascherin
Christian L. Plummer
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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

RICHARD L. DENT AND RLD RESOURCES, LLC
Plaintiff(s)

-v-

CONSTELLATION NEW ENERGY ETAL
Defendant(s)

NO: 2019 L 002910

Motion Call: D

ORDER

This cause coming before the court for administrative status, the court being fully advised in the premises and having jurisdiction of the parties and/or the subject matter,

IT IS HEREBY ORDERED AS FOLLOWS:

(4010) ☒ Supreme Court Rule 224 Petition dismissed by order of court, the Court finding that Supreme Court Rule 224 is not applicable in the instant case;

(4099) ☐ Case previously disposed of on _____;

(4010) ☐ Case dismissed by order of court, based on no activity since _____;

(4005) ☐ Case dismissed for want of prosecution, based on no activity since _____;

(4282) (1505) ☐ Case is transferred *instanter* to Room 2005 for reassignment to a commercial calendar, pursuant to Law Division Administrative Order 92-2;

(4282) (1505) ☐ Case is transferred *instanter* to Room 2005 for reassignment to a motion calendar, pursuant to Law Division Administrative Order 17-1, pertaining to refiled actions assigned to prior judicial calendar;

( ) ☒ Other: FOR REASONS STATED IN OPEN COURT and ~~Re~~incorporated into the transcript of today's proceedings. Cr per judge

PAUL G NEILAN
LAW OFFICES OF PAUL G. NEILAN, P.C.
1954 FIRST ST. #390
HIGHLAND PARK, IL 60035
847 266 0464
#49710

ENTER: Judge Patricia O'Brien Sheahan

JUDGE

JUN 21 2019

Circuit Court - 2136 NO.

C 85

A047

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, LAW DIVISION

Richard L. Dent and RLD Resources, LLC, Petitioners, v. Constellation NewEnergy, Inc.; CNE Gas Supply, LLC; Constellation Energy Gas Choice, LLC; and Constellation NewEnergy Gas Division, LLC, Respondents.	Case No. 19 L 2910

MEMORANDUM OPINION AND ORDER

Before the Court is a motion to reconsider the dismissal of a Rule 224 petition brought by petitioners Richard L. Dent and RLD Resources, LLC. The motion has been briefed with a response. Oral argument was had at the presentation of the motion. The Court has considered the arguments and reviewed all submitted materials, including the cited case law, as well as the transcripts of proceedings from June 21, 2019 and July 19, 2019.

The purpose of a motion to reconsider is to bring to the trial court's attention a change in the law, an error in the trial court's previous application of existing law, or newly discovered evidence that was not available at the time of the prior hearing or decision. *Horlacher v. Cohen*, 2017 IL App (1st) 162712, ¶ 79. The decision of whether to grant a motion to reconsider is within the sound discretion of the trial court. *Cable Am., Inc. v. Pace Elecs., Inc.*, 396 Ill. App. 3d 15, 24 (2009). Petitioners assert in their motion that the Court misapplied the law in its June 19, 2019 ruling.

On June 21, 2019, this Court issued an oral ruling on respondents' motion to dismiss the

9L 2910 Reconsider p. 2

underlying Rule 224 petition. The Court held that the petition failed to comply with the Rule and dismissed it on the grounds that the purpose of Rule 224 is satisfied where a petitioner has already identified someone who *may* be sued. *Low Cost Movers, Inc. v. Craigslist, Inc.*, 2015 IL App (1st) 143955.

The court in *Low Cost Movers* articulated the standard for evaluating Rule 224 petitions, holding as follows:

> The purpose of Rule 224 is to ascertain "the identity of one who *may* be responsible in damages." The purpose of Rule 224 has been served despite Low Cost having no basis to sue Craigslist for tortious interference with prospective economic advantage or a violation of the Illinois Consumer Fraud Act. The *Beale* court observed that the trial judge determines the extent of inquiry on a case-by-case basis, and that a petition which sought to establish actual liability, rather than the potential for liability, should be denied. Rule 224 is not intended to permit a party to engage in a wide-ranging, vague, and speculative quest to determine whether a cause of action actually exists. *Low Cost Movers, Inc. v. Craigslist, Inc.*, 2015 IL App (1st) 143955, ¶ 17 (internal citations omitted).

This case closely mirrors *Low Cost Movers*. "According to Low Cost, identity alone does not suffice as a basis to dismiss a Rule 224 petition where the individual identified cannot be a defendant under the petitioner's espoused causes of action." *Id.* at ¶ 13. Petitioners already know the identities of entities which *may* be sued: Constellation and its attorneys. Petitioners' motion to reconsider asserts that "*Low Cost Movers* is irrelevant to a case where, as here, the respondent in discovery has neither admitted to engaging, nor is found to have engaged in the wrongful conduct complained of in the Rule 224 Petition." Motion, p. 4. Respondents' response to the motion, however, notes that "Petitioners already know the identity of a party involved in the events giving rise to the termination of Constellation's at-will contracts with Petitioner RLD Resources, Ltd.: namely, Constellation." Response, p. 2.

The crux of petitioners' argument is that they lack a viable legal claim against Constellation and that a Rule 224 petition is therefore the only vehicle available to obtain the

19L2910 Reconsider P.3.

identities of the unnamed individuals who allegedly defamed Mr. Dent. It may be that Mr. Dent does not have a viable claim against Constellation for defamation, or a desire to name Constellation as a defendant, but the *Low Cost Movers* case is again analogous on this issue. "The purpose of Rule 224 has been served despite Low Cost having no basis to use Craigslist for tortious interference with prospective economic advantage or a violation of the Illinois Consumer Fraud Act." *Low Cost Movers*, 2015 IL App (1st) 143955, ¶ 17. The test for a 224 petition is whether the petitioner knows of anyone who *may* be liable in damages. Constellation's response admits that it *may* be liable in damages – indeed, that is their primary argument.

Claims against Constellation are not limited to those elaborated in the underlying petition. The damages that Mr. Dent and RLD Resources, LLC appear to allege in their petition are based upon the termination of contracts. The issue before this Court is whether petitioners have yet identified any of the persons or entities who *may* be the cause of those terminations. Rule 224 has a specific, narrow purpose that allows a petitioner to obtain the identity of a potential defendant when the petitioner lacks knowledge of *anyone* who *may* be liable in damages.

The issue before the Court is thus whether Mr. Dent and RLD have knowledge of any individual or entity that *may* be liable in damages to them. Based upon the record before the Court, they do. Whether petitioners pursue claims for defamation or otherwise, claims are available. Accordingly, petitioners' motion to reconsider is DENIED.

5285

ENTERED:

Judge Patricia O'Brien Sheahan
JUL 31 2019
Circuit Court - 2136

Judge Patricia O'Brien Sheahan
Circuit Court of Cook County

Notice of Appeal **(10/17/18) CCG 0256 B**

An appeal is taken from the order or judgment described below:

Date of the judgment/order being appealed: 6/21/19

Name of judge who entered the judgment/order being appealed: Hon. Patricia O'Brien-Sheahan

Relief sought from Reviewing Court:

Reversal of order and remand to Circuit Court of Cook County for further proceedings.

I understand that a *"Request for Preparation of Record on Appeal"* form (CCA 0025) must be completed and the initial payment of $110 made prior to the preparation of the Record on Appeal. The Clerk's Office will not begin preparation of the ROA until the Request form and payment are received. Failure to request preparation of the ROA in a timely manner, i.e., at least 30 days before the ROA is due to the Appellate Court, may require the Appellant to file a request for extension of time with the Appellate Court. A *"Request for Preparation of Supplemental Record on Appeal"* form (CCA 0023) must be completed prior to the preparation of the Supplemental ROA.

/s/ Paul G. Neilan

To be signed by Appellant or
Appellant's Attorney

RECORD ON APPEAL - TABLE OF CONTENTS