SUPREME COURT OF FLORIDA

CASE NO. 77,555

ANTHONY STEVEN FRIDOVICH,)
)
Petitioner,)
)
v.)
)
EDWARD FRIDOVICH,)
)
Respondent.)

PETITIONER'S INITIAL BRIEF ON THE MERITS TO REVIEW A DECISION OF THE FOURTH DISTRICT COURT OF APPEAL

Respectfully submitted,

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I

STATEMENT OF THE CASE

A. Introduction

The factual allegations of Edward Fridovich's third amended complaint are quoted verbatim in the fourth district's opinion below. Therefore, the statement of facts shall be brief. The court is also invited to examine the three reported decisions on Edward Fridovich's criminal trials. See Fridovich v. State, 562 So.2d 328 (Fla. 1990); Fridovich v. State, 537 So.2d 648 (Fla. 4th DCA 1989); Fridovich v. State, 489 So.2d 143 (Fla. 4th DCA 1986), review denied, 496 So.2d 142 and 500 So.2d 545 (Fla. 1986).

B. Facts

On December 4, 1981, Edward Fridovich shot his father, Martin Fridovich, in the head with a shotgun. Local law enforcement agencies investigated the shooting, concluded that it was an accident and closed their investigation.

Several months later, some of the defendants below, allegedly at petitioner's behest, went to the police and the state attorney's office with evidence that Edward had intentionally killed Martin Fridovich. Acting on this information, the investigation was reopened. Ultimately, the police and the Broward State Attorney's office found these accounts credible and obtained an indictment against Edward Fridovich for the first degree murder of his father.

Edward Fridovich was tried and convicted of manslaughter on the indictment, but the fourth district reversed his conviction because potentially exculpatory evidence was excluded at trial. Fridovich v. State, 489 So.2d 143 (Fla. 4th DCA 1986). Between the first and second trials, Edward's sister, Erica, recanted her testimony. Erica claimed her testimony was the product of coercion and part of a conspiracy orchestrated by petitioner to have Edward convicted of murder. The purported motive for the conspiracy was to disinherit Edward and remove him as personal representative of Martin Fridovich's estate. In spite of the recanted testimony, on retrial, Edward was again convicted of manslaughter in the shooting death of his father. The fourth district affirmed the conviction, but certified a question to this court regarding whether the statute of limitations had run. Fridovich v. State, 537 So.2d 648 (Fla. 4th DCA 1989). This court affirmed Edward's conviction. Fridovich v. State, 562 So.2d 328 (Fla. 1990).

C. Procedural History

The original civil complaint was filed in Broward County Circuit Court on February 2, 1988 (R.1).[1] On March 25, 1988, the first amended complaint was served, which complaint contained four (4) counts encaptioned as follows:

I. Civil Conspiracy;

II. Libel and Slander;

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[1] Citations to the record on appeal will be designated as "R."

III. Intentional Infliction of Emotional Distress; and

IV. Punitive Damages

(R. 10-16).[2] Essentially, respondent plead that his manslaughter conviction exonerated him from the allegation he murdered his father. Respondent asserted that the conduct of petitioner and the other defendants below in, inter alia, accusing respondent of murder to law enforcement authorities, was tortious and actionable.

Petitioner moved to dismiss the amended complaint on numerous grounds, which motion was granted by the Honorable Estella May Moriarty during a hearing held on March 13, 1988. (R. 32-34). The court's order granted respondent twenty (20) days to file his second amended complaint (R. 38).

Respondent's second amended complaint was filed on April 3, 1989. This complaint contained six (6) counts encaptioned as follows:

I. Defamation;

II. Conspiracy to Commit Defamation;

III. Intentional Infliction of Emotional Distress;

IV. Conspiracy to Intentionally Inflict Emotional Distress;

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[2] For reasons that are unclear from the record, petitioner was never served with the original complaint. The amended complaint was served on him nine (9) months after it was filed, in or about December, 1988.

V. Malicious Prosecution; and

VI. Conspiracy to Effect a Malicious Prosecution.

(R. 39-45). In response to the second amended complaint, petitioner once again moved to dismiss on numerous grounds. (R. 49-51). On April 25, 1989, an order was entered dismissing with prejudice the malicious prosecution counts (V and VI) and dismissing the remainder of the complaint with leave to amend. (R. 53).

Edward's third amended complaint was filed May 10, 1989 containing four (4) counts:

I. Defamation;

II. Conspiracy to Commit Defamation;

III. Intentional Infliction of Emotional Distress; and

IV. Conspiracy to Intentionally Inflict Emotional Distress.

(R. 54-64). Petitioner's motion to dismiss the third amended complaint was substantially identical to the previously filed motions to dismiss directed to these counts. (R. 65-67). After an extensive hearing on June 7, 1989, the court dismissed the third amended complaint with prejudice and without leave to amend. (R. 72).

On appeal, the fourth district affirmed the dismissal with prejudice of the malicious prosecution claim and the

defamation claim (with one small exception not relevant here). Dismissal of the defamation count was affirmed based on a finding that the statements made to law enforcement authorities were absolutely privileged. The fourth district certified to this court a question of great public importance as follows:

> Are statements made by a private individual to an investigating officer or a prosecutor preliminary to the filing of a criminal charge absolutely privileged so as to avoid liability for defamation even when the statements are false and made with actual malice?

The fourth district reversed the dismissal of the intentional infliction claim and remanded it to circuit court.

Petitioner moved for rehearing, rehearing en banc and certification of the question of whether the absolute privilege in defamation actions also applies to intentional infliction claims. The fourth district denied these motions. After respondent announced his intention not to seek review in this court of the dismissal of the defamation and malicious prosecution claims, petitioner invoked the court's jurisdiction.

II

SUMMARY OF THE ARGUMENT

This court should exercise its discretion to decide this appeal. The certified question presents a matter of great public importance about which the district courts of appeal disagree.

This court's precedent, public policy and scholarly commentary all support application of an absolute privilege. This court has recognized an absolute privilege where communications to law enforcement officials were made in the course of justice. There is no more important step in the criminal justice system than the citizen's initial complaint. Without an absolute privilege, law enforcement activities will suffer as citizen cooperation will be chilled.

Application of the same privilege to intentional infliction claims is especially warranted where the claim arises out of the publication of allegedly defamatory statements. Refusal to apply the privilege to intentional infliction claims will eviscerate the privilege in defamation actions, because plaintiffs can easily plead their case to avoid the privilege. The overwhelming weight of authority supports application of the same privilege to both torts.

III

ARGUMENT

A. The Court Should Exercise Its Jurisdiction To Review The Fourth District's Decision

Petitioner has invoked this court's jurisdiction on three (3) separate grounds:

1. The fourth district's opinion certified a question of great public importance to this court;

2. The fourth district's application of an absolute privilege to statements made to law enforcement authorities preliminary to the filing of criminal charges conflicts with decisions of the first and third districts. See Anderson v. Shands, 570 So.2d 1121 (Fla. 1st DCA 1990); Ridge v. Rademacher, 402 So.2d 1312 (Fla. 3d DCA 1981); and

3. The fourth district's recognition of an intentional infliction of emotional distress claim based on allegedly defamatory statements that are privileged, conflicts with decisions of the fifth district. See Boyles v. Mid-Florida Television Corp., 431 So.2d 627 (Fla. 5th DCA 1983) aff'd. 467 So.2d 282 (Fla. 1985); Ford v. Rowland, 562 So.2d 731 (Fla. 5th DCA 1990). See also, Southland Corp. v. Bartach, 522 So.2d 1053 (Fla. 5th DCA 1988); rev. dismissed, 531 So.2d 167 (Fla. 1988).

There are multiple, compelling reasons for the court to exercise its jurisdiction to review the fourth district's decision. The court should answer the fourth district's certified question in the affirmative and resolve the conflict between the districts on

the absolute privilege issue. A ruling by this court will have the salutary effect of promoting uniformity of decisions throughout the state. An individual's exposure to tort liability for statements made to law enforcement authorities prior to the filing of criminal charges should not depend on which judicial district has jurisdiction. More importantly, this court's ruling will settle the issue of whether such statements, as a matter of public policy, are protected regardless of motive. Resolution of this question of great public importance will undoubtedly impact on the public's participation in law enforcement activities.

Similar considerations warrant review of the fourth district's refusal to apply the privilege governing defamation claims to claims of intentional infliction of emotional distress. The fourth district's decision undermines the privilege's protection and thereby erodes its public policy objectives. The decision elevates form over substance by exposing individuals to liability for intentional infliction of emotional distress when the conduct giving rise to the claim is nothing more than publication of allegedly defamatory words of a privileged nature. The fourth district's inconsistent application of the privilege doctrine to different torts will chill law enforcement activities.

Finally, the court should exercise its jurisdiction to terminate the efforts of a felon to collaterally attack in a civil proceeding the factual basis for his conviction. According to the decisional law of this court and the district court of appeal, respondent received a fair trial. Nevertheless, this twice

convicted killer of his father has been afforded an opportunity to seek damages from those who brought his criminal conduct to the attention of law enforcement authorities.[3] Florida's long-standing refusal to permit the estoppel doctrine from barring civil proceedings subsequent to a criminal conviction justifies adoption of an absolute privilege standard.[4]

B. Statements Made to Law Enforcement Authorities Preliminary To The Filing Of Criminal Charges Should Be Absolutely Privileged Regardless Of The Declarant's Motivation

This court's precedent, public policy and scholarly commentary support application of an absolute privilege to the conduct at issue in this case. Absent extensive protection from the threat of lawsuits, public participation in the criminal justice system will be discouraged.

The fourth district's ruling that an absolute privilege protects statements made to the police and the state attorney's office rested on this court's decision in Robertson v. Industrial

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[3] Put another way, respondent alleges that but for the defendants' conduct, he would neither have been arrested nor tried and convicted. This allegation is presumed true for the purpose of a motion to dismiss. This court should invoke its discretionary jurisdiction to resolve the issue of whether, as a matter of law and public policy, plaintiffs such as Edward Fridovich should be permitted to sue for damages under these circumstances.

[4] In Trucking Emp. of N. Jersey Welfare v. Romano, 450 So.2d 843 (Fla. 1984), this court refused to allow the use of offensive collateral estoppel in a civil case to establish the facts proven by a criminal conviction.

Insurance Company, 75 So.2d 198 (Fla. 1954). Robertson involved a defamatory letter sent to the insurance commissioner requesting a hearing to determine whether Robertson's license as an insurance agent should be revoked. As a result of the letter, a hearing was convened and Robertson's license was revoked.

Rather than challenge the revocation, Robertson brought an action seeking damages for libel and slander based on the statements contained in the letter to the insurance commissioner, as well as the testimony given at the hearing. The trial court dismissed the action, finding that an absolute privilege applied to both the statements in the letter, and the testimony given at the hearing.

In affirming the trial court's dismissal, this court acknowledged that "defamatory words published in the course of judicial proceedings are absolutely privileged, if they are relevant and material to the cause or subject of inquiry . . ." Id. at 199. This court further held that the "privilege . . . arises immediately upon the doing of any act required or permitted by law in the due course of the judicial proceedings or as necessarily preliminary thereto." Id. citing Ange v. State, 98 Fla. 538, 123 So. 916, 917 (1929) (emphasis in original).

Robertson is premised on sound public policy considerations. Since the judicial process relies heavily on public participation, "[a]ll persons connected with the proceedings [should] be free from fear of being called upon to defend suits arising as a result of derogatory disclosures . . ." Id. at 200.

This court expressed its concern "that to permit such suits would result in a circuitry of actions by which the same issues tried in the judicial proceeding could be retried." Id. "A judgment for the plaintiff would be, in effect, a determination that the insurance commissioner was wrong." Id.

Although the fourth district relied primarily on Robertson, other precedent supports application of an absolute privilege in the instant case. The court's initial recognition of an absolute privilege in defamation actions came in Myers v. Hodges, 53 Fla. 197, 44 So. 357 (1907). In a thorough and scholarly rendition of the history of this area of the law, this court found "the overwhelming weight of authority" supported the rule that "no action is maintainable against a party for words spoken in the course of justice, if they be relevant to the matter in issue." Id. at 360.[5]

Among the "weighty reasons" for application of the absolute privilege doctrine is "that it is to the interest of the public that great freedom should be allowed in complaints and allegations with a view to have them inquired into . . ." Id. Abuse of the privilege could be punished by contempt of court or, in the case of defamatory words, "wholly and entirely outside of, and having no connection with, the matter of inquiry," a civil action for defamation would then properly lie. Id.

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[5] A close examination of the opinion indicates the words "course of justice" mean words spoken either in a judicial proceeding or preliminary thereto. What could be more important to the "course of justice" than citizens providing information leading to the arrest and conviction of a felon?

This court also considered the issue presented by the instant case in Ange v. State, 98 Fla. 538, 123 So. 916 (1929). In Ange, the defendant published defamatory words of and concerning the plaintiff to the county judge for the purpose of "obtain[ing] a warrant against the party with reference to whom the statement was made." Id. at 917. A portion of the defendant's statement to the judge was heard by the sheriff, who testified against the defendant at trial.

In reversing Ange's conviction for criminal defamation, this court explained that

> [t]his rule of privilege as applied to statements made in the course of judicial proceedings is not restricted to trials of actions but includes proceedings before a competent court or magistrate in the due course of law or the administration of justice which is to result in any determinations or action by such court or office.

Id. at 917 (emphasis supplied).[6]

These decisions, taken together, support the fourth district's application an absolute privilege to the facts of this case. Citizens' complaints to law enforcement authorities prior to the filing of criminal charges are an essential element of the

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[6] Again this court noted that an individual unjustly accused was not without a remedy, i.e., malicious prosecution. Id. at 917-18. Of course, Edward could not prevail on a malicious prosecution theory because he was convicted of manslaughter in the death of his father.

administration of justice.[7] Such statements must, as a matter of public policy, be absolutely privileged.

A strong majority of courts have furthered these public policy considerations by recognizing an absolute privilege for statements made preliminary to the filing of a criminal complaint.[8] See Vogel v. Grauz, 110 U.S. 311, 314, 4 S.Ct. 12, 13, 28 L.Ed. 158 (1883) (complaint made by victim of theft to state attorney to instigate prosecution absolutely privileged); General Electric Co. v. Sargent & Lindy, 916 F.2d 1119, 1125-27 (6th Cir. 1990) (collecting cases in civil context); Rauh v. Coyne, 744 F.Supp. 1186, 1193 (D. D.C. 1990) (statements made to the police for the purpose of extorting money held absolutely privileged); Ducosin v. Mott, 292 Ore. 764, 642 P.2d 1168 (1982); Wells v. Toogood, 165 Mich. 677, 131 N.W. 124 (1911); Starnes v. International Harvester Co., 184 Ill. App. 3d 199, 539 N.E. 2d 1372, 1374-75 (Ill. 4th Dist. 1989) (collecting cases); Hott v. Yarbrough, 112 Tex. 179, 245 S.W. 676 (Comm. App. 1922).

The New Hampshire Supreme Court in McGraham v. Dahar, 119 N.H. 743, 408 A.2d 121 (1979) cogently explained the reasons for recognizing an absolute privilege:

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[7] The Florida Department of Law Enforcement, in its most recent Uniform Crime Report, states that a basic source of information about crime, is citizen complaints. FDLE, 1989 Uniform Crime Reports for Florida, p.3 (1990).

[8] In McNayr v. Kelly, 184 So.2d 428, 431 (Fla. 1966), this court noted that it has always followed the majority rule in the area of privilege.

> In the context of this case, determination of the scope of the privilege to be recognized requires a balancing of two important principles: the right of an individual to enjoy an unsoiled reputation, and the public interest in free and full disclosure of facts pertinent to judicial proceedings.
>
> Discussions with attorneys and investigating officers, and even the filing of pleadings frequently and necessarily occur at a time when the declarant may not have access to information verifying or disproving the statements. The purpose of a judicial proceeding is to test the truth or falsity of allegations of criminal or wrongful conduct. Many of the cases in our courts involve allegations of undesirable conduct by one or more citizens. We cannot envision that these allegations should become the basis for defamation action <u>each time the alleged wrongdoer prevails in the first action</u>. Under such a rule, our judicial system would be seriously hampered . . . <u>Id</u>. at 124. (citation omitted) (emphasis supplied).
>
> * * * *
>
> this rule does not assume that all persons who participate are free from malice. Rather, it reflects a determination that the need to protect honest participants is so important that the law will not risk subjecting them to defamation suits merely in order that the occasional malicious participant may be penalized in damages." <u>Id</u>.[9]

In this case, the action of petitioner and the other defendants below in bringing new information to the attention of

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[9] The court later notes that the societal interest in "encouraging citizens to report suspected criminal activity" far outweighs the potential harm to a person's reputation. <u>Id</u>. at 127. Again, the court acknowledges the availability of remedies, both civil and criminal, against persons who give knowingly false information to law enforcement personnel. <u>Id</u>. at 128.

law enforcement authorities, resulted in Edward Fridovich's arrest and conviction. Without this information, a felon would have gone free. There is no step more critical to the investigation and prosecution of crime than the initial complaint to the authorities. Police do not witness most crimes. Law enforcement activities heavily depend on citizen cooperation. Recognition of an absolute privilege is the best way to ensure that citizens will continue to cooperate with law enforcement officials.

There is contrary authority which recognizes the existence of only a qualified privilege. See e.g., Packard v. Central Maine Power Co., 477 A. 2d 264, 268 (Me. 1984); Paramount Supply Co. v. Sherlin Corp., 16 Ohio App. 3d 176, 475 N.E. 2d 197 (Ohio Ct. App. 1984); Crump v. Crump, 393 So.2d 337 (La. Ct. App. 1980). In addition, both the first and third district have held that statements to law enforcement officers are entitled to only a qualified privilege. See Anderson v. Shands, 570 So.2d 1121 (Fla. 1st DCA 1990); Ridge v. Rademacher, 402 So.2d 1312 (Fla. 3d DCA 1980). It is respectfully submitted that these cases were wrongly decided.[10]

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[10] Ridge, with its absence of stated facts and its failure to discuss this court's decisions in this area of the law, is hardly compelling precedent in the respondent's favor. In fact, two third district decisions, Garcia v. Walden Electronics, Inc., 563 So.2d 723 (Fla. 3d DCA 1990) and Buchanan v. Miami Herald Publishing Co., 206 So.2d 465 (Fla. 3d DCA 1966), modified on other grounds, 230 So.2d 9 (Fla. 1969), apply an absolute privilege to statements made to the police or solicited to be made to the grand jury. In Garcia, the court held that statements made to Metro-Dade police officers regarding thefts committed by a newly-hired trainee were absolutely privileged. Id. at 725. In Buchanan, the court held that an absolute privilege "extends to those who are alleged

(continued...)

A qualified privilege does little, if anything, to serve the public policies underlying an absolute privilege. The objective of the privilege is to encourage individuals to come forward and report suspected criminal activity by protecting them from subsequent claims that their reports were inaccurate and/or improperly motivated.[11] A privilege which can, in most cases, only be resolved at the time of trial neither serves as an incentive to come forward nor does it afford an individual meaningful protection from tort claims. See Robertson, 75 So.2d at 200 ("all persons connected with the proceedings should be free from fear of being called upon to defend suits arising as a result of derogatory disclosures . . ."); Glynn v. City of Kissimmee, 383 So.2d 774, 776 (Fla. 5th DCA 1980) ("[r]arely is summary judgment appropriate in a defendant's favor where the existence of a qualified privilege for a defamatory statement is controverted.") In the instant case, application of a qualified privilege will mean that petitioner and the defendants below must defend a costly suit as a consequence of bringing their father's killer to justice.

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[10](...continued)
to have cooperated, encouraged or procured the presentation of the testimony." Id. at 467. Thus, Ridge's force in the third district is open to question.

[11] The prospect of depositions and cross examination is sufficient to intimidate many individuals from stepping forward. If the public must also be concerned with civil liability, citizen participation in law enforcement activities will be adversely affected.

Use of a qualified privilege is contrary to the considered views of both Dean Prosser and the Restatement (Second) of Torts. As Dean Prosser stated:

> [t]he better view seems to be that an informal complaint to a prosecuting attorney or a magistrate is to be regarded as an initial step in a judicial proceeding, and so entitled to an absolute, rather than a qualified immunity.

W. Prosser, Torts, § 114 at 780-81 (4th Ed. 1971).

Likewise, the Restatement recognizes an absolute privilege for

> Information given and informal complaints made to a prosecuting attorney or other proper officer preliminary to a proposed criminal prosecution whether or not the information is followed by a formal complaint or affidavit.

Restatement (Second) of Torts, § 587, comment b, at 249 (1977).[12] These two expressions of the law should persuade this court that Ridge and Anderson were wrongly decided.

Finally, common sense dictates the recognition of an absolute privilege. Edward Fridovich was convicted of

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[12] The fourth district's construction of comment e of § 587 is circular. The entire purpose of having an absolute privilege is to render an individual's motives irrelevant in determining whether a privilege exists. See Rauh v. Coyne, 744 F.Supp. at 1993 n.8. In most, if not all criminal cases, new leads can turn a moribund investigation into an active investigation. The law cannot be that information which leads police to an alleged perpetrator is only qualifiedly privileged if the suspect had managed to escape detection up until the time the new information was provided.

intentionally killing his father by proof beyond a reasonable doubt. See Taylor v. State, 444 So.2d 931, 933 (Fla. 1983). Most of the cases in this area of the law arise when an individual has been acquitted of the charges brought against him. It makes no sense to allow a convicted killer to relitigate the facts of his criminal conviction. See Robertson, 75 So.2d at 200.

C. This Court Should Apply The Absolute Privilege Recognized in Defamation Actions to Intentional Infliction of Emotional Distress Claims

The fourth district's refusal to apply the absolute privilege recognized in defamation actions to intentional infliction claims is contrary to the overwhelming weight of authority. The court's ruling eviscerates the purpose of the privilege in defamation actions and thereby undermines its public policy objectives. This court should apply an absolute privilege to intentional infliction claims where the cause of action arises in the context of providing information to law enforcement officials.

Numerous courts throughout the country have found that "various limitations rooted in the First Amendment are applicable to all injurious falsehood claims and not solely to those labeled 'defamation' . . ." Blatty v. New York Times, 42 Cal. 3d 1033, 232 Cal.Rptr. 542, 548 (1986), cert. denied, 485 U.S. 934 (1988). See also Pannell v. Associated Press, 690 F.Supp. 546, 550 n.4 (N.D. Miss. 1988); Decker v. Princeton Packet, Inc., 116 N.J. 418, 561

A.2d 1122, 1129 (1989); Hoppe v. Hearst Corp., 53 Wash.App. 668, 770 P.2d 203, 208 (Wash. App. 1989); Wilson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 111 A.D. 2d 807, 490 N.Y.S. 2d 553, 555 (N.Y. A.D. 2 Dep.); aff'd. 499 N.Y.S. 2d 553 (1985). In line with this reasoning, courts have repeatedly held that "[t]o allow appellant to proceed with [a claim for intentional infliction of emotional distress] would substantially defeat the purpose of the [absolute] privilege . . . Therefore, no such cause of action based on the defamatory nature of a communication which is in itself privileged under the defamation laws, can be permitted." Lerette v. Dean Witter Organization, Inc., 60 Cal.App. 3d 573, 131 Cal.Rptr. 592, 595-96 (Cal. 2d DCA 1976). See also Ribas v. Clark, 38 Cal. 3d 355, 212 Cal.Rptr. 143, 149 (1985) ("although the statutory privilege accorded to statements made in judicial proceedings appears in the code in the chapter on defamation, it applies to virtually all other causes of action [including] . . . intentional infliction of emotional distress"); Kemmerer v. Fresno County, 200 Cal. App. 3d 1426, 246 Cal.Rptr. 609, 618 (Cal. 5th DCA 1988) (same); Carden v. Getzoff, 190 Cal.App. 3d 907, 235 Cal.Rptr. 698 (Cal. 2d DCA 1987) (absolute privilege bars claims for intentional infliction where false evidence was manufactured in dissolution action).

California is not alone in applying the absolute privilege doctrine in defamation actions to claims for intentional infliction of emotional distress or other similar torts. See Packard v. Central Maine Power Co., 477 A.2d 264, 268 (Me. 1984)

("If the alleged defamatory falsehoods themselves are privileged, it would defeat the privilege to allow recovery for the . . . ['intentional infliction of emotional distress'] which they caused") (citation omitted); Ault v. Hustler Magazine, Inc., 860 F.2d 877, 880 (9th Cir. 1988); Rohda v. Franklin Life Ins. Co., 689 F.Supp. 1034, 1044-45 (D. Colo. 1988); Bond v. Pecaut, 561 F.Supp. 1037, 1041 (N.D. Ill. 1983), aff'd., 734 F.2d 18 (7th Cir. 1984); Framson v. Radich, 84 Or.App. 715, 735 P.2d 632, 635 (Or. App. 1987). Cf., Morton v. Hartigan, 145 Ill. App. 3d 417, 495 N.E. 2d 1159, 1165 (Ill. 1st DCA 1986) (absolute immunity doctrine extends to virtually every common law tort, not just defamation).[13]

Based on the authority cited above, this court should apply the absolute privilege defense to a claim for intentional infliction of emotional distress. Moreover, there are sound policy and practical reasons for the court to adopt this rule.

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[13] The court also should reverse the fourth district's decision because although to date, Florida courts have not directly resolved the absolute privilege issue in the context of intentional infliction of emotional distress claims, but see Baker v. Florida Nat. Bank, 559 So.2d 284, 288-89 (Fla. 4th DCA 1990) (recognizing privilege that defeats intentional infliction claim), the courts of this state have refused to recognize a cause of action for intentional infliction where the "'outrageous conduct' . . . is defamation, which gives rise to various elements of damage, including personal humiliation, mental anguish and suffering." Boyles v. Mid-Florida Television Corp., 431 So.2d 627, 636 (Fla. 5th DCA 1983) aff'd., 467 So.2d 282 (Fla. 1985) (citation omitted). See Silvester v. American Broadcasting Companies, Inc., 650 F.Supp. 766, 780 (S.D. Fla. 1986) (intentional infliction count which realleges libel counts will be dismissed) aff'd., 839 F.2d 1491 (11th Cir. 1988); Ford v. Rowland, 562 So.2d 731, 735 (Fla. 5th DCA 1990). See also Ault, 860 F.2d at 880 n.1; DeMeo v. Goodall, 640 F.Supp. 1115 (D. N.H. 1986); Fischer v. Maloney, 43 N.Y. 2d 553, 402 N.Y.S. 2d 991 (1978); Sweeney v. Prisoners Legal Services, 146 A.D. 2d 1, 538 N.Y.S. 2d 370 (N.Y. 3d Dept. 1989).

The policy underlying the absolute privilege -- encouraging individuals to step forward and report suspected criminal activity -- is only served if the privilege applies to both torts. Just as the first amendment protection afforded allegedly defamatory speech "gives freedom [ ] of expression . . . the 'breathing space' that [it]' need[s] . . . to survive.'" Blatty v. New York Times, 232 Cal.Rptr. at 548 citing New York Times Co. v. Sullivan, 376 U.S. at 271-72, extension of the absolute privilege to tort claims other than defamation is necessary so that people with knowledge of suspected crimes will feel free to report their knowledge to law enforcement authorities. This is true because "plaintiffs . . . might simply affix a label other than 'defamation' to their injurious falsehood claims -- a task that appears easy to accomplish as a general matter . . ." Blatty, 232 Cal.Rptr. at 703 ("adverse witnesses would always be fearful of subsequent civil suits and would be extremely hesitant or unwilling to testify without an absolute privilege"). The fourth district itself recently recognized as much when it rejected an attempt to circumvent the absolute privilege in judicial proceedings. Regal Marble v. Drexel Investments, 568 So.2d 1281 (Fla. 4th DCA 1990).

The fourth district noted in Baker v. Florida National Bank, 559 So.2d 284 (Fla. 4th DCA 1990), that the tort of intentional infliction of emotional distress has been recognized in Florida only since 1985. Id. at 287-88. Maturation of the tort has brought along with it "the additional modification that the

activity may be privileged . . ." Id. at 288. See Restatement (Second) of Torts, § 47 (1965). Where a son has been brought to justice for killing his father as a result of privileged information provided to law enforcement authorities prior to the filing of criminal charges, it is appropriate for this court to take the next step in the evolution of the tort. Accordingly, the court should hold that the absolute privilege recognized in defamation actions also bars respondent's claim for intentional infliction of emotion distress.

IV

CONCLUSION

In December, 1991, it will be ten (10) years since Edward Fridovich shot his father in the head with a shotgun. Respondent has litigated through the trial and appellate courts of this state on three (3) separate occasions, the issue of whether his conduct was culpable. Respondent's two (2) separate criminal trials, and subsequent appeals, should have laid to rest this issue. By allowing respondent to pursue an action for damages against those persons who brought his illegal conduct to the attention of law enforcement authorities, the public's perception of the judicial system is tarnished. More importantly, if the petitioner and the other defendants below are forced to defend petitioner's never-ending attacks on the accusations they made to law enforcement authorities, public participation in crime fighting activities will certainly be discouraged. Accordingly, petitioner respectfully

requests affirmance of the fourth district's decision to the extent it finds that respondent's defamation claim is barred as a matter of law because an absolute privilege protects statements made to law enforcement authorities. The court should reverse the fourth district's decision to allow respondent to pursue an intentional infliction of emotional distress claim based on the same conduct giving rise to his defamation claim.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing was sent Federal Express this 30 day of April, 1991 to the Clerk of Court, Florida Supreme Court, 500 South Duval Street, Tallahassee, Florida 32399 and to LINDA JULIN McNAMARA, Esquire, Glenn, Rasmussen, Fogarty, Merryday & Russo, counsel for respondent, P.O. Box 3333, Tampa, Florida 33601.

Jeffrey D. Fisher

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