IN THE SUPREME COURT OF FLORIDA

EARL STEWART, Jr., and
STEWART AGENCY, INC., d/b/a
STEWART TOYOTA OF NORTH
PALM BEACH,
Petitioners,

v. **CASE NO. SC04-752**

RAYMOND G. INGALSBE,
RAYMOND G. INGALSBE, P.A.,
J. KENT BROWN, and
J. KENT BROWN, P.A.,
Respondents.

_____/

RESPONDENTS' ANSWER BRIEF

On Discretionary Review of Certified Question
From the Fourth District Court of Appeal

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QUESTION CERTIFIED

DOES THE LITIGATION PRIVILEGE OF LEVIN, et al., P.A. v. UNITED STATES FIRE INS. CO., 639 So2d 606 (Fla. 1994) APPLY TO CLAIMS ALLEGING DIRECT INTERFERENCE WITH AN ATTORNEY'S FEE EARNED BY REPRESENTING A CONSUMER'S CLAIM FOR UNFAIR AND DECEPTIVE PRACTICES IN A SALE OF A MOTOR VEHICLE, WHERE THE INTERFERENCE AROSE FROM A SELLER-INITIATED SETTLEMENT WITHOUT COUNSEL IN WHICH THE FEE DUE THE LAWYER WAS REDUCED WITHOUT THE LAWYER'S CONSENT?

INTRODUCTION

The parties will be referred to herein as they are in the Petitioners' Initial Brief; i.e., "Stewart" (Petitioner), "Ingalsbe and Brown" (Respondents), and "The Lesueurs" (former Plaintiffs and clients of Ingalsbe and Brown).

Stewart has included in the introduction section to his brief a recitation of certain facts (without record citations) to which we respectfully disagree in part, as well as a description of the holding of the Fourth DCA below with which we also respectfully disagree since it is not accurate. These will be addressed in the Statement of Facts

and the Argument sections of this brief.

STATEMENT OF THE CASE AND FACTS

This tortious interference case arises out of an underlying consumer litigation case brought by the former clients of Ingalsbe and Brown against Stewart Toyota for having sold a used (one year old) automobile that had been previously wrecked, seriously damaged, poorly repaired and then warranted to have never been in an accident. After experiencing many problems that the dealer refused to correct despite also selling a 12 month warranty for an additional charge, the former clients filed an action against Stewart Toyota for intentional fraud and deceptive and unfair trade practices. That case was captioned Lesueur v. Stewart Agency, Inc., et al., 15th Judicial Circuit case no. CL 96 5029 AD (R. 45 - 46).

Mr. and Mrs. Lesueur retained attorneys Ingalsbe and Brown to represent them on a contingent basis which included either a percentage fee (40% in the event of litigation plus 5% for an appeal) or the court-awarded fee if it was greater. (R.10-12; 13-14; 15-17). The fee agreement recognized that this was a consumer case involving potentially low compensatory damages and that the attorneys' potential fee award could be greater than the amount of actual damages awarded. (R.13). The complaint that was prepared and filed for the Lesueurs included a request for a statutory award

of attorney's fees against Stewart Toyota under Section 501.2105, Florida Statutes.

The underlying case went to trial and the jury returned a verdict in favor of the Lesueurs on both the fraud count and the statutory count (deceptive and unfair trade practices) and a final judgment was entered awarding $20,530 as damages. (See R.46; See also Stewart v. Lesueur, 785 So2d 1242 (Fla. 4th DCA 2001.) On appeal, the Fourth DCA reversed and remanded the case for a new trial on the grounds that the trial court had improperly excluded certain evidence at the first trial. See Stewart v. Lesueur, supra. (App. "A") The dealer, Stewart Toyota, obtained an appellate attorney fee and cost judgment against the Lesueurs in the amount of $6,643 as a result of the appeal reversing the first final judgement. (R.46)

The case was remanded and a new trial was scheduled for March 11, 2002. (R.46). By that time, the case had been in litigation for about six years (R.46) and both parties were represented by counsel and had been represented throughout the proceeding.

One month before the case was scheduled to be retried, the president of Stewart Toyota, Earl Stewart, sent a letter directly to Mr. and Mrs. Lesueur behind the backs of the lawyers who had been representing them for six years. That letter is self-explanatory and in the Record at R.18. See also Appendix to Petitioners' Initial Brief at A.2(D).

The letter begins by admitting it is an attempt to establish a direct line of communication without involving the Lesueurs' attorneys. (R.18). The letter tells the Lesueurs that, so far, they have each won one round and "the only ones coming out ahead are our lawyers." (R.18). The letter states there will be rounds "three, four and so on" and mentions Stewart's ability to put a lien on the Lesueurs' property to collect appellate attorney's fees previously awarded if the case is not settled. (R.18). The letter then suggests the Lesueurs secretly meet with Earl Stewart to settle the case and states, "My only condition is that we have no attorneys around." [Emphasis in original.] The letter concludes by urging the Lesueurs to call Earl Stewart directly at his office or his home and provided both telephone numbers. (R.18).

The letter had its intended effect and the Lesueurs did meet and settle the case with Earl Stewart, leading to their signature on a "Settlement and Release Agreement". (R.3, 19-21). Both the settlement discussion and the written settlement agreement were completed clandestinely without any knowledge of the attorneys representing the Lesueurs. (See R.53). The written settlement agreement was signed two weeks before the date scheduled for retrial. (R.19, 46). The case was settled for $35,000 minus the amount (undisclosed in the record) representing the insurance payment still being held in escrow for the previous wreck of the used auto. (R.19). The settlement agreement also purported to settle the amount of attorney's fees payable to the Lesueurs'

attorneys in the amount of 33% of the settlement agreement. (R.19). That also was agreed to clandestinely, notwithstanding the statement in the settlement agreement that each party has had the opportunity to consult with their attorney about the advisability of entering into the agreement. (R.20).

Four months after the underlying consumer case was settled, attorneys Ingalsbe and Brown filed this action against Earl Stewart and Stewart Toyota for intentionally and tortiously interfering with their business relationship with their clients, the Lesueurs.[1] The complaint alleged that Stewart intentionally induced the Lesueurs to breach their agreement with their own attorneys and that the intent in doing so was to deprive the attorneys of their right to the full amount of attorney's fees they would otherwise earn pursuant to the Lesueurs' statutory right to attorney's fees under sections 501.2105 and 520.12(2), Florida Statutes. (R.1-4).

Stewart Toyota did not answer the complaint but immediately filed a motion to dismiss with prejudice arguing that the conduct alleged in the complaint is completely immunized from liability as a matter of law under the "litigation privilege", and therefore the complaint fails to state a cause of action. (R.36).

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[1] The complaint also contained a second count for "civil theft", which is not raised or involved as an issue in this appeal. The former clients, Mr. & Mrs. Lesueur, are not named parties to this case.

The trial court granted the motion to dismiss with prejudice on grounds that the claims were "barred by the absolute immunity of Florida's litigation privilege". (R.61). A final judgment was entered in favor of Stewart Toyota and the other co-defendants. (R.92-93).

That final judgment was timely appealed to the Fourth DCA, which reversed the final judgment in a 2 to 1 decision and certified the "immunity" issue to this court as a question of great public importance. (App. "A" and "B") Ingalsbe v. Stewart, 869 So2d 30 (Fla. 4th DCA 2004). The Petitioners now mischaracterize the holding of the majority opinion and we will address that at greater length in the Argument section of this brief. In a nutshell, the majority held that the act of enticing the opposing party to secretly engage in settlement discussions behind the back of their attorney and to settle in a way that squeezes out the attorney from earning a statutory fee award after six years of labor is not an act protected by any "privilege".

The dissenting opinion by Judge Gross relies on broad language used by this court in the Levin case, infra, and concludes that any act having any nexus at all to litigation is a protected act. The majority opinion, however, finds that the facts of this case do not fit within the rationale of the Levin case, infra.

This court has postponed its decision on jurisdiction but directed the parties to file briefs on the merits

SUMMARY OF ARGUMENT

The majority opinion of the Fourth DCA is correct. The dissenting opinion is not.

Moreover, since the issue here is so fact-specific, it is questionable whether it is one of great public importance even though it may be intellectually interesting.

STANDARD OF REVIEW

This court's interpretation of its own prior decision in the Levin case, infra, is necessarily *de novo* and involves a question of law arising under facts that are essentially undisputed. [2] Whether a complaint states a cause of action is also usually reviewed *de novo*. See Rittman v. Allstate Ins. Co., 727 So2d 391 (Fla. 1st DCA 1999).

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[2] Since the complaint (R. 1 - 6) was dismissed with prejudice for failure to state a cause of action (R. 60 -62), the well-pleaded allegations are deemed to be true. They have never been denied by any pleading and they are supported by the exhibits attached to the complaint. (R. 7 - 21)

ARGUMENT

The Petitioners begin their brief by mischaracterizing the Fourth DCA's majority opinion, and then wave that banner by repeating it multiple times throughout their brief. On page one of their brief, the Petitioners assert that the majority opinion held that it constitutes tortious interference for a party to settle directly with another party if the other party has a contingency fee arrangement with his own counsel. Then, on pages 3, 11, 20 and 27 the Petitioners assert that the Fourth DCA's majority opinion prohibits any settlement between the parties themselves in a contingency fee case. That is false. The majority opinion does no such thing.

At pages 22 and 27, the Petitioners assert that the majority opinion holds that Ingalsbe and Brown should have been allowed to prevent the settlement from happening. That is also false. No one has even attempted to have the settlement set aside. At page 28, n. 16, the Petitioners assert that the majority opinion implies the parties can never settle a case between themselves before trial if the attorney's contingent fee percentage is higher after trial. That is nonsensical since the majority opinion says nothing even remotely like that. The Petitioners are trying to convey the

impression that the sky is falling, but that is not true.

Of course a defendant can settle a claim directly with the plaintiff without the consent of the plaintiff's attorney, but by doing so the defendant cannot tortiously entice the plaintiff to breach the agreement under which the plaintiff's attorney was retained and worked for six years. That is the point to this case. As this court has held in the past, the parties are free to settle between themselves, but not in such a manner as to defraud the plaintiff's attorney. See Miller v. Scobie, 11 So2d 892 (Fla. 1943).

When the plaintiff's attorney accepts a case on the strength of a statutory fee award which would factor in a "contingency multiplier" for taking the risk of losing after working for years on the case, the defendant is not "privileged" to pull the carpet out from under the attorney by enticing the plaintiff to breach his own fee agreement with his own attorney. That does not mean the parties cannot settle between themselves. They can settle and simply leave the fee issue open for the court to determine under the statute. They can also settle in any other way that does not unilaterally diminish the attorney's contractual right to be paid a statutory fee award. But here, Stewart Toyota was able to convince the Plaintiffs to waive that statutory fee in return for an amount that would only cover a fraction of what the court would have undoubtedly awarded for six years of legal work.

If the law allowed this type of behavior, insurance companies and other defendants would have the court's blessing to contact the plaintiff outside the presence of counsel and exploit that by enticing an unsophisticated party to alter their attorney's entitlement to be paid for years of work. In the present case, the Plaintiffs (the Lesueurs) may not have even known or remembered about their attorney's right to a statutory fee award since they were unrepresented at the settlement meeting. It would be detrimental to the orderly system of litigation for the courts to immunize this type of tortious interference, and the Levin case does not do so.

If the law allowed this type of behavior, is it hard to imagine what would happen to the availability of counsel willing to litigate a small damages case like this one for six years? If Stewart Toyota can behave in such a way without recourse in this case, so can any defendant in any case governed by a "prevailing party" attorney fee statute in order to overcome the legislative intent behind the statute, which is to encourage attorneys to accept certain cases where many people might otherwise find it impossible to obtain affordable counsel. The majority opinion of the Fourth DCA in this case specifically notes:

> In consumer cases, such as those under the lemon law, the actual amount of damages may often be quite modest as against the probable amount of legal work required to achieve them. It is the recognition of that imbalance that is behind the legislative decision to create an entitlement to fees by statute. Without the possibility that a reasonable fee

> will be set by the court, consumers may find it impossible to interest lawyers into litigating such claims. In short, if the defendants in such cases were privileged to interfere with the very provision that allows consumers to vindicate such statutory rights, the statutes would become mere ornaments in the statutory code. (App. "A", p. 4)

The elements that create a cause of action in tort for intentional interference with business relationships are: (1) the existence of a business relationship under which the plaintiff has legal rights, (2) knowledge of the relationship by the defendant, (3) an intentional and unjustified interference with the relationship by the defendant and (4) resulting damages to the plaintiff. See Abele v. Sawyer, 750 So2d 70 (Fla. 4th DCA 1999). This tort has been held to arise in the litigation process when one party directly solicits the other party, who is represented by counsel, to settle the case without consulting with their own attorney and to alter the existing contractual relationship between the opposing party and their own attorney. See Bankers Multiple Line Ins. Co. v. Farish, 464 So2d 530 (Fla. 1985).

In the Bankers v. Farish case the client, a widow in a wrongful death case, retained an attorney, Farish, to sue the defendant, John D. MacArthur. MacArthur directly contacted and induced the widow to cooperate with him in settling the case by discharging Farish and hiring another attorney selected by MacArthur. Farish, who had been retained on a contingent basis, sued MacArthur for intentionally interfering with his relationship with his own former client. This court noted that Farish had

sufficiently proven that MacArthur intentionally and unjustifiably interfered with the attorney-client relationship and this court upheld the jury's verdict in favor of Farish.

Justice Boyd dissented on grounds that, in his view, there was no actionable tort committed by MacArthur when he contacted the plaintiff directly and convinced her to discharge her attorney and settle directly with him. Id. at 533 - 534. However, the majority of this court disagreed with that view.

Stewart Toyota relies on this court's later opinion in Levin, Middlebrooks, et al. v. U.S. Fire Ins. Co., 639 So2d 606 (Fla. 1994) which elaborated on the "litigation privilege" under distinguishable facts, and which never purported to overrule this court's earlier decision in Bankers v. Farish, supra. In Levin, one party moved to disqualify the other party's attorney on grounds that the attorney was a material witness who was going to be called to testify at trial, but then never actually called the lawyer to testify at trial. The lawyer sued for tortious interference and this court held that the act of moving to disqualify the lawyer was protected by the litigation privilege. This court did not hold that every other kind of tortious interference is also a protected act.

Stewart Toyota argues, and Judge Gross seems to agree in his dissenting opinion below, that certain broad language used in this court's opinion in Levin suggests that any act having any nexus at all to the litigation process is a protected act.

Judge Gross' dissenting opinion reasons that "a settlement of a pending lawsuit has some relation to the lawsuit" and therefore the privilege must apply. If that was true, even if a party held a gun to the head of the other party to sign the settlement agreement, no actionable tort has been committed. That is not what this court intended in Levin.

The Levin case has to be read with a view toward the facts of that case and the rationale that influenced this court to reach its decision. The majority opinion of the Fourth DCA below states that Stewart Toyota's argument in this case "does not fit within the supreme court's rationale" in the Levin case. (See App. "A", p. 2.) This court did use broad language in one part of its opinion in Levin, but at another part this court stated that the privilege arises "upon the doing of any act required or permitted by law in the course of the judicial proceedings." [e.s.] Levin at 608.

Moving to disqualify opposing counsel is an act permitted during the course of litigation and it is protected by the litigation privilege. That, however, does not immunize every conceivable act of a party that may have some nexus to litigation; but only those acts that are a permissible part of that litigation. See also Fridovich v. Fridovich, 598 So2d 65 (Fla. 1992) which limits the litigation privilege to acts that are "required or permitted" by law in the due course of litigation.

If the litigation privilege immunized every act that has any nexus to litigation,

then the attorney in the Bankers v. Farish case would have had no cause of action against John D. MacArthur for interfering with his relationship with his own client since that also related to a misguided attempt to settle ongoing litigation. There would also be no such cause of action as abuse of process or malicious prosecution since they both have a nexus to litigation.

Certain acts that are permitted in litigation are protected for public policy reasons. Statements made in pleadings filed with the court, even if malicious and untrue, are protected. See Ponzoli v. Wassenberg, P.A., 545 So2d 309 (Fla. 3d DCA 1989) (noting that many litigants harbor a desire to bring suit against their adversary's attorney for things that were said or written about them). Moving to disqualify opposing counsel is also protected. Levin v. U.S. Fire Ins. Co., supra. However, enticing the opposing party to secretly engage in settlement discussions on the condition that no lawyers attend, and then settling the case in a manner that squeezes out the attorney from a fee he has earned under his contract with the client is not a protected act, nor should it be.

There are a separate line of cases that have thwarted attempts to defraud attorneys of fees they have properly earned. One good example from this court is Miller v. Scobie, 11 So2d 892 (Fla. 1943). In that case the plaintiff retained attorneys on a contingent fee basis, but later settled the case without knowledge of the plaintiff's

attorneys on a basis that eliminated or reduced their fee entitlement. The attorneys sought to continue to prosecute the case against the defendant to recover their fees. This court permitted the action and stated that to do otherwise "would approve a system whereby a litigant could at will give his attorney the 'runaround' and escape freehanded with the fruits of the litigation." Id. at 894. This court also stated:

> We do not deny the right of litigants to settle controversies out of court but any such settlement without the knowledge of or notice to counsel and the payment of their fees is a fraud on them whether there was an intent to do so or not. Id. at 894.

Accord, Heller v. Held, 817 So2d 1023 (Fla. 4th DCA 2002); Brown v. Vermont Mut. Ins. Co., 614 So2d 574 (Fla. 1st DCA 1993); Forman v. Kennedy, 22 So2d 890 (Fla. 1945).

Other jurisdictions have dealt with the same issue in the same way. In Schiavoni v. Steel City Corp., 727 NE 2d 967 (Ohio App. 1999) a workers' compensation attorney sued an employer for tortious interference with the attorney's fee contract with the claimant after the employer initiated secret negotiations directly with the claimant. They settled the workers' compensation claim and reduced the amount of the fee after the case had been litigated for two years. The appellate court reinstated the tortious interference claim after the trial court had erroneously dismissed it and

stated:

> If this court were to adopt the trial court's position, we would essentially be granting carte blanche to insurance companies, employers and the like to contact represented parties and negotiate settlements outside the presence of counsel. Such a decision would serve only to invite abuses and encourage exploitation. Id. at 971.

Similarly in Katopodis v. Liberian S/T Olympic Sun, 282 F.Supp 369 (E.D. Va. 1968) the court held that a defendant who goes "behind the back" of plaintiff's counsel and settles the case directly with the plaintiff in bad faith or prevents the plaintiff's attorney from collecting his fee, is liable for such conduct to the attorney. The court stated:

> A plaintiff has the right to make settlement of his claim directly with a defendant and without the knowledge or consent of his employed counsel. But, by doing so, he cannot deprive the attorney of his fee. Id. at 371.
>
> * * *
>
> Proper action must be taken to prevent this from happening in the future. If a defendant...is permitted to sneak behind the back of plaintiff's counsel and by some agreement with plaintiff destroy the plaintiff's claim and his attorney's lien for services, we will destroy the usefulness of the courts and confidence of the public therein. Every effort should be made to prevent this. Id. at 372.

The same issue has been addressed by the South Carolina Supreme Court and it was handled the same way. In Keels v. Powell, 34 S.E. 2d 482 (S.C. 1945) the

supreme court held that an attorney stated a claim for tortious interference against a defendant who had settled a personal injury claim directly with the plaintiff without the attorney's knowledge and in a way that violated the attorney's contract of employment with the plaintiff.

Normally, the moment the Lesueurs' case was settled they would have been entitled to the statutory attorney's fee requested in their complaint under the Deceptive and Unfair Trade Practices Act unless that right was waived as part of the settlement. When a party sues under a statute that provides for an attorney's fee award and the defendant settles and pays the claim during litigation to avoid going to trial, the plaintiff generally is considered to have prevailed for purposes of awarding attorney's fees. See e.g. Brown v. Vermont Mut. Ins. Co., 614 So2d 574 (Fla. 1st DCA 1993)(statutory action on an insurance policy); Fitzgerald & Co. v. Roberts Electrical Contractors, Inc., 533 So2d 789 (Fla. 1st DCA 1988)(statutory action on a construction bond); Seminole County, Inc. v. Stanko, 501 So2d 195 (Fla. 4th DCA 1987)(statutory action under the condominium act).

Stewart Toyota now argues (at page 22, note 11 of its brief) that the Deceptive and Unfair Trade Practices Act contains an attorney fee statute that is different than most "prevailing party" attorney fee statutes because this one (section 501.2105, Fla. Stat.) requires that the case go to "judgment". That is not correct. See Gardner v.

Nimnicht, 532 So2d 26 (Fla. 1st DCA 1988) which holds that a consumer who elects to rescind the purchase rather than accept the jury's $1.00 award under chapter 501 is still entitled to an attorney fee award under section 501.2105 even though no "judgment" is entered for the consumer under chapter 501.

If Stewart Toyota's argument was correct (that a pre-trial settlement eliminates a claim for statutory attorney's fees under chapter 501) then not many of these consumer cases would settle before judgment, unless it was done covertly, as in this case. Stewart Toyota took a different view of this issue when it sought and obtained a $6,643 appellate attorney fee award against the Lesueurs after the first appeal in this case when a new trial was ordered. (R. 46, 18) That was before a final judgment was entered. A party is estopped from taking inconsistent positions in the same case at different times. See Blumberg v. USAA Cas. Ins. Co., 790 So2d 1061 (Fla. 2001); Palm Beach County v. Boca Devl'p Assoc., 485 So2d 449 (Fla 4th DCA 1986).

Aside from that, Ingalsbe and Brown also had a statutory claim for attorney's fees under section 501.12(2) which says nothing about requiring entry of a "judgment". (See R.4.) The Fourth DCA's certified question to this court presupposes that "the fee due the lawyer was reduced without the lawyer's consent." (App. "B") That is the question certified to this court and Stewart Toyota is trying to make an end-run around that question by claiming the attorney's fee was not really reduced since no judgment

was yet entered.

In Judge Gross' dissenting opinion below, the view is expressed that a tort should not be held to arise out of a settlement that changes the attorney's entitlement to a fee. Justice Boyd expressed a similar view in his dissent in the Farish case, supra, but the majority of the supreme court disagreed. Judge Gross also mentioned that Stewart Toyota offered more money to settle than the amount awarded by the jury in the first trial. That was done to entice the Lesueurs to breach their own attorney fee contract since Stewart Toyota knew the potential statutory attorney fee would eclipse the amount of damages to the Lesueurs.

Judge Gross' dissenting opinion also mentioned that the Lesueurs remain bound by their contact for attorney's fees with Ingalsbe and Brown. That statement is not correct because the Lesueurs will never be responsible to pay a statutory fee, which will never be assessed by the trial court. The Lesueurs will also never pay a contingency multiplier which was the lure that enticed Ingalsbe and Brown to accept a small damages case and work on it for six years, risking the possibility of losing everything if they did not win.

Judge Gross' dissenting opinion also stated that a plaintiff is not required to hazard the outcome of litigation rather than settle simply because the plaintiff's attorney is retained on a contingent fee. The majority opinion does not require the

plaintiff to hazard the outcome of the litigation rather than settle. The parties are still free to settle, but they are not free to defraud the plaintiff's attorney. As the First DCA stated in Brown v. Vermont Mut. Ins. Co., supra at 580:

> Although the parties to a lawsuit that are represented by attorneys may settle the dispute between themselves without the participation of their attorney, any such settlement made without knowledge or notice to a party's attorney and without payment of the attorney's fee due to such attorneys, operates as a fraud upon the attorney, whether intended or not...

See also Heller v. Held, supra; Strickland v. Frey, 187 So2d 84 (Fla. 4th DCA 1966); Forman v. Kennedy, 22 So2d 890 (Fla. 1945); Miller v. Scobe, supra.

Stewart Toyota points out that there was a provision in the Lesueurs' attorney fee contract entitling the attorneys to a $300 per hour fee in the event the case was settled "against the attorney's advice". First, that is not what happened here. This case was not settled against the advice of Ingalsbe and Brown. They were intentionally bypassed and kept out of the loop until the settlement was a *fait accompli*. They gave no advice because they had no knowledge of the settlement. The language of the fee contract cannot possibly be applied to these undisputed facts. Second, even if Ingalsbe and Brown had a contractual cause of action against their former clients, that does not eliminate a tort claim against a third party for inducing the client to breach the existing attorney fee agreement.

It is important to remember that this case is not just about what the client has a right to do, but what a third party entices the client to do to an existing business relationship. A client has the right to discharge his attorney with or without cause, but if that is orchestrated by the other litigant the discharged attorney has the right to sue that other litigant for tortious interference. Bankers v. Farish, supra.

Stewart Toyota also argues that Ingalsbe and Brown do not have an actionable tortious interference case, even aside from the "litigation privilege" because it is not tortious interference for a businessman to act in his own financial interests. First, no lower court (neither the trial court nor the Fourth DCA) has addressed this completely separate issue and it falls totally outside the question certified to this court. The immunity issue ("litigation privilege") was the only issue addressed by the trial court, and the only issue certified by the Fourth DCA to this court. Second, whether Earl Stewart acted out of malice toward Ingalsbe and Brown for reasons that transcend this particular litigation, is a jury question.[3] The complaint in this case alleges (at ¶17) that

[3] It was brought out in the briefs to the Fourth DCA below that these parties have a history. Ingalsbe's law practice concentrates on these types of consumer cases against automobile dealers. Ingalsbe has in the past, and will in the future, represent other clients with claims against Stewart Toyota or one of Earl Stewart's other dealerships. If the courts immunize the actions taken by Stewart in this case, it will happen repeatedly and a source of legal assistance to defrauded consumers will dry up as lawyers refuse to accept these cases.

Stewart "acted with the intent to deprive Plaintiffs of their right to the full amount of their attorney's fees." (R. 3) Whether that can be proven is a jury issue, but on a motion to dismiss for failure to state a cause of action, it is assumed to be true. Nantell v. Lim-Wick Const. Co., 228 So2d 634 (Fla. 4th DCA 1969).

It should also be noted that Stewart Toyota has barely addressed at all the alternative reason cited by the majority for reversing the final judgment regarding the impropriety of raising an immunity issue (an affirmative defense) in a motion to dismiss for failure to state a cause of action. See Vaswani v. Ganobsek, 402 So2d 1350 (Fla. 4th DCA 1981); Abele v. Sawyer, 750 So2d 70 (Fla. 4th DCA 1999).

It would be detrimental to the orderly system of litigation, and therefore bad public policy, for the courts to approve and immunize the type of conduct involved in this case. The Lesueurs may not have even known or remembered about their right to a statutory fee when they settled with Stewart Toyota since they had no representation at the settlement meeting.

The means used in this case by Stewart Toyota to intentionally interfere with Ingalsbe and Brown's contract does not fall within the rationale underlying the "litigation privilege". The Levin case should not be extended beyond its own rationale, as the Fourth DCA majority opinion ultimately concludes. Immunity breeds irresponsibility and should be limited to cases where the rationale supporting the

immunity is very strong. Levin, supra, was such a case. This case, however, is not such a case.

Lastly, because the issue in this case is so very fact-specific, it is questionable whether it is really one of great public importance, even though it may be intellectually interesting. This court has not yet decided whether to exercise discretionary jurisdiction over this certified question, which is of course a threshold issue.

CONCLUSION

The last sentence in the Argument section of Petitioners' brief urges this court to answer the Fourth DCA'a certified question "with a resounding 'no' ". We agree it should be answered with a resounding "no" since the litigation privilege does not apply to these facts. If the certified question is answered at all by this court, then the opinion of the majority of the Fourth DCA below should be approved by this court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a true and correct copy of the foregoing document has been furnished, by U.S. Mail this 30th day of June 2004 to: **Elliot Scherker, Esq.,** Greenberg, Traurig, P.A., 1221 Brickell Avenue, Miami, FL 33131, counsel for Petitioners; **Doc Blanchard, Esq.**, Blanchard Merriam Adel & Kirkland, P.O. Box 1869, Ocala, FL 34478, counsel for amicus curiae (Academy of Florida Trial Lawyers).

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for Respondents certifies that the size and style of type used in this document is 14 Point Times Roman.

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APPENDIX TO RESPONDENTS' ANSWER BRIEF

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