

STATE OF MICHIGAN
COURT OF APPEALS

CLARENCE W. GIPSON and LUCINDA S.
GIPSON, husband and wife, jointly and severally, and
CLIFFORD SMITH and JANE SMITH, husband and
wife, jointly and severally,

Plaintiffs-Appellants,

v

KENT MICHAEL TOWERS, an individual and
DUKE & SON, INC., a Michigan Corporation,

Defendant-Appellees.

UNPUBLISHED
May 23, 1997

No. 193036
Kent Circuit Court
LC No. 95-001213 CZ

Before: Murphy, P.J., and Markey and A.A. Monton,* JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's grant of summary disposition in favor of defendants. We reverse.

The complaint in this case alleges several causes of action based on alleged statements by defendant Towers, an agent of defendant Duke & Son, to plaintiffs Smith that prompted Smiths to pursue legal action against plaintiffs Gipsons.

We agree with the trial court that any statements made by defendant Towers to plaintiffs Smith's attorney during an interview were privileged, 3 Restatement Torts, 2d § 588, comment b, p 250; see also *General Electric Co v Sargent & Lundy*, 916 F2d 1119 (CA 6, 1990). However, we fail to see how that privilege affects the existence of plaintiffs' claims based on the statements allegedly made by defendant Towers to plaintiffs Smith.

Defendant argues that because plaintiffs Smith's attorney testified in a deposition that "but for" defendant Towers' statement to her, she would not have filed the previous suit, any damages that resulted from the initiation of the previous suit were proximately caused by defendant Towers' privileged

* Circuit judge, sitting on the Court of Appeals by assignment.

statement. We agree that plaintiffs cannot recover the actual amount of damages that resulted from the previous litigation because that damage was, according to plaintiffs Smith's attorney, proximately caused by the privileged statement. However, there is a question of fact as to whether plaintiffs Smith would have initiated previous litigation in any event, based on what defendant Towers allegedly told them. If so, then plaintiffs would have been damaged even without any statements defendant Towers may have made to plaintiffs Smith's attorney. In other words, the fact of plaintiffs' damage would be certain. Plaintiffs would then be required to present evidence to provide a reasonable basis for an approximation of the damages that would have resulted from prior litigation.¹ See *Hofman v Auto Club Ins Ass'n*, 211 Mich App 55, 108; 535 NW2d 529 (1995) (discussing the certainty requirement for damages). It would then be up to the jury to determine the proper amount of those damages, in addition to any other damages sought and proven under the several causes of action set forth in the complaint.

Because there are questions of fact, summary disposition at this point is improper.

Reversed.

/s/ William B. Murphy

/s/ Jane E. Markey

/s/ Anthony A. Monton

¹ While plaintiffs' actual damages may be evidence of an approximation of damages that would have resulted had plaintiffs Smith pursued legal action irrespective of defendant Towers' alleged statements to their attorney, technically, in our opinion, an award of those actual damages would be improper.