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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' REPLY 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.

REPLY 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

Reading U.S. Fire's brief, it would appear that Judge Geeker's decision to disqualify the Levin Firm was almost casually reached. That U.S. Fire had merely told Judge Geeker that it "planned" to call Mr. Mabie as a witness at trial.

On the contrary, Judge Geeker, at the hearing on December 5, 1986, ruled that defendant's Motion to Disqualify counsel would be denied unless "U.S. Fire Insurance Company affirmatively represented that it would call Lefferts Mabie, Esq., as a witness." (R1-3-Exb.E-Exb.2) (Exhibit 1 to the Appendix to this Reply Brief)

Three days after the hearing U.S. Fire certified through its counsel that it planned to call Mabie as a witness at trial. This Court should not be fooled into thinking that this decision was made by U.S. Fire's counsel as part of its trial strategy. Judge Geeker's ruling that he would deny the Motion to Disqualify unless U.S. Fire affirmatively represented that it would call Mabie as a witness was three days before the letter, plenty of time for insurance counsel to consult with and receive direction from U.S. Fire.

The full text of the letter Judge Geeker relied on says:

This letter will certify that defendant, U.S.Fire

> Insurance Company plans to call Lefferts Mabie, Esq. as a witness in the trial of the above captioned litigation. (Exhibit 1 to the Appendix of U.S. Fire's Brief)

The facts are that notwithstanding this certification to the court, Lefferts Mabie was neither subpoenaed nor called as a witness at trial. However, he was listed as a witness in U.S. Fire's pretrial papers.

U.S. Fire asked this Court to presume honesty and not fraud. That is exactly what Judge Geeker presumed when he entered the order disqualifying the Levin Firm in this case. The ultimate facts show that his trust was misplaced.

U.S. Fire in its second argument suggests that a false statement made to a trial judge in order to disqualify apposing counsel should be absolutely privileged.

The first case they rely on is Fridovich v. Fridovich, 598 So. 2d 65 (Fla. 1992). Fridovich, rather than affirming an absolute privilege limits the privilege even in claims for defamation. Rather than affirming Ange v. State, 123 So. 916 (Fla. 1929), it receded from Ange v. State. While the court quoted from Restatement of Torts, Second, Section 584 at 243, the court did not adopt the restatement. Rather, the court refused to adopt the absolute privilege even in defamation cases under the circumstances of the Fridovich case. The court said:

> The plain wording of the rule as stated in Ange and in the restatement, suggest an easy resolution to this question. Indeed in Ange the court found that an absolute privilege barred an action for defamation based on statements made in the office of the county judge to whom the defendant had gone to obtain a warrant. (Cites omitted.)

The Florida Supreme Court, rejecting the restatement and receding from Ange, held:

> . . . We thus hold, as a majority of the other states have held in this context, that defamatory statements voluntarily made by private individuals to the police or the state's attorney prior to the institution of criminal charges are presumptively qualifiedly privileged. We therefore recede from Ange and Robertson to the extent they are inconsistent with our ruling today. (p. 69)

Another issue in the Fridovich case was whether an intentional infliction of emotional distress claim could be made if the only basis for that claim was the privileged defamatory statement. The court ruled:

> In short, regardless of privilege, a plaintiff cannot transform a defamation action into a claim for intentional infliction of emotional distress simply by characterizing the alleged defamatory statements as 'outrageous.' (Cites omitted.)
>
> > We thus find that the successful invocation of a defamation privilege will preclude a cause of action for intentional infliction of emotional distress if the sole basis for the later cause of action is the defamatory publication.
>
> However, that privilege will not prevent recovery upon separate causes of action which are properly pled upon the existence of independent facts. (Emphasis added.) (p. 70)

Mabie and the Levin Firm have pled a separate cause of action, to-wit, intentional interference with an advantageous business relationship on the basis of independent facts. The Florida Supreme Court has ruled that there is no privilege against a suit for defamation under the egregious facts of Fridovich and certainly no privilege against separate causes of action properly pled upon independent facts.

This is further pointed out by Justice McDonald's dissent, where he said:

> Individuals whose reputations are irreparably harmed due to false accusations to law enforcement officers or state attorneys, but who prevail in that prosecution, are able to recover damages from that accuser via an action for malicious prosecution. This is an adequate remedy. (Emphasis added) (Cites omitted.) (p. 70)

Justice McDonald would grant absolute immunity in Fridovich for defamation because of the alternative remedies for the improper conduct.

There is no "litigation privilege" that gives absolute immunity for tortious acts or fraudulent misrepresentations merely because they took place in a judicial setting.

The last case discussed by U.S. Fire is Regal Marble, Inc. v. Drexel Investments, 568 So. 2d 1281 (Fla. 4th DCA 1990). It failed to discuss the earlier case of Regal Marble, Inc. v. Drexel Investments, 515 So. 2d 1015 (Fla. 4th DCA 1981).

The latter opinion says:

> Upon a review of the opinion in that appeal and the record in each case, we find no error or abuse of discretion in the trial court's conclusion that the issue considered in that appeal did not establish the law of the case as to the entirely different issues considered for the first time here. (p. 1283)

In fact, the finding in the first case was stated as:

> We find no support in DeClaire v. Yohanan, for appellees' argument that appellants cannot maintain a separate cause of action for damages arising out of the alleged fraudulent acts by appellees. (515 So. 2d at 1016)

This is entirely inconsistent with the statement in the latter case that:

> There is no cause of action recognized in this state for false statements made in prior judicial proceedings. (568 So. 2d at 1282)

The latter case appears to lend support to appellee's argument that it enjoys a litigation privilege that grants it absolute immunity for all actions or representations in a judicial proceeding.

However, on closer scrutiny we see that this case is based entirely on Wright v. Yurko, 446 So. 2d 1162 (Fla. 5th DCA 1984), and Myers v. Hodges, 53 Fla. 197, 44 So. 357 (1907), both of which were discussed in Appellants' brief in chief. As pointed out there, the Myers case established a limited or qualified privilege for defamatory statements and Wright involved a two count complaint, the first for slander and the second for malicious prosecution. The Wright case declined to allow the defamation claim to go forward but recognized the right to go forward with a malicious prosecution case against the expert witnesses and the parties who had rendered false testimony in the previous lawsuit. To the extent that the latter Regal Marble case can be read to expand the privilege, it misconstrues Florida law and should not be authoritative. The Florida Supreme Court in Fridovich, supra, two years later acknowledged the right to proceed with both malicious prosecution claims and other causes of action if appropriately supported by facts.

U.S. Fire relies on Kessler v. Townsley, 182 So. 232 (Fla. 1938), for the proposition that a party cannot maintain an action against one who has, by perjured testimony, brought about an

adverse verdict. However, that limitation only applies "while such verdict and judgment remain in force." (p. 233). Kessler v. Townsley, supra, does not endorse obtaining judgments by fraud and perjury. It merely states that res judicata can be a defense so long as the illegal judgment is still of record. Catlett v. Chestnut, 146 So. 547 (Fla. 1933), similarly held that:

> 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. (p. 548)

In the case at bar, there is no pending litigation and there is no judgment in force.

U.S. Fire argues that to deny absolute immunity for false statements to the court would create a "slippery slope which must be avoided both as a matter of law and for reasons of sound public policy" (p. 17 of U.S. Fire's Brief) and that the potential price to be paid for allowing this cause of action to stand is great to be allowed. If the slope is slippery, it can only be because of the grease applied by U.S. Fire. They certified that they were going to call Mabie as a witness knowing that of all the people in the world they would least like to take the witness stand it was Lefferts Mabie. They did this in order to gain an advantage in the litigation and even though they ultimately lost, the effect of their acts was to prevent the Levin Firm from continuing to

represent its client which resulted in substantial loss to the Levin Firm. The price to pay is accountability, a commodity which seems to been in dwindling supply. The public policy question is simply whether or not U.S. Fire is going to be held accountable for this act or whether parties will be encouraged to make false representations to trial judges in order to gain advantage when they see fit. This Court should not fashion a privilege that condones misrepresentations to judges without redress by the aggrieved party. U.S. Fire argues that such conduct is subject to disciplinary actions by the court (contempt), the Florida Bar and/or criminal action by the State. These remedies are illusory at best. U.S. Fire did not violate a court order, but rather obtained a court order by false pretenses, U.S Fire is not subject to the Florida Bar disciplinary rules and the statement was not sworn and therefore perjury would not apply. There is no other remedy for the wrong committed by U.S. Fire. This Court should not permit U.S. Fire to abuse the process of the judicial system by granting it a privilege that allows U.S. Fire to get away with making false statements to the trial court to the detriment of the Levin Firm for the purpose of gaining an advantage in the litigation.

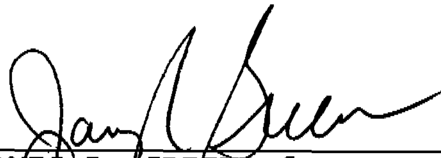
Far more harm would be done by allowing U.S. Fire to escape being held accountable and setting a precedent that would permit and even encourage parties to make misrepresentations to trial courts in order to improve their position in the litigation.

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; James M. Landis, Esquire, P. O. Box 3391, Tampa, FL 33601, and C. Rufus Pennington, III, Esquire, Suite 1702, American Heritage Tower, 76 South Laura Street, Jacksonville, FL 32202, all by regular U.S. Mail on this the 29th day of December, 1993.



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APPENDIX

EXHIBIT 2

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT, IN AND FOR ESCAMBIA COUNTY, FLORIDA

CASE NO.: 85-1998-CA-01

MORRISON ASSURANCE COMPANY,

Plaintiff,

vs.

UNITED STATES FIRE INSURANCE COMPANY,

Defendant.

ORDER ON DEFENDANT'S MOTION TO DISQUALIFY

This cause came before the Court for hearing on Defendant, United States Fire Insurance Company's Motion to Disqualify Plaintiff's Counsel. The Court having considered the pleadings and discovery filed herein, heard argument by the parties, and otherwise having been fully apprised of the circumstances, it is accordingly

ORDERED AND ADJUDGED:

1. At the hearing hearing held December 5, 1986 in the above-captioned litigation, the Court ruled that Defendant's Motion to Disqualify Counsel would be denied without prejudice, but would be granted if United States Fire Insurance Company affirmatively represented that it would call Lefferts Mabie, Esq., as a witness.

2. The Court has received the affirmative representation by counsel for United States Fire Insurance Company that it would call Lefferts Mabie, Esq. as a witness. Accordingly, the Motion to Disqualify Plaintiff's Counsel is granted.

3. As a result of the disqualification of Plaintiffs' current counsel, the Pretrial Conference and Trial presently

scheduled for December 16, 1986 and January 19, 1987, respectively are hereby continued, to be reset at a date convenient to all counsel.

DONE AND ORDERED in Chambers, this 12 day of December, 1986.

/S/ NICKOLAS P. GEEKER

Nickolas P. Geeker
Circuit Judge

Copies furnished to:
S. William Fuller, Jr.
Dennis J. Wall
James A. Hightower