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

ANSWER BRIEF OF DEFENDANT/APPELLEE, UNITED STATES FIRE INSURANCE COMPANY

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STATEMENT OF THE CASE AND OF THE FACTS

Appellee, United States Fire Insurance Company, adopts the statement of the case as set forth by the United States Court of Appeals for the Eleventh Circuit in its Introduction to the Certified Question.

Appellee also accepts the Eleventh Circuit Court of Appeals' Statement of the Facts [with the single correction thereto made by Appellant, to wit: that Mabie and the Levin Firm represented the plaintiff (not MAC) in the underlying case which resulted in a judgment against U.S. Fire's insured in excess of U.S. Fire's primary limits].

Appellee, for the reasons set forth in the Introduction to the Argument in this brief, disputes that any of the conclusory allegations as to falsity or improper motive constitute "facts" legally cognizable as such by the trial court in considering the motion to dismiss.

SUMMARY OF THE ARGUMENT

Appellants' claim of tortious interference with a business relationship is based upon a statement made by U.S. Fire's counsel, that "U.S. Fire Insurance Company plans to call Lefferts Mabie, Esquire as a witness in the trial of the above-captioned litigation." That statement was made during the litigation of a bad faith action and as a ground in support of U.S. Fire's motion to disqualify, which motion was subsequently granted and affirmed on appeal.

Because Mr. Mabie was neither subpoenaed nor called as a witness when the case was finally tried more than four years later, Appellant alleges that the above-mentioned statement must have been false when made. That statement cannot form the basis of a tort action for tortious interference with a business relationship, however, because it is absolutely privileged as a statement made during litigation and relevant to the litigation.

Contrary to Appellants' contention, Florida courts have recognized and applied the litigation privilege to tort actions other than defamation, including actions for fraud, perjury, extortion, breach of fiduciary duty, and intentional interference with contractual relations.

Appellants' action would also seem to be banned by the privilege which protects parties against collateral attacks on judgments or orders in their favor.

There are strong public policy considerations which justify application of the litigation privilege in this case, to protect the unfettered right of counsel and litigants to seek the disqualification of opposing counsel when valid grounds for disqualification exist.

The competing public policy considerations, if any, are insufficient to warrant establishing a precedent that would overturn a well-founded and long-standing immunity. An

aggrieved party under circumstances like ours is not without a remedy, as there is available the disciplinary powers of the trial court that granted the motion to disqualify, the Florida Bar, and the State (through criminal action). On the other hand, overturning the traditional immunity in cases such as this would open the door to similar suits whenever a disqualified attorney feels he had been wrongfully disqualified.

The Certified Question should therefore be answered in the affirmative.

ARGUMENT

I. INTRODUCTION

The issue on this appeal, as framed by the United States Eleventh Circuit Court of Appeals in its Certified Question, is:

> **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.**

Even though the case was before the trial court on a motion to dismiss the complaint, we must initially question the propriety of expanding the Certified Question, as Appellant requests, to include the conclusory allegations of improper motive. Those allegations were neither "well pled facts" nor inferences which could reasonably be drawn from the facts which were pled and should therefore have been ignored by the trial court.[1] Indeed, the allegations of improper

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[1]2A Moore's Federal Practice, paragraph 12.07[2-5] -- "...the court must presume all factual allegations in the complaint to be true and all reasonable inferences are made in favor of the non-moving party. However, legal conclusions, deductions or opinions couched as factual allegations are not given a presumption of truthfulness." See also: Fleming v. Lind-Waldock & Co., 922 F.2d 20 (1st Cir. 1990) -- "...it is only when...conclusions are logically compelled, or at least supported by the stated facts, that is, when the suggested inference rises to what experience indicates is an acceptable level of probability, that 'conclusions' become 'facts' for pleading purposes." And see: Mitchell v. Archibald & Kendall, Inc., 573 F.2d 429 (7th Cir. 1978) -- "the court is required to accept only well pleaded facts as true in deciding whether the motion to dismiss was properly granted, and is not required to accept legal conclusions that may be alleged or that may be drawn from the pleaded facts."

motive were contrary to the only permissible inferences which could be drawn from the limited facts pled. Those facts were that after Mabie was listed as witness with knowledge of key facts in answers to interrogatories, U.S. Fire sought and obtained his disqualification based upon a representation to the court that it planned to call Mr. Mabie as a witness at trial, and when the case was finally tried more than four years later, U.S. Fire did not subpoena Mr. Mabie and did not call him as a witness.

Honesty, not fraud, must not only be inferred from those facts, but presumed, especially when those facts are reasonably reconcilable with honesty and fairness, as they certainly are.[2]

There were valid reasons why trial counsel might have planned to call Mr. Mabie as a witness at trial after Mabie had been identified in answers to interrogatories in the underlying bad faith suit as a witness having knowledge of the facts supporting the allegations of bad faith, and it was therefore appropriate to seek his disqualification. Though challenged, the appropriateness of the disqualification was affirmed on appeal. Morrison Assurance Co. v. U.S. Fire Ins. Co., 515 So.2d 895 (Fla. 1st DCA 1987). It is also well known that trial counsel's opinions as to which witnesses will actually be called at trial are constantly evolving and changing as discovery progresses, expert witnesses are consulted and trial preparation is refined. Accordingly, there are any number of reasons why trial counsel might choose to discard arguments or not call previously listed witnesses immediately prior to trial.

We respectfully submit, therefore, that one cannot legitimately infer evil intent or improper purpose from the mere fact that though previously listed as a witness and disqualified

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[2]See 27 Fla. Jur. 2d, Fraud & Deceit, §10, citing FEC Rail R. Co. v. Thompson, 111 So. 525 (Fla. 1927). See also: 27 Fla. Jur. 2d, Fraud & Deceit, §§103 and 109, and 23 Fla. Jur. 2d, Evidence & Witnesses, §§91 and 114, and cases cited therein.

upon that basis, Mr. Mabie was not called to testify at trial, especially in the face of the contrary presumption of honesty.

If the Court, as it should, disregards Appellant's conclusory allegations of bad motive and fraud, the answer to the certified question (as properly framed by the Eleventh Circuit Court of Appeal), would be self evident -- that stripped of their inflammatory clothing, the facts upon which appellant's action is based simply will not support a claim of tortious interference.

Even if the allegations of improper motive are included in the question, however, we respectfully submit that the question should still be answered in the affirmative, because as we read the Florida cases, they seem to stand for the proposition that,

> **any statement made during the course of litigation and relevant thereto, regardless how false or fraudulent, is absolutely privileged and cannot form the basis for liability under any theory.**

II. A FALSE STATEMENT MADE DURING LITIGATION AS A GROUND FOR A MOTION TO DISQUALIFY OPPOSING COUNSEL SHOULD BE ABSOLUTELY PRIVILEGED, AND SHOULD NOT BE ALLOWED TO FORM THE BASIS FOR A LATER SUIT FOR TORTIOUS INTERFERENCE WITH A BUSINESS RELATIONSHIP.

It is important that this Court bear in mind throughout its consideration of the privilege issue that the gravamen of the Levin Firm's tortious interference action is (1) an allegedly false

written statement[3], (2) made by counsel for U.S. Fire, (3) during the litigation, and (4) relevant to the litigation [it was made in support of the motion to disqualify], that,

> U.S. Fire Insurance Corporation plans to call Lefferts Mabie, Esquire as a witness in the trial of the above-captioned litigation.

We submit that under Florida law, such statement, regardless whether false when made, should be deemed absolutely privileged and should not be allowed to form the basis for a later tort action, under any theory.

As this Court pointed out in Fridovich v. Fridovich, 598 So.2d 65,66 (Fla. 1992),

> The law in Florida has long been that defamatory statements made in the course of judicial proceedings are absolutely privileged, and no cause of action for damages will lie, regardless of how false or malicious the statements may be, so long as the statements are relevant to the subject of inquiry. Myers v. Hodges, 53 Fl. 197, 209, 44 So. 357, 361 (1907).

In Myers v. Hodges, supra, this Court, initially considered the privilege issue in connection with certain statements alleged to be defamatory:

> ...Thus is presented for our decision for the first time a very grave and important question, involving, as it does, the rights and privileges of parties who are concerned in proceedings in the courts, and incidentally affecting the rights of counsel and witnesses also....
>
> . . .

[3]That statement was the subject of a request for admissions served upon U.S. Fire below, and a copy of the statement is attached as an Appendix to this Brief.

> In the United States, according to the overwhelming weight of authority, in order that defamatory words, published by parties, counsel or witnesses in the due course of a judicial procedure, may be absolutely privileged, they must be connected with, or relevant or material to, the cause in hand or subject of the inquiry. If they be so published and are so relevant or pertinent to the subject of inquiry, no action will lie therefore, however false or malicious they may in fact be. ...We hold this to be the true rule.

The Myers court acknowledged the "weighty reasons" in favor of the English doctrine of absolute privilege regardless whether the statements in question were relevant to the subject of inquiry ("that parties and counsel should be indulged with great latitude in the freedom of speech and the conduct of their causes in courts and in asserting their rights, because in this way the purposes of justice will be subserved, and the court can and will protect the party aggrieved by expunging irrelevant, defamatory matter from the pleadings, and by punishing for contempt of court the guilty party"), but nevertheless felt that the protection of absolute privilege should be limited to statements relevant to the litigation.

The Myers court went on to explain how even irrelevant statements made during the course of judicial proceedings should be protected by a "qualified privilege" overcome only upon proof of express malice, quoting with approval from Calkins v. Sumner, 13 Wis. 193, 80 Am. Dec. 738:

> [I]t would be extremely inconsistent, and...absurd, for the law to presume that judicial proceedings of any kind are resorted to for the mere purpose of enabling parties to indulge their malice and utter slanders, and not in good faith, to attain some legitimate end, or to perform some lawful act or duty, which is useful and beneficial to themselves or others. On the contrary, the presumption is very strong that persons so situated are using legal proceedings for proper purposes, and that what is said or done proceeds from sufficient cause and right motives; and, when that

> which thus transpires may constitute the basis of an action at all, it is only upon the ground that there is proof of express malice, and that the person complained of has availed himself of his position to gratify his malevolence by defamatory expressions against the parties or others, which have no connection with or bearing upon the subject under investigation. (Emphasis added.)

In Ange v. State, 123 So.2d 917 (Fla. 1929) (also a defamation case), this Court explained that the privilege as applied to statements made in the course of judicial proceedings,

> ...extends to the protection of the judges, parties, counsel and witnesses, and arises upon the doing of any act required or permitted by law in the due course of the judicial proceedings or as necessarily preliminary thereto....

Though Myers and Ange involved allegedly false and defamatory statements, the Court's reasoning can, should be, and has been applied to any allegedly false statement made during the course of judicial proceedings and relevant thereto which allegedly results in harm or injury to another.

In Wright v. Yurko, 446 So.2d 1162 (Fla. 5th DCA 1984), Wright, after successfully defending a medical malpractice action against him, brought suit against his former patient (the plaintiffs in the medical malpractice action), their attorney and an expert witness who testified at trial, alleging, among other things, that the malpractice suit was brought without any basis or probable cause, and further, that the defendants conspired to and gave false and perjured testimony at trial. Although the Court upheld the cause of action for malicious prosecution, ("the only private remedy in this context allowed or recognized") because the plaintiffs pleaded all of the required elements of that tort, it affirmed dismissal of the claims for defamation,

conspiracy and perjury, holding that the statements upon which those causes of action were based were absolutely privileged. Quoting from that opinion:

> With regard to civil suits for perjury, liable, slander, defamation, and the like based on statements made in connection with judicial proceedings, this state has long followed the rule, overwhelmingly adopted by the weight of authority, that such torts committed in the course of judicial proceedings are not actionable. ...Parties, witnesses and counsel are accorded absolute immunity as to civil liability with regard to what is said or written in the course of a lawsuit, providing the statement are relevant to the litigation.

The Wright court pointed out that, "the reason for the rule is that although it may bar recovery for bonafide injuries, the chilling effect on free testimony and access to the courts if such suits were allowed would severely hamper our adversary system." That court also pointed out that the aggrieved party is not necessarily left without any remedy for injuries allegedly suffered as a result of false, though relevant statements made during the course of judicial proceedings. "Remedies for perjury, slander and the like committed during judicial proceedings are left to the discipline of the courts, the bar association and the state."

The instant action for intentional interference, like actions for defamation, perjury or conspiracy to commit perjury, is based upon an allegedly false statement made in connection with judicial proceedings. Accordingly, we submit that there is no legitimate reason why the same rule should not apply to this lawsuit, which unquestionably also involves a statement made in the course of, and relevant to judicial proceedings.

In Procacci v. Zacco, 402 So.2d 425 (Fla. 4th DCA 1981), the Fourth District expressly held that the privilege defense applies to a cause of action based upon an alleged tortious interference with a contractual relationship. That case involved a two count complaint, one for

alleged slander of title, and another for alleged tortious interference with a contractual relationship. Both counts were predicated upon the filing of a notice of lis pendens in an earlier easement action. Quoting from the opinion:

> Both torts share a common legal basis; both involve intentional interference with another's economic relations. Moreover, ...both torts are subject to the same defenses. It has long been recognized that the privilege defenses available in an action for personal defamation are also available in an action for slander of title. See Restatement (2d) of Torts, §645 (1977); Sailboat Key, Inc. v. Gardner, 378 So.2d 47 (Fla. 3d DCA 1979). Reasoning from this premise, we determine that tortious interference is also subject to the same privilege defenses due to the common root it shares with slander of title and the fact that, in this case, both torts allegedly arose from the single act of filing the notice of lis pendens.
>
> The privilege sought to be asserted here is the absolute privilege of participants in judicial proceedings....
>
> . . .
>
> Our decision reflects the general policy underlying all privilege defenses that "[i]n certain circumstances the public need for free and unfettered discussion outweighs the need to protect individuals from injury caused by false statements."

See also: Tietig v. Southeast Regional Construction Corp., 557 So.2d 98 (Fla. 3d DCA 1990) (an attorney's charging lien on the proceeds of a settlement was privileged as against a claim of tortious interference with a contractual relationship.)

In Cox v. Klein, 546 So.2d 120 (Fla. 1st DCA 1989), the First District affirmed a dismissal with prejudice of a count for libel, recognizing the rule set forth in Wright v. Yurko, supra, that,

> Parties, witnesses, and counsel are afforded absolute immunity as to civil liability with regard to what is said or written in the course of a lawsuit, providing the statements are relevant to the litigation.

The Third District, in Ponzoli & Wassenberg v. Zuckerman, 545 So.2d 309 (Fla. 3d DCA 1989), applied the litigation privilege to statements made by attorneys, as counsel, in a motion to dismiss, who were later sued for libel and extortion. In discussing the policy reasons for the privilege, the court stated:

> In fulfilling their obligations to their client[s] and to the court, it is essential that lawyers, subject only to control by the trial court and the bar, should be free to act on their own best judgment in prosecuting or defending a lawsuit without fear of later having to defend a civil action for defamation for something said or written during the litigation.

By the same token, we submit that lawyers, and parties, should, subject of course to control by the trial court and the bar, be free to act on their own best judgment in seeking disqualification of opposing counsel where valid grounds exist for disqualification, without fear of later having to defend a civil action for tortious interference with a business relationship.

The Ponzoli court applied an absolute privilege not only to the libel claim, but the extortion claim as well, stating:

> The same analysis applies to the extortion claim, which is based on the same statement in the same motion. The absolute immunity for statements made in judicial proceedings precludes civil liability.

The Levin Firm having in effect accused U.S. Fire of "fraud on the court" (it alleges that the "certification" given to the trial court in support of the motion to disqualify was "deliberately false"), a case remarkably similar to the instant case is Drexel Investment, Inc. v. Regal Marble, Inc., 568 So.2d 1281 (Fla. 4th DCA 1990), rev. den. 583 So.2d 1036 (Fla. 1991). In that case,

the plaintiffs sued for fraud and conspiracy, alleging damages arising out of the introduction of a false exhibit in a prior eviction action. The plaintiffs contended that the preparation and use of an incorrect sketch in that case was deliberate. In affirming a summary judgment for the defendants, and holding that "there is no cause of action recognized in this state for false statements made in prior judicial proceedings", the court further stated:

> As for the fraud count, although it is wordy and repetitive, it merely places the label "fraud" on the repeated allegation that defendants adduced a false survey into evidence and gave false testimony about the survey in the earlier tenant eviction trial. By any other name, this rose is really a thinly veiled attempt to recover damages for perjury or false evidence given in an earlier trial. Both Wright and Perl [Perl v. Omni International of Miami, Ltd., 439 So.2d 316 (Fla. 3d DCA 1983)] make clear that Florida recognizes no such cause of action under any theory, a position "overwhelmingly adopted by the weight of authority"....

The Drexel court observed that permitting claims of that nature "could render our adversarial system impotent." It further pointed out, as have many other courts, that the aggrieved party is not without remedy, if it should appear that one is warranted:

> ...The remedy beyond a new trial, if indeed there has been knowingly given false testimony...is for the criminal process, the Florida Bar or other offices of government.

By the same token, if, as the Levin Firm contends, the statement to the trial court in support of the motion to disqualify was knowingly false when made, the Levin Firm's remedy is not through a tort action for tortious interference (because the statement upon which the action is necessarily based is privileged), but through the trial court that granted the disqualification, the criminal process, the Florida Bar or other government offices.

In Graham-Eckes Palm Beach Academy, Inc. v. Johnson, 573 So.2d 1007 (Fla. 4th DCA 1991), the Fourth District held that the absolute privilege normally accorded to pleadings applies

even if a complaint is wholly frivolous and filed to interfere with the performance of a contract for the sale of property. Quoting from that opinion:

> Appellant contends that the absolute privilege normally accorded to pleadings should not apply where the complaint is wholly frivolous and filed to interfere with the performance of a contract for the sale of property. While appellant's argument is persuasive, we hold that its proper cause of action would have been one for malicious prosecution, and affirm on the authority of Procacci v. Zacco, 402 So.2d 425 (Fla. 4th DCA 1981).

Cruz v. Angelides, 574 So.2d 278 (Fla. 3d DCA 1991), applied the litigation privilege to "an action heretofore unrecognized under Florida law." In that case, the plaintiff sued his treating physician for breach of a fiduciary duty, based solely upon the fact that in a prior medical malpractice action brought by the plaintiff against another medical doctor, which resulted in a defense verdict, his physician gave expert medical opinion testimony favorable to the defendant. In so holding, the court stated:

> The law is well settled that a witness in a judicial proceeding, as here, is absolutely immune from any civil liability, save perhaps malicious prosecution, for testimony or other sworn statements which he or she gives in the course of the subject proceeding. ...This being so, it is plain that the plaintiff has no cause of action for breach of a fiduciary duty against the defendant.

(Interestingly, that court also observed that whether the defendant physician had violated the ethical standards of his profession is a matter to be addressed by the medical profession itself, rather than by the courts.)

In Donner v. Appalachian Ins. Co., 580 So.2d 797 (Fla. 3d DCA 1991), rev. den. 591 So.2d 181 (Fla. 1991), the plaintiff brought multiple causes of action arising from alleged fraudulent misrepresentations made during discovery in a previous action, which only came to

light following production of litigation files in an action subsequent to the previous one. The trial court dismissed the complaint with prejudice and the District Court affirmed, stating that, "We agree with the trial court that the complaint Ms. Donner filed in this action failed to state a cognizable claim. See: Ponzoli & Wassenberg, P.A. v. Zuckerman, 545 So.2d 309 (Fla. 3d DCA), (statements made in course of judicial proceeding enjoy absolute privilege), rev. den. 554 So.2d 1170 (Fla. 1989); Wright v. Yurko, 446 So.2d 1162 (Fla. 5th DCA 1984); Perl v. Omni International of Miami, Ltd., 439 So.2d 316 (Fla. 3d DCA 1983) (same) We therefore affirm the dismissal." (In a footnote to the opinion, the District Court observed that the plaintiff could ask the trial court to impose sanctions against the defendants for their alleged misconduct in the discovery proceedings.)

As mentioned at the outset of this brief, this Court recently spoke to the issue of privilege in connection with defamatory statements in Fridovich v. Fridovich, 598 So.2d 65 (Fla. 1992). Although under the particularly egregious facts of that case the Court did choose to limit the privilege to a qualified one with respect to defamatory statements made to police or a state's attorney prior to the institution of criminal charges, it nevertheless reaffirmed the long standing absolute privilege with respect to defamatory statements made in the course of judicial proceedings, "regardless of how false or malicious the statements may be, so long as the statements are relevant to the subject of inquiry." This Court recognized the traditional reason for applying an absolute privilege, as set forth in the Restatement (2d) of Torts §584:

> These "absolute privileges" are based chiefly upon a recognition of the necessity that certain persons, because of their special position or status, should be as free as possible from fear that their actions in that position might have an adverse effect upon their own personal interests. *To accomplish this, it is necessary for them to be protected not only from civil liability, but also from the*

> *danger of even an unsuccessful civil action.* To this end, it is necessary that the propriety of their conduct not be inquired into indirectly by either court or jury in civil proceedings brought against them for misconduct in their position. Therefore, the privilege, or immunity, is absolute and the protection that it affords is complete. It is not conditioned upon the honest and reasonable belief that the defamatory matter is true or upon the absence of ill will on the part of the actor.

In passing, we note that in the Office of the State Attorney, Fourth Judicial Circuit of Florida v. Parrontino, 18 Fla. L. Weekly S611 (Fla. S.Ct. Dec. 2, 1993), this Court recently reaffirmed, and applied the long recognized "prosecutorial immunity" in what might be considered an extreme and sensitive situation. Quoting from that opinion,

> We are sympathetic to the circumstances that led to a death in this case. However, we cannot allow sympathy in one instance to establish precedent that would overturn a well founded and long standing immunity accorded to state attorneys. Overturning the earlier precedent necessarily would allow state attorneys to be sued in many other disparate contexts, resulting in serious disruption of the office. Such a slippery slope must be avoided both as a matter of law and for reasons of sound public policy. (Emphasis added.)

By the same token, we respectfully submit that to deny the protection of absolute immunity as requested by the Levin Firm, or even to qualify that privilege as suggested by the Academy of Florida Trial Lawyers, under the circumstances of this case, is likewise a "slippery slope which must be avoided both as a matter of law and for reasons of sound public policy." The potential price to be paid for allowing this cause of action to stand is too great to allow. The threat of a suit for intentional interference with a business relationship will without question deter parties and counsel from ever seeking the disqualification of opposing counsel, even where good and valid grounds for disqualification exist, as they unquestionably did in this case.

The rule of law in Florida, as it has evolved over the years, is that statements made by a party or counsel during the course of judicial proceedings, if relevant to the litigation, are absolutely privileged and cannot form the basis for tort liability because of an alleged injurious effect of said statements.

This rule has been applied not only to defamatory statements, but to statements which are merely false and/or fraudulent as well; and absolute immunity has been held a bar to various types of tort actions in addition to defamation, including fraud and conspiracy (Drexel Investment, Inc. v. Regal Marble, Inc., supra) and "tortious interference" (Procacci v. Zacco, supra, and Tietig v. Southeast Regional Construction Corp., supra). The only tort action not subject to the protection of immunity is malicious prosecution (and, perhaps, abuse of process), because the basis of said tort(s) is the institution of a legal proceeding, and not the alleged false statement itself.

Pointing out that this action, in essence, is an attempted collateral attack upon the propriety of the order of disqualification of counsel (subsequently affirmed on appeal), which Appellant now contends was procured by a false statement or fraud, another rule of law which would seem to protect the alleged false statement with the cloak of privilege is that which was enunciated in Catlett v. Chestnut, 146 So. 547 (Fla. 1933);

> Public policy, and the safe administration of justice, require that circuit judges, witnesses, and parties to pending legal controversies be privileged against any restraint sought to be imposed upon them by suits for damages brought against them for alleged conspiracies charged against them concerning the subject-matter of pending litigation, the effect of the trial of which actions for conspiracy will simply amount to a collateral retrial of the plaintiff's pretended rights which it is alleged were intended, by means of the asserted conspiracy, to be defeated.

> The foregoing rule is a necessary corollary to be deduced from the adjudicated cases in which it has been uniformly held, by both the English and American courts, that an action at law for damages, against an adversary party or his witness, for allegedly procuring a verdict and judgment by fraud or perjury, cannot be maintained while such verdict and judgment remain in force.

And see: Kessler v. Townsley, 182 So. 232 (Fla. 1938), in which this Court cited its earlier decision in Catlett v. Chestnut, but went on to cite 26 RCI, 770 as follows:

> It is well settled that the defeated party to an action cannot maintain an action against one whose perjured testimony brought about the adverse verdict. This is usually placed upon the ground that public policy and convenience require the establishment of this rule, or that to permit the action would involve a collateral attack on the judgment, which cannot be permitted even as to one not a party....

In the instant case, the Appellant law firm alleges that its disqualification as counsel was wrongfully procured by an allegedly false and/or fraudulent statement made to the trial court in support of the motion to disqualify. As pointed out above, although the Appellant firm challenged the propriety of the disqualification, the disqualification was upheld on appeal. [Morrison Assurance Co. v. U.S. Fire Ins. Co., supra.]

Not only could this suit be deemed a prohibited collateral attack upon the order of disqualification and thus subject to the privilege defense applicable to actions against one whose perjured testimony brought about an adverse verdict, we submit with deference that in any event, the well established "litigation privilege" should extend to the statement complained of, which was the basis for the motion to disqualify.

Because the statement was made not only "in the course of", but as a part of the judicial proceeding, it should be deemed privileged.

And because the statement was clearly relevant to the proceedings (it was the basis for the motion to disqualify), the privilege should be an absolute one.

Even the Academy of Florida Trial Lawyers, in its Amicus Curiae Brief, recognizes the strong public policy considerations for applying the privilege in this case -- "to protect the unfettered right of counsel and litigants to seek the disqualification of opposing counsel, when valid grounds for disqualification exist." (Amicus Curiae Brief, p. 1.)

The Academy, however, argues for a modification of the general rule and application of a "qualified privilege" in this case rather than an absolute one, as this Court felt constrained to do in Fridovich v. Fridovich, supra. In support of this suggestion, the Academy contends that the party forced to retain a "second choice" as trial counsel "will be left entirely without a remedy for the fraud that caused the harm", that the disqualified lawyer will be "deprived of a fee", and that if such statements are deemed absolutely privileged, such fraudulent and unethical conduct "will be regarded and perhaps will come to define the new standard for 'aggressive' litigation." (Amicus Curiae Brief, pp. 3 and 4)

With respect, we submit that the Academy's concerns are without basis in this case. The party forced to retain "second choice" counsel was fortunate enough to prevail at the trial of the bad faith action, winning a substantial judgment for excess damages, plus interest and attorney's fees. In addition, we would expect that the disqualified law firm (the Appellants herein) would have been entitled to, and may have received out of the proceeds of the aforesaid judgment a reasonable fee for its services rendered prior to the disqualification. And finally, extending absolute immunity to the statement upon which this tort action is based will in no way encourage fraudulent or unethical conduct. To the contrary, in cases of false or fraudulent statements made

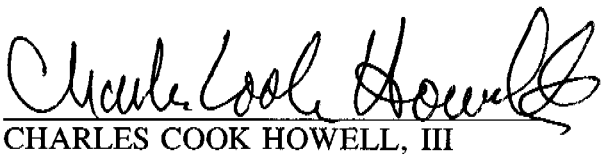
during the course of judicial proceedings, the party and/or counsel making such statements would be subject to disciplinary action by the court (contempt), the Florida Bar, and/or criminal action by the State. Wrongful misconduct during and in the course of litigation is in no way "without remedy", and this has been recognized time and again by our appellate courts.

For the foregoing reasons, we submit with deference that there is every reason why the traditional cloak of privilege should be applied to the statement which is the basis of this action for tortious interference, and there is no legitimate reason why, in this case, that privilege should not be an absolute one.

III. CONCLUSION

For the reasons set forth hereinabove, Appellee, United States Fire Insurance Company, respectfully submits that the Certified Question should be answered in the affirmative.

Respectfully submitted,



CHARLES COOK HOWELL, III

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail this **10th** day of December, 1993 to James R. Green, Esq., 226 S. Palafax Place, P.O. Box 12308, Pensacola, FL 32581; James M. Landis, Esq., P.O. Box 3391, Tampa, FL 33601; and C. Rufus Pennington, III, Esq., Suite 1702, American Heritage Tower, 76 South Laura Street, Jacksonville, FL 32202.

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