IN THE SUPREME COURT OF FLORIDA

LEVIN, MIDDLEBROOKS, MABIE, THOMAS, MAYES & MITCHELL, P.A., ETAL.,

Plaintiffs/Appellants,

VS. CASE NO. 82,649

UNITED STATES FIRE INSURANCE COMPANY,

Defendant/Appellee.
_____/

PLAINTIFFS/APPELLANTS' BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The parties will be referred to herein as they stand before this Court. Levin, Middlebrooks, Mabie, Thomas, Mayes, & Mitchell, P.A., etal., (the Levin Firm) were the plaintiffs in the trial court and are the Appellant in this appeal; the United States Fire Insurance Company (U.S. Fire) was the defendant in the trial court and is the appellee in this appeal.

References to the transcript of the record on appeal will be designated "(R___)" followed by the appropriate page number.

STATEMENT OF THE CASE

The Levin Firm accepts 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.

STATEMENT OF THE FACTS

The Levin Firms accepts the statement of the facts as set forth by the United States Court of the Appeals for the Eleventh Circuit in its Certification to the Florida Supreme Court with the exception that on page 2 it is stated that Mabie and the Levin firm represented MAC in the underlying case. That is incorrect. Mabie and the Levin firm represented the plaintiff in the original action and Morrison Assurance Company was the excess carrier for the defendant. U.S. Fire was the primary carrier for the defendant. It is the excess carrier, Morrison Assurance Company that later retained Mabie and the Levin firm to pursue its bad faith case action against U.S. Fire.

In addition, the Levin Firm would point out that this case was decided on a motion to dismiss.(R1-15) The complaint alleged that at the time U.S. Fire certified to Judge Geeker that they were going to call Mabie as a witness, they knew they would not call him at trial and that the misrepresentation was made for the improper purpose of disqualifying Mabie as an attorney because they knew he was experienced in handling "bad faith" cases and thought it would be to its advantage if Morrison Assurance Company was forced to employ other counsel.(R1-3-Exb.B)

SUMMARY OF ARGUMENT

U.S. Fire did not contest the sufficiency of the Complaint for interference. The Judgment was entered based on an Order granting Defendant's Motion to Dismiss on the sole grounds of privilege. Therefore, the claims in the Plaintiff's Complaint properly alleging tortious interference with business relations for the improper purpose of gaining an advantage in the litigation are deemed admitted.

Florida does not recognize a "litigation privilege" which would protect parties from intentional misrepresentations to the court in an attempt to gain an advantage in litigation. Florida does recognize a privilege for statements made in judicial proceedings for defamation. However, the privilege is only applied when statements are relevant to the litigation.

Florida has always recognized claims for abuse of process, malicious prosecution, fraud and misrepresentation arising out of actions that occur in litigation and has provided remedies for independent actions to set aside prior judgments as well as providing a procedure under the Florida Rules for setting aside judgments within one year that were obtained by fraud or misrepresentation in Rule 1.540, Fla.R.Civ.P. A party that makes an intentional misrepresentation to the court is abusing the power of the court and should not be immune from civil liability

The trial court erred in granting the motion to dismiss and recognizing a privilege where none exists under Florida Law.

ARGUMENT ON ISSUE I

CERTIFIED QUESTION: 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

Plaintiffs/appellants would expand the certified question by adding that the certifying party never had any intent to call opposing counsel as a witness at trial but made a false certification for the sole purpose of trying to gain an advantage in the litigation. It also should be pointed out that U.S. Fire attorneys were not sued in this case. It is not the conduct of the attorneys that is at issue.

This case was before the trial court on a motion to dismiss the complaint. The trial court ruled as a matter of law that the affirmative defense of privilege was apparent on the face of the complaint and that the complaint therefore failed to state a cause of action.

The defendant in this case seeks to create a new term of art in Florida's Jurisprudence. That is, they seek to create a "litigation privilege" in the state of Florida. This Court would make a serious mistake if it were persuaded to coin a phrase and create a legal concept known as "litigation privilege" which would immunize participants in legal actions including parties, their attorneys, witnesses, and court personnel from responsibility for all kinds of illegal and unethical conduct.

The historic application of privilege in litigation has been

in causes of action for defamation. There is no privilege to commit a fraud on the court or to make misrepresentations to the court in order to gain an advantage in litigation. There is no "litigation privilege" that protects parties from their bad faith conduct in the procedural or evidentiary aspects of a trial. The only privilege for conduct arising out of litigation is for defamation, and the defamatory conduct must be pertinent to the subject of inquiry. This Court has been reluctant to grant or expand privilege to litigants.

In 1907, Florida in Myers v. Hodges, 44 So. 357 (Fla. 1907), adopted the majority view in the United States that:

> . . . in order that defamatory words, published by parties, counsel or witnesses in the due course of judicial procedure, may be absolutely privileged, they must be connected with, or relevant or material to, the cause in hand or subject of inquiry. (Pg. 361)

Florida declined to adopt the English Doctrine of absolute privilege for defamatory words published in the course of judicial proceedings instead saying:

> We think the ends of justice will be effectually accomplished by not extending the privilege so far as to make it an absolute exemption from liability for defamatory words wholly and entirely outside of, and having no connection with, the matter of inquiry. For why should a person be absolutely privileged to defame another in the course of a judicial proceeding by making slanderous statements wholly outside of the inquiry before the court? We think it unnecessary to carry the doctrine so far. The ends of justice can be effectually accomplished by placing a limit upon the party or counsel who avails himself of his situation to gratify private malice by uttering slanderous expressions and making libelous statements, which have no relation to, or connection with, the cause in hand or the subject matter of inquiry. (Pg. 361,362)

The root of the privilege lies in defamatory statements, not fraudulent misrepresentations to eliminate expert opposing counsel. U.S. Fire did not make any defamatory statements about the Levin Firm or Mabie, but rather, it willfully and fraudulently certified to the court that Mabie would be called as their witness in the trial. At the time it made the certification U.S. Fire knew that it would not call Mabie as a witness.

The trial court in the case sub judice, relied on Wright v. Yurko, 446 So. 2d 1162 (Fla. 5th DCA 1984), for the statement:

> Florida courts have long recognized that '[p]arties, 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 that the statements are relevant to the litigation.' (Pg. 5 of the Order)

Taken out of context, this seems to support a broad "litigation privilege." However, Wright, supra, involved a two count complaint. The first count alleged a cause of action for defamation, and the court held that privilege was a defense to the defamation claim.

Count two of Wright, supra, involved a complaint against the plaintiffs and their expert witnesses for malicious prosecution. The court held that the plaintiff alleged the malpractice suit was filed without probable cause and with malice and intent to injure him; it concluded in his favor; and it resulted in special and general damages to him. As to the malicious prosecution count, the court held that the complaint was improperly dismissed and should have been allowed to proceed. The proof in the malicious prosecution case would necessarily include the same statements that

were not actionable under a defamation theory. Nevertheless, the parties committing the defamatory acts could be liable under the alternative theory of malicious prosecution. Rather than creating a broad litigation privilege, the case restricts the privilege to actions for defamation and recognizes civil liability for improper conduct by parties to judicial proceedings.

See also, Ange v. State, 123 So. 916 (Fla. 1929), where the court stated:

> While a party may not be prosecuted for liable or defamation on account of relevant statements made in the course of judicial proceedings, even though false and malicious, this does not mean that a person unjustifiably prosecuted is without other means of redress, such for instance as an action for malicious prosecution. (Emphasis added.) (Pg. 917,918)

Further evidence of the court's distaste for misrepresentation and fraud to gain an advantage in litigation is shown by the line of cases that interpret Florida Rule of Civil Procedure 1.540. Relief from a judgment for fraud, misrepresentation or other misconduct of an adverse party is specifically authorized. The last sentence of the Rule states:

> This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, decree, order or proceeding to set aside a judgment or decree for fraud upon the court.

The last paragraph of the rule abolishes some common law writs and states:

> . . . procedure for obtaining any relief from a judgment or decree shall be by motion as prescribed in these rules or by an independent action. (Emphasis added.) F.R.Civ.P. Rule 1.540.

This rule contemplates independent actions to correct

mistakes or errors in judgments, decrees, or orders which are the result of fraud or misrepresentation on the court.

In Brown v. Brown, 432 So. 2d 704 (Fla. 3d DCA 1983), Mr. Brown sued his former wife to foreclose a mortgage given to her as part of a judicially approved property settlement. Mrs. Brown filed a counter-claim alleging that her ex-husband had fraudulently induced her to execute the property settlement agreement, which included the subject note and mortgage, by knowingly and intentionally overvaluing assets in exchange for which, in part, the note and mortgage were given. She had previously filed a motion for relief from judgment under Rule 1.540(b) which was denied for having been filed later than a year after the judgment was entered.

The former husband moved to dismiss with prejudice and on appeal that court discussed the effect of Rule 1.540(b) and the right to an independent action to set aside a judgment based on fraud. The court concluded that the rule preserved "two distinct and separate powers of a court over an independent action - the first being the power to entertain an independent action 'to relieve a party from a judgment, decree, order or proceeding,' and the second, the power to entertain an independent action 'to set aside a judgment for fraud upon the court.'" (Pg. 710)

The court went on to cite Federal Rule of Civil Procedure 60(b) which also used the disjunctive under similar circumstances and would allow relief both by the rule and by independent action. (Pgs. 710,711)

In sum, the courts have never countenanced fraud and misrepresentation by parties or their attorneys regarding procedural matters or in the presentation of evidence. There has been a privilege protecting people from suits for defamation but there has never been a blanket privilege against being sued for fraud or misrepresentation in legal proceedings.

The issue of privilege was raised in Robinson v. Volkswagenwerk AG, 940 F.2d 1369 (10th Cir. 1991). According to the complaint, Volkswagenwerk AG (VWAG) was sued along with their lawyers Herzfeld & Reubin (H & R) for fraudulently concealing the true relationship among VWAG and Audi NSU and Auto Union from the plaintiffs in a previous lawsuit, thereby precluding the plaintiffs from using critical liability evidence against VWAG and collecting damages.

In discussing the immunities defense raised by H & R the court said:

> H & R claims that it is absolutely immune from civil liability for damages based upon its discovery and courtroom conduct in the previous trial. The district court rejected this theory, stating 'any immunity that might attach to a private attorney's conduct is not attached to the conduct alleged in this case to be fraudulent.' V R. doc. 199 at 4. Our review of the district court's legal determination on absolute immunity is de novo. See Snell, 920 F.2d at 694. Given the sparing recognition of absolute immunity by both the Supreme Court and this court, one claiming such immunity must demonstrate clear entitlement.... In this case, however, the absolute immunity precedent indicates that H & R's claim of absolute immunity would not be recognized at common law; we need proceed no further. (Cites omitted) (Emphasis added.) (Pgs. 1370-1371)

The claim of absolute immunity from civil liability for

damages based on concealment of the true relationship of the defendants to the defendant's advantage was rejected just as this Court should reject U.S. Fire's claim of immunity for its misrepresentation to the court in an attempt to gain an advantage.

In this review of the federal approach to immunity the Court considered the history of immunity at common law just as the Florida Supreme Court did in the earlier discussed case of Myers v. Hodges, 44 So. 357 (Fla. 1907) and once again concluded the immunity was for liable and slander, not for fraud or misrepresentation.

The trial court in granting U.S. Fire's motion to dismiss based on an absolute privilege seemed to rely on Procacci v. Zacco, 402 So. 2d 425 (Fla. 4th DCA 1981). The issue in that case was whether the filing of a notice of lis pendens pursuant to Section 48-23(1)(a), Florida Statutes (1975) could give rise to a suit for slander of title or tortious interference with a contractual relationship. The court held that a lis pendens was merely a statutorily authorized republication of pleadings in a judicial proceeding and was simply notice to any prospective purchasers that any interest acquired by them in the property in litigation was subject to the decree of the court.

The court struggled with an intentional interference claim as it reasoned:

> Both torts share a common legal basis; both involve intentional interference with another's economic relations. Moreover, the case at bar illustrates an additional aspect of their commonality for, as alleged here, 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. (Cites omitted) 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, in this case, both torts alleged arose from the single act of filing the notice of lis pendens. (Pgs. 426-427)

The Procacci court misapprehends the law and oversimplifies it when it states that both torts are subject to the same defense of privilege. While both torts do have privilege as a defense, the conduct that is privileged in one is not necessarily privileged in the other. Statements made in a judicial proceeding are privileged against suits for defamation if pertinent to the judicial inquiry, while these same statement made anywhere else are not privileged. For example, if a person called someone a thief and a cheat in a public place, he has no privilege against suit for slander. However, if the same words are testified to in a lawsuit for an accounting of a business transaction between the two, the words are privileged even if false.

Conduct that is privilege in a business interference complaint does not include slanderous remarks. Normally, privileged conduct has to do with conduct that protects one's own business interests or involves fair competition.

For example, if a person called a competitor a thief and a cheat and induced the competitor's customers to cease doing business with the competitor, the person would be sued for both slander and interference. On the other hand:

> One is privileged purposely to cause another not to enter into or continue a business relationship with

> a third person by asserting in good faith, or threatening to protect properly a legally protected interest of his own which he believes may otherwise be impaired or destroyed by the performance of the transaction. . . (45 Am. Jur. 2d Interferences, § 23 at 299)

A person has the right to protect his own contract rights even if it has a harmful effect on some third person's rights. But U. S. Fire's misrepresentation to the court did not protect any of its contractual rights or its right to compete in the market place.

The conduct in Procacci, supra, of filing a lis pendens was privileged on the defamation claim because it was part of a court pleading and the property was pertinent to the subject of inquiry. It was also privileged under the interference with a contract claim because the person was seeking to establish legitimate rights to an easement that was in question. Coincidentally, both claims arose out of the one simple lawful act of filing a lis pendens. That court, as noted by the United States Court of Appeals, Eleventh Circuit limited its holding to the filing of a lis pendens.

The length that U.S. Fire was willing to go in order to disqualify the Levin Firm is demonstrated by the fact that it began trying to disqualify the Levin Firm immediately upon the filing of the lawsuit. At that time, the trial court refused to disqualify and U.S. Fire appealed the denial. The trial court was sustained on appeal following which U.S. Fire took some depositions and again moved to disqualify the Levin Firm. It was at that point that the court refused to disqualify the Levin Firm unless U.S. Fire certified that they were going to call Mr. Mabie as a witness. When U.S. Fire so certified, the court entered the order

disqualifying the Levin Firm.

This court's most recent decision regarding slander and privilege was Fridovich v. Fridovich, 598 So. 2d 65 (Fla. 1992). This court took the opportunity to restrict the privilege rather than expand the privilege. The court said:

> In deciding this issue we recognize the need to balance two important and competing interests, described by one scholar 'the right of the individual, on one hand, to enjoy [a] reputation unimpaired by defamatory attacks, and, on the other hand, the necessity, in the public interest, of a free and full disclosure of facts and the conduct of the legislative, executive, and judicial departments of the government.' Van Vechten Veeder, *Absolute Immunity in Defamation*: Judicial Proceedings, 9 Colum. L. Re. 463, 464 (1909). (Pg. 68)

These competing interests do not apply in the case sub judice. The misrepresentation that Mr. Mabie would be called as a witness and should therefore no longer represent his client, did not impugn his reputation. There was simply nothing defamatory about the remark. It was merely a means of preventing the Levin Firm from continuing to represent its client, a means of preventing Morrison Assurance Company from having its choice of counsel to represent it, and a means of obtaining less qualified counsel to oppose U.S. Fire's position in the litigation.

The actions of U.S. Fire in this case are more akin to abuse of process than they are to defamation. The First District Court of Appeals in Bradley v. Peaden, 347 So. 2d 455 (Fla. 1st DCA 1977) quoted Prosser on Torts, Third Edition, Chapter 23 as follows:

> . . . 'thus if the defendant prosecutes an innocent plaintiff for a crime without reasonable grounds to believe him guilty, it is malicious prosecution; if

> he prosecutes him with such grounds to extort payment of a debt, it is abuse of process.' (Pg. 457)

In other words, if you prosecute criminally to collect a debt, you abuse the system. The system is no less abused when a party misrepresents to the court that it will call opposing counsel as a witness with no intention of ever calling him as a witness, but for the improper purpose of obtaining that counsel's disqualification in order to gain an advantage in this litigation. There is no strong public policy reason to create a new privilege that will immunize parties from liability for abusing the courts for personal gain by fraudulent conduct.

CONCLUSION

This court should answer the certified question in the negative and hold that a party that makes an intentional misrepresentation to the court for an improper purpose is not absolutely immune from civil liability.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Charles Cook Howell, III, Esquire, P. O. Box 240, Jacksonville, FL 32201-0240 and to James M. Landis, Esquire, P. O. Box 3391, Tampa, FL 33601, by regular U.S. Mail on this the 22nd day of November, 1993.

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