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IN THE SUPREME COURT OF FLORIDA

DONALD TOBKIN,

Petitioner,

CASE NO. 91,236

vs.

KIMBERLY L. JARBOE, et al.,

Respondents.

AMENDED BRIEF OF *AMICUS CURIAE*

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TABLEOFCONTRNTS

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PRELIMINARY STATEMENT

By granting The Florida Bar's motion, this Court has allowed the Bar to address the matter of this appeal as one of great public interest. While the arguments of the petitioner and respondents are centered on the eventual ability of the petitioner to go forward with a long-standing civil action, the narrow issue to be addressed by the Bar is the current status of the applicable privilege of immunity that may be asserted by a claimant making a complaint to The Florida Bar regarding a charge of misconduct by one of its members. The petitioner herein has argued that the applicable law has given him the right to sue for defamation based upon a complaint against him to The Florida Bar by the respondents. In their defense, the respondents assert current case law and the ruling below by the Fourth District Court of Appeal that complainants to the Bar enjoy an absolute privilege of immunity against such lawsuits based upon a grievance filed with The Florida Bar. The Florida Bar takes the position that this Court has established a qualified immunity or privilege for such complaining parties but that some confusion remains in this area. It is this confusion which the Bar wishes to address and would ask for a definitive ruling on the privilege so as to alleviate the necessity of future argument.

Amicus Curiae, The Florida Bar, will be refereed to as "The Florida Bar," or as "the Bar" throughout this brief. The Florida Bar Disciplinary Review Commission will be referred to as "the Commission" or "the Loucks Commission" and its report of January, 1989, will be referred to as "the report" or "the Loucks report." The Rules Regulating The Florida Bar will be referred to as "the Rules" or "the RRTFB."

SUMMARY OF THE ARGUMENT

Prior to 1990, persons filing complaints with The Florida Bar had the privilege of absolute immunity for any statements made during and about the disciplinary process. See Stone, et al. v. Rosen, 348 So. 2d 387 (Fla. 3d DCA 1977). In 1987, the Disciplinary Review Commission was created and charged with, among other things, evaluating the performance of the disciplinary system to determine if it could be improved. As a result of the Commission's investigations, it issued a report in January, 1989. In the report, the Commission recommended: "The complainant shall not have absolute immunity or privilege from civil liability when he or she files a complaint with The Florida Bar but shall be subject to applicable Florida law." In its commentary on this recommendation, the Commission discussed qualified immunity for complainants.

As a result of the report, amendments to the Rules Regulating The Florida Bar were proposed to this Court. Those amendments incorporated the Commission's recommendations with limited exception; one of those exceptions was the issue of complainant immunity wherein the Bar sought to maintain absolute immunity on behalf of the complainant. In its opinion on the proposed amendments, this Court approved all of the amendments, "except those which are in conflict with the above recommendations of the Commission [including the recommendation removing absolute immunity for complainants]." The Florida Bar re: Amendments to the Rules Regulating The Florida Bar (Grievance Procedures and Confidentiality), 558 So, 2d 1008, 1009 (Fla. 1990).

By its opinion of March 16, 1990, this Court intended to change the immunity status of persons filing complaints against attorneys by making that immunity equal to that of applicable law.

Under established law, parties to judicial proceedings have absolute immunity in those proceedings; however, under Stone, absolute immunity also applies in bar proceedings. r s

that this Court intended to make a change to the immunity status ofcomplainants; but, the degree of change to that immunity is uncertain.

ARGUMENT

FLORIDA LAW ALLOWS FOR QUALIFIED AND ABSOLUTE IMMUNITY FOR PERSONS INVOLVED IN INVESTIGATORY PROCEEDINGS.

In the instant case, attorney Tobkin originally filed a complaint in circuit court against his former clients for, among other things, libel arising from complaints filed against him with The Florida Bar. The trial court, in dismissing that complaint, did not address the issue of immunity, but relied upon Tobkin's failure to provide pre-suit notice as required by statute in defamation actions. Upon appeal of the dismissal of his claims to the Fourth District Court of Appeals, the trial court was affirmed based upon the ground that statements made in complaints to the Bar are absolutely privileged. In making this decision, the Fourth District Court of Appeals cited Stone v. Rosen, 348 So. 2d 387 (Fla. 3d DCA 1977), as authority and held that the matter of The Florida Bar re: Amendments to the Rules Regulating The Florida Bar, 558 So. 2d 1008 (Fla. 1990), did not affect the conclusion in Stone because the reasoning remains sound in enhancing the professionalism of lawyers. Tobkin v. Jarboe, 695 So. 2d 1257, 1259 (Fla. 4th DCA 1997).

In its March 16, 1990, opinion on the proposed amendments, this Court did not clearly establish a new standard of privilege or immunity as to complaints filed with The Florida Bar against member attorneys. See In re: Amendments, *supra.* The Florida Bar proposed those amendments as a result of a review and report by the Disciplinary Review Commission of The Florida Bar. The Commission recommended numerous rule changes that affected the disciplinary review procedures of The Florida Bar. As pointed out in its opinion, this Court noted that one of the three areas in which the Bar's petition differed from the recommendations of the Disciplinary Review Commission was in regards to the immunity of the complainant

In its report, the Commission recommended that "The complainant shall not have absolute immunity or privilege from when he or she files a complaint with The Florida Bar but shall be subject to applicable law." William E. Loucks, Chairperson, Disciplinary Review Co-Report to Supreme Court of Florida and The Florida Bar Board of Governors 28-29 (January, 1989). In its comment, the Commission acknowledged the then-current position as set forth in Stone. The commission in its comment further explained that its recommendation was for a rule providing qualified immunity. Loucks Report 28-29.

In its opinion promulgating the new rules, this Court stated, "After careful consideration, we approve all amendments proposed by the Board of Governors except those which are in conflict with the above recommendations of the Commission." In re Amendments, *supra* at 1009. Accordingly, it is argued that this court changed the policy of absolute immunity for Bar complaints to that recommended by the Disciplinary Review Commission; namely, such immunity available under applicable Florida law or qualified immunity.

In support of the Bar's position of there being a qualified immunity standard, it is important to look at this Court's rationale in Fridovich v. Fridovich, 598 So. 2d 65 (Fla. 1992). In Fridovich, the Court addressed the level of immunity that attaches to defamatory statements made by private individuals to police prior to the institution of criminal charges. After considering the issues in regards to striking a balance between a right to enjoy a reputation unimpaired by defamatory attacks and the necessity, in the public interest, of a free and full disclosure of facts in the conduct of the legislative, executive and judicial departments of government, this Court agreed that a qualified privilege sufficiently protects those who wish to report events concerning crime. Id. at 68. This

Court further stated that there is no benefit to society or the administration of justice in protecting those who make intentionally false and malicious defamatory statements to police.

Applying the above rationale to the instant matter would clearly accomplish the intent of the Disciplinary Review Commission. Those making a good faith statement of facts concerning the actions of a lawyer in reporting misconduct would enjoy a qualified immunity from exposure of lawsuits based upon statements made to the Bar. Those individuals that make intentionally slanderous and malicious statements merely to harass or harm a member of the Bar would not be protected. Such a position is exactly the rationale behind the Commission's recommended rule change on immunity. In that this can also be seen as applicable Florida law, it supports the Bar's position that, at least at the initial complaint stage, the privilege is one of qualified immunity.

In making its recommendation on applicable immunity, the Disciplinary Review Commission specifically mentioned those complaints filed with malicious intent as not being under the privilege of absolute immunity. In promulgating its proposed rule, the Commission excluded such Bar complaints from enjoying absolute immunity, but provided such a complaint be subject to applicable Florida law. If this rule is to be the pole star for determining the extent of privilege or immunity to be afforded a complaining party, then such provision only adds to the confusion.

Prior to this Court's 1990 rule amendments and 1992 **Fridovich** decision, applicable law was , absolute immunity as seen in the Third District Court of Appeals' decision in **Stone,** et al. v. Rosen, 348 So. 2d 387 (Fla. 3d DCA 1977). Stone was an attorney; he and his partners brought suit against Rosen for malicious prosecution because Rosen had filed a complaint against the firm with The Florida Bar which complaint was ultimately determined to have no probable cause by a grievance committee. Before the trial court, Rosen asserted a qualified privilege existed as to the complaint

that would make her immune to the suit for malicious prosecution. On a motion for summary judgment, the trial court granted dismissal based upon qualified immunity. On appeal, the Third District Court of Appeal affirmed that summary judgment was appropriate as no issue of fact was in dispute. However, the court found that instead of a qualified privilege, in fact, an absolute privilege of immunity should apply to complainants in disciplinary proceedings. The court's reasoning was that

> [m]embers of the legal profession are accorded rights and privileges not enjoyed by the public at large; the acceptance of these carries with it certain responsibilities and obligations to the general public. For the sake of maintaining the high standards of the profession and disciplining those who violate the Canons of Legal Ethics, one who elects to enjoy the status and benefits as a member of the legal profession must give up certain rights or causes of action which, in this instance, is the right to file an action against a complainant who lodges an unsuccessful complaint with the Grievance Committee of The Florida Bar.

Id. at 389. This reasoning has been followed by other jurisdictions throughout this and other states. See Dugas, et al. v. City of Harahan, 978 F. 2d 193 (5th Cir. 1992); McKenzie v. Raymond, 5 19 So. 2d 711 (Fla. 2d DCA 1988); Mueller v. The Florida Bar, 390 So. 2d 449 (Fla. 4th DCA 1980).

It is well established that defamatory statements made during the course of judicial proceedings are absolutely privileged provided that the statements are relevant or pertinent to the proceeding. See Briscoe, et al. v. LaHue, et al., 460 U.S. 325, 103 S. Ct. 1108, 75 L. Ed. 2d 96 (1983); Myers v. Hodges, 53 Fla. 197, 44 So. 357 (1907); Robertson v. Industrial Ins. Co., 75 So. 2d 198 (Fla. 1954).

> The rule adopted by this Court controlling privileged publications is that words, spoken or written, in the course of a judicial proceeding by the parties, or counsel, if relevant will not support an action for defamation; nor when irrelevant, if the speaker or writer believed that the words used were relevant, and had reasonable or probable cause so to believe; nor in any case, without proof of actual malice. See Myers v. *Hodges,* 53 Fla. 197, 44 So. 357.

Taylor v. Alropa Corp., et al., 138 Fla. 137, 139, 189 So. 230, 231 (Fla. 1939). This privilege applies to all participants, no matter the role they play in the proceedings; i.e. judge, party, counsel or witness. See Robertson, *supra.* This right of absolute privilege has been extended to witnesses testifying before a grand jury. See Buchanan v. Miami Herald Publishing Co., et al., 230 So. 2d 9 (Fla. 1969) (public policy does not allow suits for damages to deter function of grand juries). Proceedings before the grievance committees of The Florida Bar have been determined to be the same in nature as grand jury proceedings; they are both investigatory. See The Florida Swickle, 589 So. 2d 901 (Fla. 1991). Additionally, absolute privilege applies not only to purely judicial proceedings (suits filed before a court of competent jurisdiction), but also to administrative proceedings which are quasi-judicial in nature. See Robertson, *supra.* This Court has defined The Florida Bar and its proceedings as quasi-judicial. See Rule 3-7.6(e)(1), Rules Regulating The Florida Bar; The Florida Bar v. Clement, 662 So. 2d 690 (Fla. 1995).

CONCLUSION

The procedures of the Bar's disciplinary system are similar to that of other prosecutorial authorities. Upon receipt of unsolicited complaints from the public, formal investigations are undertaken and disciplinary proceedings may result. With the Court's acceptance of the Commission recommendation on changing immunity, it would appear current law must dictate that only a qualified immunity or privilege is available to those filing initial complaints. The defining by rule that the proceedings at a referee stage are quasi-judicial in nature would provide for absolute immunity to any statements relevant and pertinent to the subject made in connection with those proceedings. This Court has also declared that proceedings conducted before a grievance committee are in the nature of grand jury proceedings which also carry with them the privilege of absolute immunity. The confusion on this subject lies in the nature of the initiation of a disciplinary proceeding. If a complaint filed with the Bar is analogous to the unsolicited statement to police about knowledge of a crime as in **Fridovich,** then a qualified immunity applies to the complainant at that time. If, however, the complaint is analogous to the statement filed with the insurance commissioner which starts investigations into an individual's insurance license as in **Robertson,** then an absolute privilege applies.

The Florida Bar asks for clarification from this Court as to what is "applicable Florida law" as it intended by its amendment to the Rules Regulating The Florida Bar as stated in its opinion of March 16, 1990. As presented in this brief, it is the position of The Florida Bar and its Board of Governors that qualified immunity attaches to the initial complaint filed voluntarily by an individual against an attorney; but, after that point, absolute privilege as afforded judicial and quasi-judicial proceedings is applicable.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of The Florida Bar's Amended Brief of *Amicus Curiae* has been provided by United States Mail this 23d day of January, 1998, to RICHARD A. BARNETT, Attorney for Appellant, Richard A. Barnett, P.A., 121 S 61 st Terrace, Hollywood, Florida 33023; and THOMAS RICHARD JULIN and EDWARD MAURICE MULLINS, Attorneys for Appellees, Steel Hector & Davis, L.L.P., 200 S Biscayne Boulevard, 40th Floor, Miami, Florida 33 13 1.

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