IN THE SUPREME COURT OF FLORIDA

CASE NO. 82,649
11th Cir. Case No. 92-2984

LEVIN, MIDDLEBROOKS, MABIE, THOMAS, MAYES & MITCHELL, P.A., ET AL.,

Plaintiffs-Appellants,

vs.

UNITED STATES FIRE INSURANCE COMPANY,

Defendant-Appellee.
_____/

ON CERTIFIED QUESTION FROM THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

AMICUS CURIAE BRIEF OF THE ACADEMY OF FLORIDA TRIAL LAWYERS IN SUPPORT OF THE POSITION OF THE PLAINTIFFS-APPELLANTS

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I. STATEMENT OF THE CASE AND OF THE FACTS

The Academy of Florida Trial Lawyers adopts the statement of the case and of the facts of the Plaintiffs–Appellants.

II. ISSUE ADDRESSED BY AMICUS CURIAE THE ACADEMY OF FLORIDA TRIAL LAWYERS

> Whether certifying to a trial court an intent to call opposing counsel as a witness at trial in order to obtain counsel's disqualification, and later failing to subpoena and call counsel as a witness at trial, is an action that is absolutely immune from a claim of tortious interference with a business relationship by virtue of Florida's litigation privilege.

III. SUMMARY OF THE ARGUMENT

The Court should protect the competing policy interests by answering the certified question in the negative. If the Court is to adopt any "litigation privilege" in the context of the present case, the Academy suggests that the privilege should be qualified, rather than absolute.

IV. ARGUMENT

Although this amicus curiae brief is offered in support of the position of the appellants (because we believe the certified question should be answered in the negative), the Academy of Florida Trial Lawyers recognizes that there are valid policy considerations advanced by both sides in this appeal. The Academy submits that it is important to protect the unfettered right of counsel and litigants to seek the disqualification of opposing counsel, when valid grounds for disqualification exist. We submit that it is equally important to ensure the right of parties and counsel to be secure in the attorney–client relationship, and to be free from fraudulent or bad faith motions to disqualify aimed solely at removing the attorney of the client's choice from the

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representation. We urge the Court to fashion a response to the certified question that protects these competing, but undeniably valid, interests.

A close reading of the briefs previously filed in this proceeding suggests that the parties may not disagree on the most fundamental principles at stake in this case. The Levin firm argues that a cause of action should lie against one who wrongfully interferes with an opposing litigant's attorney–client relationship, and thereby causes economic harm to opposing counsel. U.S. Fire appears to acknowledge this proposition; and, indeed, although this Court has not decided the immunity issue raised by the present case, the Court has recognized the validity of the underlying cause of action. *See Bankers Multiple Line Insurance Co. v. Farish*, 464 So.2d 430 (Fla. 1985).

On the other hand, U.S. Fire argues that a party should not be subjected to civil liability for consequences arising from the good faith filing of a motion to disqualify opposing counsel -- even if based upon a certification that opposing counsel will be called as a trial witness, and that certification is later repudiated. The Levin firm appears to agree with the merit of this position (at least, as long as the failure to call the disqualified attorney is based on a good faith change in trial tactics). Clearly, some measure of protection from liability for the filing of a motion to disqualify is appropriate, even if the asserted grounds for the motion do not ultimately come to pass.

It seems to us that the danger lies in taking an extreme position. If a judicially–created "absolute litigation immunity" is extended to protect even the fraudulent removal of opposing counsel, then we will be sanctioning, and (more cynical observers might say) perhaps inviting, routine and baseless motions to disqualify counsel. Yet, U.S. Fire argues that, if *no* protection is afforded to the filing of a motion to disqualify, then there may be some appearance of a chilling effect upon the filing of legitimate motions.

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We suggest that, in practical terms, permitting a cause of action for damages caused by the fraudulent filing of a motion to disqualify opposing counsel would have little real chilling effect on legitimate motions for disqualification. However, if it is believed that some type of privilege is necessary in order to protect the litigant who moves for disqualification of counsel in good faith, then that goal can be met by the adoption of a *qualified* privilege, i.e., immunity from civil liability in the absence of fraud or malice. A qualified privilege would protect a litigant's right to seek the disqualification of an opposing lawyer on the ground that he will be called as a witness, or for any other legitimate reason. In fact, a qualified privilege would immunize the conduct from civil liability entirely, as long as the motion was not filed solely for the improper purpose of terminating counsel's relationship with the client. This approach would impose a significantly higher burden of proof upon a plaintiff than would otherwise exist in a contractual interference case, i.e., in order to overcome a qualified privilege, a plaintiff would be required to show malice or fraud, an element of proof that is normally *not* required to establish a prima facie case of tortious interference with a business relationship. *McDonald v. McGowan*, 402 So.2d 1197, 1201, 1201 (5th DCA), *dismissed*, 411 So.2d 380 (Fla. 1981).

By adopting a qualified, rather than an absolute, privilege, the Court would also give some measure of protection to those litigants and attorneys who conduct themselves in good faith and who abide by the rules of professional conduct. A party who is harmed by being forced to retain a "second choice" as trial counsel should not be left entirely without a remedy for the fraud that caused that harm. This would be particularly true if the matter in litigation calls for highly specialized counsel; or if much duplication of effort will be required because the disqualification occurs well into the pleading and discovery phases of the litigation; or if the case is filed in a smaller county, when the "second choice" may be no real choice at all. Likewise, a lawyer who

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has been deprived of a fee because of a fraudulent motion to disqualify should not be left with a nominal cause of action that is coupled with an "absolute immunity" protecting the very wrongful conduct giving rise to the cause of action.

The Florida courts have held that a party may be held accountable, in a subsequent lawsuit, for damages caused by the negligent or fraudulent destruction of evidence that leads to the loss or impairment of a cause of action. *Continental Ins. Co. v. Herman*, 576 So.2d 313 (Fla. 3d DCA 1990); *Miller v. Allstate Ins. Co.*, 573 So.2d 24 (Fla. 3d DCA 1990), *rev. denied*, 581 So.2d 1307 (Fla. 1991); *Bondu v. Gurvich*, 473 So.2d 1307 (Fla. 3d DCA 1984), *rev. denied*, 484 So.2d 7 (Fla. 1986). There is no compelling reason why similarly wrongful conduct resulting in the termination of an opposing attorney's representation should go without a remedy.

The notion that any privilege should be qualified, rather than absolute, is also consistent with the Court's holding in *Fridovich v. Fridovich*, 598 So.2d 65 (Fla. 1992), that defamatory statements to the police or to the state's attorney are qualifiedly, rather than absolutely, privileged. It is also consistent with the rule that *irrelevant* defamatory statements, even if made in the context of litigation, are *not* entitled to the protection of the litigation privilege. *Myers v. Hodges*, 44 So. 357, 361 (Fla. 1907). Frankly, if there is *zero* potential liability attached to the fraudulent filing of a motion to disqualify, such unethical conduct will be rewarded and perhaps will come to define the new standard for "aggressive" litigation.

We urge the Court to take a balanced approach. Of course, at this stage of this appeal, we are in no position to determine the facts behind the Levin firm's allegations. If the allegations are true, however, we respectfully suggest that U.S. Fire should not enjoy absolute immunity from the consequences of its actions. Accordingly, we ask the Court to answer the certified question in the negative.

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VI. CONCLUSION

For the foregoing reasons, amicus curiae The Academy of Florida Trial Lawyers respectfully submits that the certified question should be answered in the negative.

VII. CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by U.S. Mail this twenty-second day of November, 1993, to James R. Green, Esq., Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A., 226 South Palafox Place, Post Office Box 12308, Pensacola, Florida 32581; Charles Cook Howell, III, Esq., Howell, O'Neal & Johnson, The Greenleaf Building, Suite 1100, 200 Laura Street, Jacksonville, Florida 32202; and James M. Landis, Esq., P.O. Box 3391, Tampa, Florida.

Respectfully submitted,

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