IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

CASE NO.: 65,426

STEVEN EDELSTEIN, CITY OF MIAMI, MICHAEL J. MURPHY, and FOWLER, WHITE, BURNETT, HURLEY, BANICK & STRICKROOT, P.A.,

Petitioners,

vs.

MIRIAM DONNER and ARTHUR J. MORBURGER,

Respondents.
_____/

PETITION FOR DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL THIRD DISTRICT OF FLORIDA

CERTIFIED QUESTION OF GREAT PUBLIC IMPORTANCE

PETITIONERS' REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PREFACE

The parties herein will be referred to as they were in the PETITIONERS Initial Brief.

All emphasis is added unless otherwise indicated.

RESPONSE TO FACTUAL STATEMENT

On page 18 of the RESPONDENTS' counter-statement in paragraph 3 the RESPONDENTS state that Judge Smith's June 17, 1983 Order "found that [PETITIONERS] discussions with Judge Korvick about §624.311(3) ... was ex-parte". This is a blatant misstatement of Judge Smith's June 17, 1983 Order. All one needs to do is review that Order to find out that nowhere in that Order or any other Order entered in this cause has any court made any finding of any improper ex-parte communications by the PETITIONERS herein.

RESPONSE TO THE ISSUES RAISED BY THE RESPONDENTS

Although the PETITIONERS feel that they have adequately set forth the relevant issues on appeal as contained in their Initial Brief on the Merits, the RESPONDENTS' numerous and specious issues will be addressed herein in the order they appear in the RESPONDENTS' brief.

RESPONDENTS' ALLEGED FAILURE TO PLEAD ANY PARTICULAR FACTS IN SUPPORT OF THE CLAIM OF ATTORNEY-CLIENT COMMUNICATION PRIVILEGE

The PETITIONERS set forth very plainly in their response to the Order to Show Cause that MURPHY and his LAW FIRM

represented the CITY, Hetherington and the insurer in the underlying false arrest suit filed by DONNER and prosecuted by her attorney MORBURGER.

This argument is ridiculous in that both this court, the lower court, and the trial court could take judicial notice of the fact that MURPHY and his LAW FIRM and EDELSTEIN had previously appeared for and represented the CITY and Hetherington in DONNER's false arrest suit. (A. 10-16) The attorney-client communications were in fact surrendered to the trial court, and inspected by the trial court and determined by the trial court to be privileged. Those documents were transmitted to the Third District Court of Appeal, and it ruled that there was no privilege with respect to the attorney-client communications.

Additionally, the RESPONDENTS on page 22 of their Brief state that the PETITIONERS

> "... Failed to set out any 'affirmative defense' or any plea of particular facts that might be construed as an affirmative defense."

This is a misstatement and the response of the PETITIONERS in the trial court on pages 3-19 argue the "Reasons for Declining the Request for Attorneys Files Pursuant to the Act." Therein the PETITIONERS set forth six enumerated legal reasons with legal argument as to why the relief prayed for by DONNER and MORBURGER should not be granted. Those reasons as enumerated are attorney-client privilege, work product privilege, a breach of professional ethics, the fact that MURPHY and the LAW FIRM represent other entities besides the CITY who are not public agencies,

the Act as construed would be unconstitutional under both the Federal and State Constitutions if it required disclosure of attorney files and there was no waiver of any privilege as previously asserted. Although the aforementioned "reasons" were not denominated as "affirmative defenses" they were in fact affirmative defenses for denying the relief sought and the specious argument made by DONNER and MORBURGER that they were not denominated as affirmative defenses and therefore cannot be considered by the court is ridiculous.

THE ALLEGED FAILURE ON THE PART OF THE PETITIONERS TO PRODUCE ANY EVIDENCE OF PRIVILEGE

The RESPONDENTS claim that the PETITIONERS failed to produce any evidence of the privilege. The evidence that was submitted were the communications themselves which the trial court reviewed in camera and which could not have been reviewed by the RESPONDENTS without having destroyed the privilege. Additionally, the Third District received and reviewed the communications. They did not rule that the communications were not attorney-client communications they simply ruled that the attorney-client communications privilege did not apply.

The RESPONDENTS apparently believe that it is a prerequisite that the attorney file an affidavit verifying that the communications to the client which are in the record are meant to be confidential.

It is inconceivable to these PETITIONERS that RESPONDENTS could think otherwise since DONNER is suing the CITY in the

underlying matter through her attorney MORBURGER, and MURPHY and his LAW FIRM are representing the CITY, Hetherington and their insurer in the underlying matter. It seems apparent to anyone who could read the Response to the Order to Show Cause filed by the PETITIONERS that they, indeed, were claiming the privilege that it was intended to be confidential, was in fact confidential and found to have been confidential by the trial court when the records were submitted to that court. Any other reading of the response and the depositing of the files with the trial court for an in camera review is at odds with common sense.

In this particular issue the RESPONDENTS have raised the issue of alleged ex-parte contact on the merits between the PETITIONERS and the then presiding Judge Korvick. The PETITIONERS wish to point out to this Court that there was <u>never</u> any finding by the trial court, either the successor Judge in the trial court, or the Third District Court of Appeal, that there were any improper ex-parte communications on the merits of this cause. So that there is no misunderstanding, the PETITIONERS set forth below a direct quote from Judge Korvick from the hearing held on February 28, 1983 as follows:

> "All right. First of all, before we get started, I want to bring the record up to date. The Appellate Court has asked me to do an inspection of certain documents; so as to separate these documents, so as to comply with the previous order that I had entered in this case as to a past hearing; I received several large boxes of documents and I separated a good portion of them, however, included in these documents there were hand written notes and memos that were

> difficult to read and because of the many lawyers that have handled the case throughout the long period of time, there were other letters and memos where it was difficult to ascertain which side had written them and to whom. So, in order to properly complete the in camera inspection, I asked the attorney representing the City, which was Mrs. Carter, and Mr. Murphy, to come to my office, February 18th which is the last day the Appellate Court had given me to complete the sorting through of these numerous documents and they did, and I was finally satisfied after this in camera hearing, that I understood what all the papers were and what they purported to say, and that they were sorted out appropriately.
>
> I then examined them, again an order that had been previously provided to me, and I felt it complied with my ruling and I signed it and mailed it to all appropriate parties. I placed with the Clerk the sealed boxes, the ones that were the subject of my ruling, and I returned, to Mr. Murphy, the rest of the boxes that belonged to his firm at which point I felt I had complied with what the Appellate Court had asked me to do and looking in the file I noticed that there is a motion for recusal, and I have also recently received a supplemental motion for recusal from I think its Arthur Morburger and Miriam Donner."

There was never in fact, any ruling by the trial court or the Appellate Court that there was any improper ex-parte communications and there in fact were none. (See the testimony of Murphy and Carter taken before Judge Fredricka Smith on May 20, 1983.)

The recusal by Judge Korvick was not based upon the RESPONDENTS' claim of alleged ex-parte communications on the

merits, but was in fact, at the Judge's own insistence, when she stated at the February 28, 1983 hearing that

> "I want to avoid any appearance of impropriety, this is a civil case, it is not a criminal case, and just to avoid any appearance of impropriety I am going to recuse myself willingly, freely and voluntarily."

She did not recuse herself because of any alleged ex-parte communications on the merits nor did she recuse herself because DONNER and MORBURGER asked her to. She simply did so to "avoid any appearance of impropriety" because it came to her "attention" that DONNER had tried through the State Attorney's office to have her (Judge Korvick) arrested. (See February 28, 1983 transcript of hearing).

THE ALLEGED FAILURE TO ASSERT ANY CLAIM OF PRIVILEGE IN THE RESPONSE OF THE PETITIONERS TO THE INITIAL DEMAND FOR ACCESS TO ATTORNEY-CLIENT FILES AND THE ALLEGED FAILURE TO SEGREGATE RECORDS CLAIMED TO BE PRIVILEGED ALLEGEDLY FORECLOSING A BELATED CLAIM OF PRIVILEGE

MORBURGER wrote MURPHY and demanded his files with respect to his representation and his LAW FIRM's representation of the CITY and Hetherington in DONNER's false arrest suit prosecuted by MORBURGER her attorney. This demand was made on October 30, 1981. MURPHY denied this request on November 3, 1983 setting forth that the demand was denied in toto. It is acknowledged that MURPHY did not use the magic words "work product privilege and/or attorney-client privilege." Nor did EDELSTEIN use those magic words when he denied their demand for his records. It is

assumed and was assumed that MORBURGER, a licensed attorney, would assume and know from his own representation of clients in the past that his request was denied on the basis of work product and attorney-client privilege which attached to any attorney representing any client in any litigation in the State of Florida. MORBURGER most assuredly was aware that MURPHY was representing the CITY, Hetherington and their insurer in the lawsuit filed by DONNER and prosecuted by him. This argument that any such claim has to be asserted by using some magic words is absolutely devoid of merit.

Additionally, the records were in fact segregated when deposited with the court for the in camera inspection. Work product materials were separated from the attorney-client materials and the copies of the originals were separated from the originals deposited with the trial court. The copies were transmitted to the Appellate Court as sealed exhibits and are now before this Court as sealed exhibits.

THE ALLEGED WAIVER BY PETITIONERS OF THE CLAIM OF PRIVILEGE

The RESPONDENTS claim that the PETITIONERS affirmatively waived any claimed privilege at an October 22, and October 23, 1981 hearing in the underlying case, No. 76-8301. A review of the transcript of those two hearing dates does not reveal anything of that nature. It is hard to understand and follow the logic of the RESPONDENTS. They argue that in the underlying matter statements made by MURPHY at two hearings dated October

22, and October 23, 1981 somehow waived the work product and/or attorney-client privilege for documents which were never requested prior to October 22, or October 23, 1981. MORBURGER's demand letter for documents came seven (7) days after the October 22, and October 23, 1981 hearings. MORBURGER's letter which is in the record is dated October 30, 1981 and for the first time he makes demand for "attorneys files." Judge Korvick previously made a ruling that there had been no waiver of this privilege.

Additionally, Judge Smith's August 4, 1983 Order (RZ: 103) found that there was no waiver by any statements made by counsel. The Third District made no ruling that there was any waiver of the privilege. There was in fact no waiver and there could be no waiver when the demand for attorneys files came after the October 22, and October 23, 1981 hearings.

THE ALLEGED FRAUD BY THE PETITIONERS IN THE UNDERLYING CASE

DONNER and MORBURGER attempt to bootstrap their argument for production of attorneys files in this matter by claiming that an oversight on the part of a CITY employee certifying answers to Interrogatories with respect to liability insurance coverage and the amount thereof which apparently misstated the amount and extent of coverage is a sufficient reason to violate the claimed attorney-client privilege.

The trial court below found no fraud, the Third District Court of Appeal found no fraud and it is easy to understand why since the CITY, a large bureaucracy with many employees han-

dling or dealing with insurance on a day-to-day basis somehow overlooked the fact that there was an excess policy of insurance. MORBURGER and DONNER have not demonstrated their right to recover anything under the primary policy let alone the excess policy, and accordingly this issue of alleged fraud is specious. There is no legal reason why such an oversight should in any way require an attorney to reveal confidences or work product.

REMAINING ISSUES

The PETITIONERS will rely upon their initial brief on the merits to rebut all the remaining issues raised by DONNER and MORBURGER in their answer brief with one exception as noted below.

The RESPONDENTS claim that the PETITIONERS' failure to brief argument on the law the case somehow waives any challenge to the trial Judge's ruling and the Third District's ruling on the claimed work product exemptions. As the RESPONDENTS correctly point out there is no such thing as an assignment of error under the Florida Rules of Appellate Procedure. The PETITIONERS herein raised in the trial court the affirmative defense of work product which was initially upheld by the trial Judge and later overruled by a second trial Judge on a Motion for Rehearing. That Order was appealed to the Third District by the PETITIONERS in a timely manner. The PETITIONERS argued in their appeal in the Third District in their initial brief the issue of the error

is the Order denying the work product privilege and also requesting that the Third District certify the matter to this Court. This issue has been preserved for appeal and is before this Court. The PETITIONERS will not further burden this Court with the argument as to work product because said argument is adequately set forth in the initial brief in this matter, however, nowhere during the course of these proceedings have the PETITIONERS abandoned their argument that a work product privilege applies to this cause and that the Wait decision should be revisited by this Court.

CONCLUSION

Based upon the arguments set forth herein and the initial brief filed by the PETITIONERS it is respectfully requested that this Court do the following:

1. Answer the certified question in the affirmative.

2. Reverse the decision of the District Court of Appeal in the instant case and the case of Miami Herald Publishing Co. v. City of North Miami, Case No. 64,944.

3. Reverse the District Court of Appeal's Order disallowing the work product privilege and overrule and/or modify this Court's previous decision in Wait v. Florida Power & Light Co., 372 So.2d 420 (Fla. 1979) to allow public entities a work product privilege.

4. Order that the RESPONDENTS' original Petition for Writ of Mandamus be discharged and/or dismissed denying access to the requested documents.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the PETITIONER'S Brief was mailed this 30th day of July, 1984 to: MIRIAM DONNER, P. O. Box 1232, Hallandale, Florida 33009; ARTHUR MORBURGER, P. O. Box 1232, Hallandale, Florida 33009 and ROBERT D. PELTZ, ESQUIRE, Rossman & Baumberger, Attorneys for Dade County Trial Lawyers Association, 19 West Flagler Street, Suite 1207, Miami, Florida 33130.

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