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IN THE SUPREME COURT OF FLORIDA

FILED
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MAY 22 1991
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ANTHONY STEVEN FRIDOVICH,
et al.

Petitioner,

vs. CASE NO: 77,555

EDWARD FRIDOVICH,

Respondent.
_____/

RESPONDENT, EDWARD FRIDOVICH'S ANSWER BRIEF

May 20, 1991

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INTRODUCTION

This brief is filed on behalf of the respondent, Edward Fridovich ("Edward"), who was the plaintiff in the trial court. Edward's Third Amended Complaint (the "Complaint") was dismissed with prejudice by the trial court. Anthony Fridovich ("Anthony") is the petitioner. The other defendants in the trial court have not joined in Anthony's petition. In this brief, the remaining defendants shall be referred to collectively as the "Defendants."

STATEMENT OF THE CASE AND FACTS

Anthony's statement of the case and facts is accurate in its recitation of the procedural aspects of the case. However, Anthony omits many of the specific allegations of Edward's Complaint. Because the trial court disposed of this case on a motion to dismiss, a more specific review of the allegations in the Complaint is necessary to respond to the certified question and to address the other issue raised by Anthony.

Edward's Complaint, which is grounded in defamation, malicious prosecution, and intentional infliction of emotional distress, alleges a conspiracy among the Defendants to wrongly accuse Edward of murdering his father in order to obtain Edward's share of their father's estate. (R 54-64) Edward's sister, Erica, formerly a defendant in this action, swears to the truth of many of the allegations in the Complaint and the

pleading incorporates her sworn testimony. (R 9, 57-58)

In the Complaint, Edward alleges that Martin Fridovich, Edward's father, was accidentally shot and killed by Edward while Edward was cleaning his shotgun. (R 54) Law enforcement authorities extensively investigated the incident and concluded that Martin Fridovich ("Martin") died as a result of an accident. (R 54) No criminal charges were filed. (R 54)

Edward alleges further that Martin had named Edward as personal representative of his estate, which totals several million dollars. (R 55) The Defendants, some of Edward's siblings and in-laws, became dissatisfied with Edward's status as personal representative and as president of the estate's primary asset, Agri-Leis Corp. (R 55) Anthony, the petitioner in this Court, became furious that his younger brother had been named personal representative and initiated a conspiracy among the Defendants to have Edward removed as personal representative and deprive him of his share of the assets of the estate. (R 55) Anthony suggested to the other Defendants that they ensure that Edward would be convicted of intentionally murdering their father (a crime for which the penalty may be death). (R 55)

Edward claimed that, in furtherance of the conspiracy, Anthony and one other Defendant purchased a stress analyzer to determine which of the Defendants could lie the most convincingly. (R 55) One of the Defendants even traveled to New York to learn to use the machine and all of the Defendants

practiced lying while using the machine to determine which of the Defendants should make the false statements in furtherance of the conspiracy. (R 55) Anthony told Erica and her former husband that, because the other Defendants "failed" the lie detector test, Erica and her former husband should falsely state that Edward intended to kill their father. (R 55) Anthony induced Erica and her former husband to lie by promising them financial support. (R 55)

Next, Edward alleged that the Defendants executed an elaborate scheme to assure Edward's conviction. (R 56) According to the Complaint, Anthony pored over letters written by Edward in an attempt to locate tangible documents that could wrongly be used as evidence of Edward's intent to kill his father. (R 56) The Complaint even set forth an example in which Anthony discovered a letter that Edward had written to Erica in which Edward wrote that he wanted to "push it to finish it." (R 56) Although Anthony knew that this statement had nothing to do with their father, Anthony convinced Erica to falsely claim that the letter referred to Martin's death. (R 56)

Edward alleged that, ten months after Martin's death, and long after the investigation had been closed, Erica and her former husband voluntarily appeared before law enforcement authorities and falsely claimed that Edward plotted to kill his father. (R 56) The Defendants encouraged the authorities to initiate a new investigation into the death and to charge Ed-

ward with first-degree murder. (R 56) As a direct result of the Defendants' lies, the Broward County State Attorney's office reopened the case and charged Edward with first-degree murder. (R 56)

In the Complaint, Edward listed several of the false statements that Erica made to investigators at the behest of the other Defendants. (R 56-57) Those statements included:

1. That Edward told her on numerous occasions that he planned to kill his father and that the murder was his "fantasy;" (R 56)

2. That Edward told her that he planned to purchase explosives so that he could kill Martin in an automobile explosion; (R 56)

3. That Edward offered Erica's former husband twenty thousand dollars to kill Martin or to have Martin killed; (R 57) and

4. That Edward told her that he would kill their father in a gun "accident." (R 57)

Edward also claimed that Erica's former husband, at the behest of the other Defendants, made similar false statements to authorities. (R 57) Moreover, both Erica and her former husband falsely testified at Edward's trial in an attempt to frame Edward in Martin's murder. (R 57) In addition, the Defendants gave false statements to the Assistant State Attorney, Edward's attorney, and in conjunction with a civil wrongful death action. (R 57)

Moreover, Edward alleged that, when it became clear that Edward probably would be acquitted of murder, one of the Defendants attempted to hire a professional killer to murder Edward. (R 58) Fortunately, this plan was thwarted when that Defendant attempted to hire an undercover police officer rather than an actual hitman. (R 58)

Edward alleged that Erica later admitted in a sworn statement that her previous statements about Edward's intent in killing his father were lies. (R 9, 57-58) Edward attached Erica's sworn recantation to the Complaint. (R 9, 57-58) In her 54-page sworn statement, Erica stated that the whole family, including all the Defendants, were involved in the conspiracy to frame Edward. (R 9)

These facts, although nearly unfathomable in their depth of greed and hate, were alleged by Edward in the third amended complaint and were verified by Erica in her 54-page statement. However, the trial court dismissed all of Edward's claims, "with prejudice and without leave to amend." Anthony's petition accurately memorializes the procedural history thereafter.

SUMMARY OF THE ARGUMENT

The opinion of the Fourth District Court of Appeal created an irreconcilable conflict among the District Courts with regard to the law of privilege relating to defamation actions. The Fourth District's opinion ignores established Florida law

that unsworn statements made to an investigatory officer are not absolutely privileged. Rather, those statements enjoy only a qualified privilege so that a defamation action may be grounded on those statements if the statements were made with actual malice. This law serves the sound policy that, when the criminal penalties for perjury are unavailable to deter malicious and harmful behavior, the law of torts should step in to serve that function and to provide the injured party an opportunity to seek redress for his damages. Therefore, this Court should exercise its jurisdiction to resolve the conflict created by the Fourth District's opinion and should answer the certified question in the negative.

Additionally, the Fourth District Court left open the question of whether any privilege accorded statements for purposes of a defamation claim applies also to other torts, including a claim for intentional infliction of emotional distress. The Fourth District Court reversed the trial court's dismissal of Edward's claim for intentional infliction of emotional distress, thereby implying that any privilege does not prevent Edward's emotional distress claim. This implication comports with modern law regarding privilege. Because Edward's emotional distress claim is founded on a conspiracy that reaches much farther than the Defendants' institution of judicial proceedings and that is evidenced by facts outside, as well as inside, that proceeding, the Fourth

District Court correctly reversed the trial court's dismissal of Edward's emotional distress claim.

I. THIS COURT SHOULD EXERCISE ITS JURISDICTION TO REVIEW THE OPINION OF THE FOURTH DISTRICT COURT OF APPEAL

The Fourth District Court of Appeal upheld the trial court's dismissal of Edward's claims for defamation and malicious prosecution and reversed the dismissal of Edward's claims for intentional infliction of emotional distress. Affirming the dismissal of the defamation count, the Fourth District Court held that an absolute privilege protected the statements that Edward's siblings made to the authorities. However, perhaps recognizing that this ruling conflicts with established Florida law, the Fourth District certified to this Court the question of whether statements made to the authorities preliminary to an investigation are absolutely privileged.

This Court should accept jurisdiction to resolve the conflict that was created by the Fourth District's opinion. The Fourth District's opinion protects parties who maliciously report intentional falsehoods to authorities and purposefully cause disaster and even death to their victims. This result is directly contrary to the more reasonable result reached by several of Florida's other courts that have held that statements preliminary to an investigation are only qualifiedly privileged--in other words, the statements are privileged if

they were made without malice. See pp. 8-16, infra.

Moreover, although the Fourth District's opinion presents no conflict with established law regarding intentional infliction of emotional distress, the opinion leaves unanswered the issue of whether an absolute or qualified privilege applies also to the intentional infliction of emotional distress issue. That question was not explicitly addressed by the District Court (although, by reversing the dismissal of the count for intentional infliction of emotional distress, the Fourth District impliedly concluded that any absolute privilege will not bar that claim). This case presents this Court with the opportunity to (1) resolve the certified question and to remove the conflict created by the Fourth District's opinion and (2) determine whether any privilege applicable to a defamation claim applies also to other torts.

II. UNDER FLORIDA LAW, STATEMENTS MADE TO LAW ENFORCEMENT OFFICERS ARE NOT ABSOLUTELY PRIVILEGED BUT RATHER ARE MERELY QUALIFIEDLY PRIVILEGED

Unsatisfied with a qualified immunity that would protect him from a defamation action if he acted in good faith, Anthony insists that the Florida courts cloak him with an absolute privilege for uttering false and malicious statements to the police (or causing those statements to be made by others) regarding Edward's state of mind at the time of his father's death. However, the Florida courts have never granted absolute immunity to a defendant accused of the type of

activity that Edward alleged in the Complaint. Rather, the Florida courts safeguard potential defamation defendants with a qualified privilege that freely allows a party to report suspected or known criminal conduct, so long as the report is made in good faith.

Claiming that several controlling cases were "wrongly decided," Anthony nonchalantly dismisses several cases that are directly relevant to the privilege issue. The most compelling case on this issue is the recent case of Anderson v. Shands, 570 So.2d 1121 (Fla. 1st DCA 1990), a case nearly factually identical to this case.

In Anderson, the appellant, who had been convicted of an unspecified offense, sued a prosecution witness, claiming that the witness falsely and maliciously accused the appellant of committing a criminal act. The trial court dismissed the complaint with prejudice. However, the Florida First District Court of Appeal reversed, holding that it was error for the trial court to dismiss the complaint. The court stated:

> As for the statements made during the police investigation which formed the basis of Count I, they are subject to a qualified rather than an absolute privilege. Liability, therefore, depends upon whether actual malice is established.

570 So.2d at 1122 (citation omitted). Thus, the Anderson court recognized that Florida law does not protect defamatory statements made during a police investigation if those statements are made with malice.

Similarly, in Ridge v. Rademacher, 402 So.2d 1312 (Fla. 3rd DCA 1981), the Third District Court reversed the dismissal of a slander complaint, succinctly holding:

> [A]n unsworn statement to a municipal police officer in regard to an alleged crime is not accorded an absolute privilege which will bar, as a matter of law, a subsequent action for slander based on such a statement, particularly when it is alleged to have been maliciously made. Such a statement partakes of a qualified privilege and is a mixed question of law and fact, depending on the actual malice established.

402 So.2d at 1312 (citations omitted)(emphasis added).

Anthony attempts to refute Ridge, by arguing that it conflicts with the earlier Third District case of Buchanan v. Miami Herald Publishing Co., 206 So.2d 465 (Fla. 3rd DCA 1966) and the later Third District case of Garcia v. Walden Electronics, Inc., 563 So.2d 723 (Fla. 3rd DCA 1990). To the extent that Ridge conflicts with the earlier case, Ridge, of course, is controlling because it was decided most recently. However, neither Buchanan nor Garcia is inapposite to Ridge.

In Buchanan, the allegedly defamatory statements were made under oath to a grand jury in connection with that bodies investigation. Therefore, unlike the Defendants in this case (who made their statements in connection with a police non-grand jury investigation), the Buchanan defendant could be subject to the criminal penalties for perjury if he gave false testimony.

In Garcia, the allegedly defamatory statements were made by a former employer to a potential employer, which happened

to be the Metro-Dade Police Department. The Third District Court affirmed a summary judgment, noting, "Certainly there was no showing of maliciousness to nullify a qualified privilege." 563 So.2d at 725. Thus, Garcia supports Edward's argument that his siblings' statements to the police were only qualifiedly privileged. Although the Garica court ultimately determined that the plaintiff failed to prove malice, the trial court did not dismiss the complaint but rather allowed the plaintiff's defamation charge to stand until the defendant proved he was entitled to summary judgment due to the lack of proof.

Moreover, in Pledger v. Burnup & Sims, Inc., 432 So.2d 1323 (Fla. 4th DCA 1983), review denied 446 So.2d 99 (Fla. 1984), the court held that statements preliminary to (rather than in the due course of) judicial proceedings are not absolutely privileged. The Pledger court reversed the trial court's dismissal of a cause of action on the basis of absolute privilege, noting that presuit activities are absolutely privileged only when they are necessarily preliminary to judicial proceedings. Explaining what constitutes "necessarily preliminary to judicial proceedings," the Pledger court referred to "actions brought under the Florida Tort Claims Act, landlord-tenant actions, certain agricultural claims, various actions brought under the Uniform Commercial Code, insurance claims, and other actions where the parties have agreed to a notice requirement as a condition precedent to suit." 432

So.2d at 1326 (footnote omitted). These examples all share a requirement, either statutory or contractual, that a party provide certain notice before initiating a judicial proceeding. In this case, there existed no requirement that the petitioners publish the statements that they did as a condition precedent to a judicial proceeding. Indeed, the State had already conducted a complete investigation and concluded that no charges should be brought.

The Complaint filed by Edward does not allege that the defamatory statements were "necessarily preliminary to" or "in the due course of" the judicial proceeding. Indeed, the Complaint alleges just the opposite--that the defendants first uttered their defamatory statements "long after the investigation had been closed" (R 56) and that "Michael Giannoutos's voluntary statements to the authorities, like Erica Fridovich's, were false and were not part of any proceeding or ongoing investigation." (R 57) No absolute privilege appears on the face of the Complaint and the dismissal, premised on absolute privilege, was improper.

At best, the defendants' statements are qualifiedly privileged, which is, of course, an affirmative defense that the Complaint need not anticipate and refute. See Lomelo v. Schultz, 422 So.2d 1050, 1051 (Fla. 4th DCA 1982)("The complaint need not anticipate affirmative defenses.") In any event, a plaintiff may avoid the privilege defense by showing actual malice on the part of the defendants. Edward's Com-

plaint refuted the existence of a qualified privilege by alleging that the defendants made the statements maliciously.

Anthony fails to cite a single Florida decision that justifies the application of an absolute privilege under the circumstances alleged in Edward's Complaint. Anthony's reliance on Robertson v. Industrial Insurance Co., 75 So.2d 198 (Fla. 1980), and Myers v. Hodges, 44 So. 357 (Fla. 1907), is sorely misplaced. The issues before this Court in Robertson were,

> [W]hether the proceeding before the Florida Insurance Commissioner was quasi-judicial . . . in nature; and if [so], whether or not the rule of absolute privilege . . . as pertaining to judicial proceedings extends to proceedings before an administrative officer when the particular function being performed is quasi-judicial in character.

75 So.2d at 199. The case did not address whether unsworn statements made to the police to induce an investigation are absolutely privileged.

Myers is also inapposite to the instant case. In Myers, the allegedly defamatory statements were made in a complaint filed in the circuit court. The issue addressed by the Myers Court was whether defamatory statements made in a pleading are absolutely privileged. The Myers Court determined that defamatory words made in the due course of a judicial proceeding are absolutely privileged only if the words are relevant or material to the subject of the pleading. Although Anthony suggests that the Myers Court intended this holding to reach statements made during the preliminary investigation of a matter, nothing in Myers intimates that the holding reaches any

further than statements made in a pleading filed in a court. Indeed, even if the Myers Court had addressed statements made outside a pleading, any such remarks would constitute mere dicta because the only issue before the Court concerned defamatory statements made in a pleading.

Similarly, Ange v. State, 123 So. 916 (Fla. 1929), also relied on by Anthony, concluded that an absolute privilege protects statements made in "proceedings before a competent court or magistrate in the due course of law or the administration of justice which is to result in any determination or action by such court or officer." Of course, Edward did not allege in his Complaint that his siblings' defamatory statements were made in any court or before any magistrate. Rather, Edward claimed that his siblings' statements were made outside the judicial process long after an investigation was concluded.

Lacking any support from the Florida courts for his claim that his and his siblings' defamatory statements were absolutely privileged, Anthony ventures outside the state in an attempt to buttress his argument.[1] To the extent that any of the cases cited by Anthony hold that preliminary statements to investigatory officers are absolutely privileged, those cases

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[1] Anthony also attempts to invoke the sympathy of the Court by repeatedly referring to Edward as his "father's killer." Anthony even claims that Edward was convicted of "intentionally killing his father by proof beyond a reasonable doubt." Of course, Edward was acquitted in his first trial of murder and was convicted only of manslaughter in his second trial, a crime for which no intent is necessary.

directly conflict with governing Florida law as expressed in Ridge v. Rademacher and Anderson v. Shands, supra. On the other hand, many other states, like Florida, have decided not to insulate malicious wrongdoers with an absolute privilege. For example, Grossman v. Fieland, 483 N.Y.S.2d 735, 736 (N.Y. App. Div. 1985), holds:

> Although defendant's statements were qualifiedly privileged, because they were made to district attorneys, a review of the record indicates that plaintiff overcame this privilege by proving that the statements were false, that defendant had knowledge of their falsity, and that defendant was motivated by ill-will toward the plaintiff.

Similarly, Packard v. Central Maine Power Co., 477 A.2d 264, 268 (Me. 1984), holds:

> Communications made to law enforcement officials for the purpose of aiding in the detection of crime are privileged if made in the belief, based on reasonable grounds, that they are true.

Paramount Supply Co. v. Sherlin Corp., 16 Ohio App. 3rd 176, 475 N.E.2d 197 (Ohio App. 1984), provides:

> Private citizens are qualifiedly privileged to give information to proper governmental authorities for the prevention or detection of crime. Popke v. Hoffman, 1926, 21 Ohio App. 445, 153 N.E. 2d 248; Prosser, Law of Torts (4th Ed. 1971) 791, Section 115; Restatement of the Law, 2d, Torts (1977) 281, Section 598. In that situation, no recovery can be made for defamation absent a showing that the speaker was moved by actual malice.

See also Crump v. Crump, 393 So.2d 337, 339 (La. App. 1980)("Remarks made in good faith setting forth charges that are well-founded and have firm factual basis are clearly privileged.")

These jurisdictions share the Florida courts' belief that malicious and false statements should not be absolutely protected. This Court first expressed the concept of qualified privilege in Coogler v. Rhodes, 21 So. 109, 112 (Fla. 1897), stating:

> Where a person is so situated that it becomes right, in the interests of society, that he should tell to a third person certain facts, then, if he bona fide, and without malice, does tell them, it is a privileged communication.

The converse is equally true. If a person acts with malice and in a manner that he knows is not bona fide, as Edward has alleged of his siblings, no privilege should inure.

Within the confines of a judicial proceeding, the laws of perjury are available to squelch malicious behavior. Therefore, an absolute privilege for statements made within the proceedings will not impede the truth. However, outside the sanctity and judicial oversight of a formal proceeding, only the law of torts is available to both repress defamatory statements and redress injuries that result from those who are not deterred. The Florida courts have refused thus far to grant intentional wrongdoers absolute safe haven. This Court should not retreat from this principle and, therefore, should answer the certified question in the negative.

III. Absolute Privilege Does Not Protect Anthony or the Other Defendants from an Action for Intentional Infliction of Emotional Distress.

Anthony's argument regarding Edward's claim for intentional infliction of emotional distress is faulty for two reasons.[2] First, assuming arguendo that Anthony's and his siblings' statements are privileged, Anthony and the other Defendants are protected only by a qualified privilege, as discussed above. Because the facts alleged by Edward and verified by Erica evidence intentional and malicious behavior by the Defendants, Edward's claim for intentional infliction of emotional distress should not have been dismissed.

Moreover, even if the Defendants' statements to the investigatory officers are absolutely privileged for purposes of Edward's defamation action, that privilege does not necessarily extend to other torts that Edward may assert. As evidenced by Anthony's heavy reliance on California cases, the California courts have been the most active in addressing privilege issues in defamation and intentional infliction of emotional distress cases. A recent California case explains that, when certain torts are asserted, statements made in the course of judicial proceedings are not privileged.

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[2] In the Fourth District Court of Appeal, Anthony and several of the other defendants had the audacity to claim that the facts alleged in Edward's Complaint are not sufficiently outrageous to support a claim for intentional infliction of emotional distress. Anthony has apparently recognized the offensiveness of this claim and has now chosen to rely on a claim that the purported absolute privilege also precludes Edward's emotional distress count.

In Durant Software v. Herman, 257 Cal. Rptr. 200, 209 Cal. App. 3d 258 (Cal. App. 1989), the plaintiff, a judgment creditor, alleged that an attorney and several other defendants conspired to fraudulently convey the assets of a judgment debtor. The plaintiff sought to set aside the fraudulent conveyance and sought damages from the attorney. The plaintiff alleged that the attorney, acting in furtherance of the conspiracy, destroyed evidence and induced a party to commit perjury during a debtor's examination. The attorney moved for summary judgment, arguing that, even if the allegations were true, his conduct in the preparation for and participation in the debtor's examination were absolutely privileged pursuant to a California statute that creates an absolute privilege for statements made in any "legislative or judicial proceeding or in any other official proceeding authorized by law." The trial court agreed with the attorney and entered the summary judgment.

On appeal, the California Second District Court conducted an extensive and scholarly review of the scope of the statutory privilege. The court noted that, although the statutory privilege is found in the chapter regarding defamation, California courts have also applied the privilege to other causes of action. However, the Durant court declined to blanket all statements made in a judicial proceeding with an absolute privilege with regard to all torts. The Durant court stated:

> The privilege applies when the damages grow out of judicial proceedings. It is thus necessary to determine the relationship be-

> tween the conduct complained of and the causes of action alleged. We must "draw a careful distinction between a cause of action based squarely on a privileged communication, such as an action for defamation, and one based on an underlying course of conduct evidenced by the communication."

257 Cal. Rptr. at 204 (citations omitted). The court also noted that, so long as the alleged conduct is something other than the communication itself, the publication may be used as evidence bearing on the tortious nature of the conduct:

> Where the conduct is not the "nucleus" of the cause of action, however, and is offered merely as evidence of a tort, the privilege does not operate.

257 Cal. Rptr. at 206. The court explained that the underlying wrongs for which the plaintiff sought redress were the allegedly fraudulent conveyances, which occurred long before the debtor's examination. Therefore, the later communication during the debtor's examination was not central to the underlying wrong but was merely evidence that the attorney had participated in the fraudulent transaction.

Thus, pursuant to Durant, so long as the alleged tort results from something other than the privileged communication, that communication may be used as evidence of the tort. In this case, Edward's claim for intentional infliction of emotional distress is premised on a host of facts, some of which include his siblings' statements to police officers. However, Edward's claims extend beyond the mere institution of criminal proceedings. Edward seeks redress for his siblings' conspiracy to remove him as personal representative of his

father's estate and, more importantly, to remove him permanently from this world. Although the institution of legal proceedings was evidence of and in furtherance of this plan, Edward's siblings also took other actions outside the judicial process in furtherance of their conspiracy. For example, as a part of the conspiracy, one of the Defendants attempted to hire a professional killer to murder Edward. Thus, Edward was subjected to threats on his life instituted by the Defendants on a number of fronts. As the Fourth District Court of Appeal determined, these facts are sufficient to sustain a claim for intentional infliction of emotional distress.

In sum, even if the statements that Edward's siblings made to the police are qualifiedly or absolutely privileged for purposes of the defamation claim, those same statements are mere evidence of Edward's siblings' intentional infliction of emotional distress. Therefore, Edward's claim for intentional infliction of emotional distress stands independent of Edward's defamation claim.

CONCLUSION

For the reasons discussed above, the certified question should be answered in the negative and the Fourth District Court's reversal of the trial court's dismissal of the intentional infliction of emotional distress claim should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by United States mail this 20th day of May, 1991, to Jeffery D. Fisher, Esq., 175 Bradley Place, Palm Beach, Florida 33480.

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