IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC04-752

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

Petitioners,

v.

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

Respondents.

PETITIONERS' INITIAL BRIEF

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

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INTRODUCTION

The Fourth District's certified question calls upon this Court to construe its decision in *Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. United States Fire Ins. Co.,* 639 So. 2d 606 (Fla. 1994), in which decision the Court established the scope of the litigation privilege – and in the strongest possible language: "we find that absolute immunity must be afforded to any act occurring during the course of a judicial proceeding, regardless of whether the act involves a defamatory statement or other tortious behavior such as the alleged misconduct at issue, so long as the act has some relation to the proceeding." *Id.* at 608. That rule notwithstanding, the Fourth District, in a 2-1 decision, held that it constitutes tortious interference for a defendant to settle directly with a plaintiff who has a contingency-fee arrangement with plaintiff's counsel, if the settlement provides for a fee award to plaintiff's attorney based on the settlement amount. *Ingalsbe v. Stewart Agency, Inc.*, 869 So. 2d 30 (Fla. 4th DCA 2004). The certified question asks whether the *Levin* privilege applies to a tortious interference claim by a plaintiff's attorney against a defendant who has personally settled with the plaintiff, *sans* lawyers.

The settlement agreement between petitioner Stewart Agency, Inc., and Earl Stewart, Jr. (collectively Stewart) was the culmination of several years of litigation between Stewart and the buyers of a used car who became disappointed in their purchase. The buyers, Jean Marie Lesueur and Bernadette Lesueur, sued Stewart in 1996, represented by respondents Raymond G. Ingalsbe and J. Kent Brown (and their respective law firms). The Lesueurs prevailed at trial, but the Fourth District reversed

and ordered a new trial. *Stewart Agency, Inc. v. Lesueur*, 785 So. 2d 1242 (Fla. 4th DCA 2001). On remand, Stewart and the Lesueurs settled, without their lawyers, with the Lesueurs agreeing to dismiss their claims in exchange for a payment of $35,000 and Stewart's forgiveness of its costs judgment (of approximately $6,000).

Stewart tendered a fee payment to Ingalsbe and Brown, which payment amounted to 40% of the settlement payment, plus $10,000 in appellate fees. Ingalsbe and Brown refused the tender and thereupon commenced an action against Stewart, asserting claims for tortious interference and civil theft. They alleged that Stewart, by settling directly with the Lesueurs, had both interfered with the relationship between the Lesueurs and their lawyers and committed civil theft by depriving Ingalsbe and Brown of their right to "the full amount of their attorneys' fees and property rights in the lawsuit." On Stewart's motion, the trial court ruled that the claims were barred by Florida's litigation privilege, because absolute immunity attaches to acts occurring during the course of a judicial proceeding. The court also dismissed the civil theft claim for failure to state a cause of action.

Ingalsbe and Brown appealed only the dismissal of the tortious interference count. The Fourth District recognized that, under established Florida law, Stewart "was privileged to propose and conclude a settlement because of the importance the law places on settlements of civil disputes." *Ingalsbe,* 869 So. 2d at 33 (footnote omitted). But, over a strong dissent, the majority held that, because the fee contract provided for "different alternatives" in the lawyers' fees, Stewart "was not privileged to use the right to settle in such a way as to interfere with the obligation of [plaintiffs]

arising from the clear language of the fee contract." *Id.* at 31, 33.

The Fourth District's rationale would eviscerate the *Levin* rule. There is no question but that the parties to a lawsuit are entitled to settle their dispute without the assistance of their lawyers. It is equally well established that a settlement has a close "relation to" the litigation, within the meaning of *Levin,* 639 So. 2d at 608. But more perniciously, the court's attempt to allow the action to go forward against Stewart would bar *any* settlement between the parties themselves in a contingency-fee case.

This is so because, if a plaintiff settles directly with the defendant *without* providing for an award of attorney's fees in accordance with the plaintiff's contingency agreement, Florida law allows a lawyer to continue the action against the defendant to protect the lawyer's interest. Here, the panel has held that a settlement agreement in which the parties provide for payment of attorney's fees, based on the contingency agreement's provisions, gives rise to a claim that the defendant has tortiously interfered with the lawyer's fee contract. Thus, despite the established principle that parties are free directly to settle their lawsuits without their attorneys, even in contingency cases, the panel's decision will effectively pretermit such parties-only settlements. No defendant will be able to agree to such a settlement because either a tortious interference claim or a continuation of the action by the plaintiff's lawyers will inevitably follow.

As Judge Gross wrote in his dissent, "[i]ntent on stretching the law to cover the facts of this case, the majority has expanded the law of tortious interference to create

tort liability in conflict with *Levin.*" 869 So. 2d at 38 (Gross, J., dissenting). Faithful adherence to *Levin* ineluctably leads to the conclusion that the Fourth District's decision should be quashed.

STATEMENT OF THE CASE AND FACTS

1. The Lesueurs' Action.

The Lesueurs brought an action against Stewart in a dispute arising from the sale of a used 1994 Mustang. *Stewart Agency, Inc. v. Lesueur,* 785 So. 2d 1242, 1243-44 (Fla. 4th DCA 2001). Ingalsbe and Brown represented the Lesueurs pursuant to a contingency-fee contract. (R:10). Appendix (hereafter "A") 2.

[1]

The trial resulted in a judgment for the Lesueurs, which judgment the Fourth District subsequently reversed because the trial court had denied Stewart an opportunity to call a witness whose testimony was critical to Stewart's defense. *Lesueur,* 785 So. 2d at 1244-45. On remand, Stewart, as the prevailing party on the appeal, was awarded a cost judgment of $6,643.78 against the Lesueurs. (R:18, 46; A:2).

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[1] The recitation in the Fourth District's majority opinion that Ingalsbe and Brown were retained by plaintiffs "under the Lemon Law," and the opinion's reference to potential recovery of fees "under the attorney's fees statute in Lemon Law cases," *Ingalsbe v. Stewart Agency, Inc.*, 869 So. 2d 30, 31 (Fla. 4th DCA 2004); (A:4), is incorrect. The fee contract provides for the possibility of unspecified statutory fees, and that the attorneys will be entitled to the greater amount of fees as between any statutory fee and their contingency fee. (R:10; A:2). And the Lesueurs did not plead a Lemon Law claim; they sought recovery for fraud and unfair trade practices. *Lesueur,* 785 So. 2d at 1243.

Following the remand and the entry of the cost judgment, Stewart and the Lesueurs – without the assistance of their lawyers – entered into a Settlement and Release Agreement (Settlement Agreement). (R:19-21; A:1).[2] The Settlement Agreement recites that, in exchange for payment of $35,000, the Lesueurs released and discharged Stewart on their claim. (R:19-21; A:1). Stewart agreed to pay Brown and Ingalsbe "fees up to 33% of the settlement agreement plus reasonable court costs if stipulated in plaintiffs' fee agreement." *Id*. The Settlement Agreement resolved all of the parties' claims, including the cost judgment. *Id*.

On March 8, 2002, Ingalsbe filed a motion for attorney's fees. (R:47). Upon reviewing the attached fee agreements, Stewart discovered that, contrary to the information provided by the Lesueurs, the Lesueurs were obligated to pay 40%

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[2] The Settlement Agreement was entered into on February 27, 2002. (R:18; A:1). Attached to Brown and Ingalsbe's complaint is a letter, dated January 7, 2002, from Stewart to the Lesueurs, in which Stewart asked if the parties could "settle matters" between themselves, "rather than going through our lawyers." *Id.* The letter states, in part:

> I know the past two or three years have been as frustrating for you as for me. We both have spent a lot of our time and money pursuing what we thought to be the right thing. When all the smoke has settled, the only ones coming out ahead are our lawyers, because they are getting paid.
>
> As you know, you won round one, I won round two, and who knows who will win rounds three, four and so on? As I said earlier, the only sure winners are our two lawyers who are the only ones getting paid....

Id. The letter also noted that Stewart had been awarded $6,643.78 in costs and fees by this Court (R:46), and that, "I guess I'm supposed to put a lien on your property and sue you for that money ... more money for our lawyers." (R:18; A:1).

of their recovery in fees, plus $10,000 in appellate fees. *Id*. Stewart accordingly tendered a check to Brown and Ingalsbe for costs and attorney's fees, pursuant to the amount of recovery set forth in the Settlement Agreement and in accordance with the fee agreements. *Id*. Ingalsbe returned the check on the following day. *Id*.

2. The Trial Court's Dismissal of Ingalsbe and Brown's Claims.

On June 24, 2002, Ingalsbe and Brown brought an action against Stewart, asserting claims for tortious interference and civil theft. (R:1-21; A:2). The complaint alleged that Stewart had "intentionally and unjustly interfered" with the relationship between the Lesueurs and their lawyers by "induc[ing]" the Lesueurs to breach their "contractual relationship" with Brown and Ingalsbe. (R:3; A:2).

[3]

Stewart moved to dismiss the tortious interference claim for failure to state a cause of action and because the claim is barred by the litigation privilege. (R:36-40, 45-56). The trial court granted the motion. (R:60-63; A:3).[4]

The order states, in pertinent part:

> 2. Plaintiffs' claims ... are barred by the absolute immunity of Florida's litigation privilege. *Levin, Middlebrooks, Mabie, Thomas, Mayes and Mitchell, P.A. v. United States Fire Ins. Co.*, 639 So. 2d 606 (Fla. 1994) and *Jackson v. Bellsouth Telecommunications, Inc.*, 181 F.

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[3] The civil theft claim alleged that Stewart had obtained property belonging to Ingalsbe and Brown "with the intent to, either temporarily or permanently, deprive [Ingalsbe and Brown] of a right to their property." (R:5; A:2). That count was also dismissed by the trial court. (R:60-63, 92-93; A:3). Ingalsbe and Brown did not challenge the dismissal of the civil theft count on appeal.

[4] The trial court did not reach Stewart's argument that Ingalsbe and Brown had failed to state a cause of action for tortious interference in dismissing the count. (R:60-63; A:3). See n.9, *infra*.

Supp. 2d 1345 (S.D. Fla. 2001).

> 3. It is well settled that parties may settle cases between themselves without the intervention of their lawyers, *Sentco, Inc. v. McCu[]lloh*, 84 So. 2d 498 (Fla. 1956); *Brown [v.] Vermont Medical Insurance Co.*, 614 So. 2d 574 (Fla. 1st DCA 1993) and the public policy to encourage litigants to settle disputes, *Ameristeel Corp. v. Clark*, 691 So. 2d 473 (Fla. 1997); *Treasure Coast, Inc. v. Ludlum Construction Co., Inc.*, 760 So. 2d 232 (Fla. 4th DCA 1997), would be thwarted by truncating the litigation privilege.
>
> 4. *American National Title and Escrow [of] Florida, Inc. v. Guarant[ee] Title and Trust Company*, 810 So. 2d 996 (Fla. 4th DCA 2002), is not clear as to whether the existence of the litigation privilege appears on the face of the pleading at issue. However, in this case, the existence of the litigation privilege appears on the face of Plaintiffs' complaint and, accordingly may be raised in a motion to dismiss, see *Abele, Jr. v. Sawyer*, 750 So. 2d 70 at 75 (Fla. 4th DCA 1999) and Judge Middlebrooks[']s well-reasoned opinion in *Jackson*, 181 F. Supp. 2d at 1363....

(R:61; A:3). The court thereafter entered a final judgment in Stewart's favor on February 6, 2003. (R:92-93).

3. The Fourth District's Decision.

The Fourth District majority held that *Levin*'s litigation privilege is inapplicable:

> [W]e begin with an acknowledgement that [Stewart] was privileged to propose and conclude a settlement because of the importance the law places on settlements of civil disputes. But there is nothing inherent in the right to settle lawsuits that would compel a corollary right to interfere with a fee contract between one of the settling parties and his lawyer. Without such a legally recognized right, [Stewart] was not privileged to use the right to settle in such a way as to interfere with the obligation of [the Lesueurs] arising from the clear language of the fee contract. [Stewart] could not thereby set up a settlement imperative directing which contractual alternative for calculating the fee would be controlling after the settlement. Nor could [Stewart] bind [Ingalsbe and Brown] to an involuntary rescission of one or more of the contract's reasonable alternatives simply by committing to paying only the one most favorable to [Stewart]. Nothing in *Levin Middlebrooks* purports to establish such

> a corollary right. No legitimate interest of [Stewart] and [the Lesueurs] in settling their dispute gives them a privilege to interfere with [Ingalsbe and Brown's] fee contract in such a way as to restrict the fee due to only the lowest among the contract's reasonable alternatives.

Ingalsbe, 869 So. 2d at 32-33 (footnote omitted). (A:4).

[5]

In dissent, Judge Gross wrote that "[i]t is inconceivable that a tort could arise out of these facts." *Ingalsbe*, 869 So. 2d at 35 (Gross, J., dissenting). (A:4). He concludes that, "[i]ntent on stretching the law to cover the facts of this case, the majority has expanded the law of tortious interference to create tort liability in conflict with *Levin*." *Id.* at 38. (A:4).

First, the Lesueurs were fully entitled to settle their claim directly with Stewart – and for an amount that "far exceeded the amount of damages set at the first trial" – rather than risk a second trial (at which Stewart, pursuant to the Fourth District's reversal, would be entitled to introduce favorable evidence that had been excluded at the original trial). *Ingalsbe*, 869 So. 2d at 36 (Gross, J., dissenting). (A:4). Proceeding from this premise, the dissent analyzed the dispositive issue:

> The primacy of the [Lesueurs'] right to settle a lawsuit compels the conclusion that [Ingalsbe and Brown] have failed to state a cause of action for tortious interference. One of the essential elements of the cause of action is that there be "an intentional and *unjustified* interference" with a business relationship or contract. Parties to a lawsuit may settle an action "without the intervention of their attorneys."

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[5] The court "hasten[ed] to add" its view that this Court's decision in *Bankers Multiple Line Ins. Co. v. Farish*, 464 So. 2d 530 (Fla. 1985), a decision that addresses neither *Levin* nor the litigation privilege and that predates *Levin*, supports Ingalsbe and Brown's cause of action. *Ingalsbe*, 869 So. 2d at 33-34. (A:4). See pp. 24-25, *infra*.

> [Stewart] acted in furtherance of a legitimate business interest to settle the lawsuit.
>
> [Stewart] did not use improper means to settle; its offer to settle honored one of the contractual provisions. [Stewart] tendered $14,000 (forty percent of $35,000) plus $10,000 for the appeal to [Ingalsbe and Brown]. A provision in the contract contemplated that it might be settled without . . . Ingalsbe and Brown's] approval . . . [Ingalsbe and Brown] retained their right under the contract to enforce their contract against [the Lesueurs]. There was therefore no "unjustified" interference with [Ingalsbe and Brown's] rights under the contract that would justify the imposition of tort liability.

Id. at 36 (Gross, J., dissenting) (citations omitted; original emphasis). (A:4).

Judge Gross disagreed with the majority's analysis of *Levin*: "one must conclude that a settlement of a pending lawsuit has 'some relation' to the lawsuit." *Ingalsbe,* 869 So. 2d at 37 (Gross, J., dissenting). (A:4). The dissent continues:

> To distinguish *Levin,* the majority relies on horseback opinions, not legal authority. The majority reasons that *Levin* does not apply because [Stewart] did not have a "legally recognized right" to "interfere with a fee contract between one of the settling parties and his lawyer." That approach fails, because the litigation privilege does not depend upon a party's "right" to commit a tort; no one has a "right" to commit perjury, libel, or slander, yet the litigation privilege applies because policy considerations favor the freedom in prosecuting or defending a lawsuit over the preservation of those tort claims when they are connected to a judicial proceeding.

Id. at 37 (Gross, J., dissenting) (citation omitted). (A:4).

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[6] Judge Gross also noted that "[t]o say that a tortious interference cause of action is unavailable here does not mean that a party to a lawsuit is entitled to enter into settlements designed to defraud or otherwise defeat the payment of attorney's fees," because the lawyer has the right to continue an action if the lawyer's client fraudulently settles the claim. *Ingalsbe,* 869 So. 2d at 37 (Gross, J., dissenting). (A:4). That rule does not obtain here because the settlement (continued...)

SUMMARY OF ARGUMENT

Parties-only settlements are well within the scope of Florida's litigation privilege, as that privilege is defined by *Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. United States Fire Ins. Co.,* 639 So. 2d 606 (Fla. 1994). *Levin* extends absolute immunity to acts taken during a judicial proceeding – and settlements are indisputably a key component of the litigation process. The rule is no different for settlements that are reached without the assistance of the parties' lawyers; indeed, parties have an unfettered right to settle on their own, and their lawyers may not seek to hinder the exercise of that right.

While the Fourth District's majority opinion purports to acknowledge these fundamental principles, the opinion destroys the litigation privilege – and imposes tortious interference liability – when a plaintiff whose lawyer has been retained on a contingency basis enters into a parties-only settlement. The majority holds that, by entering into an agreement that provided for an award under the fee agreement's contingency provisions, Stewart interfered with Ingalsbe and Brown's purported entitlement to the most favorable fee recovery under their contract with the Lesueurs, and that the litigation privilege is inapplicable.

As Judge Gross's dissent correctly states, Stewart neither unjustifiably interfered with Ingalsbe and Brown's contract nor acted outside the litigation privilege's scope. The fee contract expressly recognized that the Lesueurs were

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(...continued)

agreement contemplated the payment of attorney's fees. *Id*. at 38 (Gross, J., dissenting). (A:4).

entitled to settle without their lawyers and the settlement honored Ingalsbe and Brown's right to a contingency fee. And, even if there had been "interference," the majority went astray in holding that the litigation privilege provides no immunity because Stewart had no "right" to interfere with the lawyers' fee contract. The litigation privilege's applicability does not turn on whether a party acted within the scope of a "right"; to the contrary, the privilege immunizes tortious conduct if that conduct occurs within the confines of a judicial proceeding.

The Fourth District's analysis, carried to its logical extent, will bar parties-only settlements when a plaintiff's lawyer has been retained pursuant to a contingency-fee agreement. Established precedent requires that a parties-only settlement provide for attorney's fees, lest the lawyer be entitled to continue the action in the client's name to secure payment of attorney's fees. But the Fourth District has held that a defendant is liable for tortious interference as a consequence of a parties-only settlement that hews closely to that requirement. The inevitable result of the Fourth District's rewriting of the law governing tortious interference and the litigation privilege will be to deprive parties of their long-recognized right to settle disputes without their lawyers.

ARGUMENT

1. The Litigation Privilege.

Florida has long recognized the litigation privilege. *E.g., Ange v. State*, 98 Fla. 538, 123 So. 916, 917 (1929). Since the inception of the privilege's recognition, it has extended "to the protection of the judge, parties, counsel and witnesses," and has been held to "arise[] immediately upon the doing of any act required or permitted by law in

the due course of the judicial proceedings or as necessarily preliminarily thereto." *Id.* In *Fridovich v. Fridovich*, 598 So. 2d 65 (Fla. 1992), this Court reaffirmed 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." *Id*. at 66 (citing *Myers v. Hodges*, 53 Fla. 197, 44 So. 357, 361 (1907)). The Court adopted the RESTATEMENT (SECOND) OF TORTS, § 587 (1977):

> A party to a private litigation or a private prosecutor or defendant in a criminal prosecution is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of or during the course and as a part of, a judicial proceeding in which he participates, if the matter has some relation to the proceeding.

Fridovich, 598 So. 2d at 66-67. And, because defamation claims are barred, "a plaintiff is not permitted to make an end-run around a successfully invoked defamation privilege by simply renaming the cause of action and repleading the same facts." *Id.* at 69.

Thus, the Court held that, "if the sole basis of a complaint for emotional distress is a privileged defamatory statement, then no separate cause of action exists." 598 So. 2d at 69. In *Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. United States Fire Ins. Co.*, 639 So. 2d 606 (Fla. 1994), this Court addressed the question whether the litigation privilege extends immunity "to a tortious interference with a business relationship action that was based on misconduct in a judicial proceeding." *Id*. at 607. The Court extended the privilege to *all* tortious behavior arising from a

judicial proceeding:

> In balancing policy considerations, we find that absolute immunity must be afforded to any act occurring during the course of a judicial proceeding, regardless of whether the act involves a defamatory statement or other tortious behavior such as the alleged misconduct at issue, so long as the act has some relation to the proceeding. The rationale behind the immunity afforded to defamatory statements is equally applicable to other misconduct occurring during the course of a judicial proceeding. Just as participants in the litigation must be free to engage in unhindered communication, so too must those participants be free to use their best judgment in prosecuting or defending a lawsuit without fear of having to defend their actions in a subsequent civil action for misconduct.

Id. at 608; *accord*, *e.g.*, *Boca Invs. Group, Inc. v. Potash,* 835 So. 2d 273, 274-75 (Fla. 3d DCA 2002), *review denied,* 846 So. 2d 1147 (Fla. 2003); *American Nat'l Title & Escrow of Fla., Inc. v. Guarantee Title & Trust Co.,* 748 So. 2d 1054, 1055 (Fla. 4th DCA 1999), *review denied*, 767 So. 2d 453 (Fla. 2000) (*American National Title I*); *Ponzoli & Wassenberg, P.A. v. Zuckerman,* 545 So. 2d 309, 310 (Fla. 3d DCA), *review denied*, 554 So. 2d 1170 (Fla. 1989). The Court also reaffirmed that "[t]he immunity afforded the statements made during the course of a judicial proceeding extends not only to the parties in a proceeding, but to judges, witnesses, and counsel as well." *Levin,* 639 So. 2d at 608 (citations omitted).

2. Parties-Only Settlements Are Within the Scope of the Litigation Privilege.

a. Florida law recognizes the right of parties to settle without their lawyers.

In *Sentco, Inc. v. McCulloh,* 84 So. 2d 498 (Fla. 1955), the parties entered into a settlement and the defendant moved to dismiss the action based on the settlement.

Id. at 498-99. Plaintiff's counsel opposed the dismissal "on the ground that the settlement agreement was fraudulently made to deprive plaintiff's counsel of a substantial attorneys' fee." *Id*. at 499. The trial court dismissed the action and this Court rejected the contention of plaintiff's counsel that the action should not have been dismissed. *Id*. The Court expressly held that "it is well settled that, if acting in good faith, the parties to an action may settle and adjust the same without the intervention of their attorneys." *Id*.

The *Sentco* principles are embodied in The Florida Bar's fee rules, which rules provide, in part, that the client in a contingency-fee case has "the right to make the final decision regarding settlement" and, indeed, "*must* make the final decision to accept or reject a settlement." R. Regulating Fla. Bar 4-1.5, Statement of Client's Rights for Contingency Fees, ¶10 (emphasis added). Thus, even the Fourth District majority opinion was forced to "acknowledg[e] that [Stewart] was privileged to propose and conclude a settlement because of the importance the law places on settlements of civil disputes." *Ingalsbe*, 869 So. 2d at 32-33 (footnote omitted). (A:4). The dissent, quoting *Singleton v. Foreman*, 435 F.2d 962, 970 (5th Cir. 1970), was more forthcoming:

> [I]t is clear that an attorney never has the right to prohibit his client from settling an action in good faith. A client by virtue of a contract with his attorney is not made an indentured servant, a puppet on counsel's string, nor a chair in the courtroom. Counsel should advise, analyze, argue, and recommend, but his role is not that of an imperator whose edicts must prevail over the client's desire. He has no authoritarian settlement thwarting rights by virtue of his employment.

Ingalsbe, 869 So. 2d at 35-36 (Gross, J., dissenting). (A:4). As this Court held in

Sentco, this principle does not fall by the wayside where, as here, a lawyer is hired on a contingency basis. *Sentco,* 84 So. 2d at 499 (rejecting notion "that a litigant is required to hazard the outcome of litigation, rather than settle the suit, simply because his attorneys are employed on a contingent fee basis").

b. Settlements are within the litigation privilege's scope and do not give rise to a claim for tortious interference.

(i) The elements of tortious interference.

The four essential elements of tortious interference with a business relationship or contract are:

> (1) The existence of a business relationship, not necessarily evidenced by an enforceable contract; (2) knowledge of the relationship on the part of the defendant; (3) an intentional and unjustified interference with the relationship by the defendant; and (4) damage to the plaintiff as a result of the breach of the relationship.

Tamiami Trail Tours, Inc. v. Cotton, 463 So. 2d 1126, 1127 (Fla. 1985); *accord*, *Ethan Allen, Inc. v. Georgetown Manor, Inc.*, 647 So. 2d 812, 814 (Fla. 1994); *Greenberg v. Mount Sinai Med. Ctr. of Greater Miami, Inc.*, 629 So. 2d 252, 255 (Fla. 3d DCA 1993); *Sloan v. Sax*, 505 So. 2d 526, 527-28 (Fla. 3d DCA 1987); *Ethyl Corp. v. Balter,* 386 So. 2d 1220, 1223 (Fla. 3d DCA 1980), *review denied,* 392 So. 2d 1371 (Fla.), *cert. denied,* 452 U.S. 955 (1981).

Since the nascence of tortious interference in *Chipley v. Atkinson,* 23 Fla. 206, 1 So. 934 (1887), the rule in Florida has been that " interference" in a business relationship by one acting in furtherance of legitimate business interests is *not* actionable. 1 So. at 939-40. There can be no claim for tortious interference "where

the action complained of is undertaken to safeguard or promote one's financial or economic interest." *Genet Co. v. Annheuser-Busch, Inc.*, 498 So. 2d 683, 684 (Fla. 3d DCA 1986) (citations omitted). "[S]o long as improper means are not employed, activities taken to safeguard or promote one's own financial, and contractual interests are entirely non-actionable." *Ethyl Corp.*, 386 So. 2d at 1225 (citations omitted); *accord, e.g., Perez v. Rivero*, 534 So. 2d 914, 916 (Fla. 3d DCA 1988); *Adler Consulting Corp. v. Executive Life Ins. Co.*, 483 So. 2d 501, 502 (Fla. 3d DCA 1986); *Unistar Corp. v. Child*, 415 So. 2d 733, 735 (Fla. 3d DCA 1982) (*en banc*).

It is only when one acts *solely* out of malice and, therefore, without justification, that the privilege is unavailable. *Ethyl Corp.*, 386 So. 2d at 1225; *accord, e.g., Nordyne, Inc. v. Florida Mobile Home Supply, Inc.*, 625 So. 2d 1283, 1285-86 (Fla. 1st DCA), *review dismissed*, 630 So. 2d 1100 (Fla. 1993); *McCurdy v. Collis*, 508 So. 2d 380, 383-84 (Fla. 1st DCA), *review denied*, 518 So. 2d 1274 (Fla. 1987). "The existence of malice is key to the tort of tortious interference with a business relationship." *Rockledge Mall Assocs., Ltd. v. Custom Fences of S. Brevard, Inc.*, 779 So. 2d 554, 557 (Fla. 5th DCA 2001). And, as the Florida Supreme Court held in *Chipley*, "[w]here one does an act which is legal in itself, and violates no right of another person, ... the fact that the act is done from malice, or other bad motive towards another, *does not give the latter a right of action against the former*." 1 So. at 938 (emphasis supplied). Thus, "it is irrelevant whether the person who takes authorized steps to protect his own interests does so while also harboring some

personal malice or ill-will toward the plaintiff." *Ethyl Corp.*, 386 So. 2d at 1225.

(ii) Parties-only settlements are protected by the litigation privilege from claims for tortious interference.

Ingalsbe and Brown's tortious interference claim is based solely on the parties-only settlement between Stewart and the Lesueurs. Their complaint alleges that Stewart had "intentionally and unjustly interfered" with the relationship between the Lesueurs and their lawyers by "induc[ing]" the Lesueurs to breach their "contractual relationship" with Brown and Ingalsbe. (R:3; A:2).

[7]

The question whether conduct is related to litigation, so as to invoke the privilege has been answered using a bright-line rule. *E.g., American Nat'l Title I,* 748 So. 2d at 1056 ("[t]he essence of *Levin* was its extension of absolute immunity to acts taken *during the proceeding*") (emphasis added). Settlements are a key component of the litigation process. *E.g., Ameristeel Corp. v. Clark,* 691 So. 2d

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[7] To the extent that the majority sought to bolster its conclusion by suggesting that the litigation privilege should not be raised on a motion to dismiss, *Ingalsbe,* 869 So. 2d at 35, it should be noted that *American Nat'l Title & Escrow of Fla., Inc. v. Guarantee Title & Trust Co.*, 810 So. 2d 996 (Fla. 4th DCA 2002), holds only that a litigation privilege immunity defense does not support dismissal when, to address the defense, the court must "go *beyond* the facts alleged in the complaint." *Id.* at 998 (emphasis added). But, because "in this case, the existence of the litigation privilege appears on the face of Plaintiffs' complaint," the trial court addressed the merits. (R:61; A:3). And, on appeal, Brown and Ingalsbe explicitly *disavowed* any argument that "it was premature for the court to reach the immunity issue," and disavow any procedural challenge to the trial court's ruling. Appellants' Initial Brief at 7. Where, as here, the complaint pleads the facts pertinent to an affirmative defense, that defense may be raised on a motion to dismiss. *Abele v. Sawyer,* 750 So. 2d 70, 75 (Fla. 4th DCA 1999).

473, 478 (Fla. 1997) ("[t]he legal system favors the settlement of disputes by mutual agreement between contending parties") (citations omitted).[8]

It is thus undeniable that settlements are related to the judicial proceedings. *E.g., Jackson v. Bellsouth Telecommunications, Inc.*, 181 F. Supp. 2d 1345, 1363 (S.D. Fla. 2001). In *Jackson*, disgruntled plaintiffs alleged that their lawyers and the defendant in a civil rights action had "worked in concert to cause plaintiffs to enter into a settlement agreement ... that was well below the actual value of their claims, to defraud the plaintiffs out of a large percentage of the settlement proceeds." *Id.* at 1352. The court held that *Levin* barred the plaintiffs' tortious interference and fraud claims:

> This absolute immunity, originally covering only defamatory statements made in the course of judicial proceedings, was subsequently extended by the Supreme Court of Florida to "any act occurring during the course of a judicial proceeding, regardless of whether the act involves a defamatory statement or other tortious behavior...." Additionally, "the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action," and is thus "an *immunity from suit* rather than a mere defense to liability."
>
> Plaintiffs contend that the litigation privilege as set forth in *Levin* does not apply to the settlement proceedings and fraud claims arising therefrom because "the actions of the Defendants in this matter only tangentially, at best, had anything to do with settling the lawsuit." But the occurrences from which plaintiffs' claims arise have *everything* to do with the settlement of a lawsuit, which is a crucial element in concluding the vast majority of civil litigation today.... The plaintiffs try to cloud this analysis by stating the obvious: that "[c]learly one litigant's running down with their vehicle of another litigant in the parking lot after a hearing would not

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[8] The primacy of the right to settle necessary calls into question whether a tortious interference claim can *ever* be based on good-faith settlement between parties who choose to settle without their lawyers. See nn. 9 & 16, *infra*.

> be protected by the litigation privilege." Such a tort, having no relation to the merits of the underlying proceeding, clearly would not be considered to have occurred "during the course of a judicial proceeding"; settlement negotiations, on the other hand, and the communications between opposing counsel occurring during these negotiations, are an integral part of the judicial process....

Id. at 1363-64 (citations and footnotes omitted; original emphasis); *accord, e.g.*, *Green Leaf Nursery v. E.I. DuPont de Nemours & Co.*, 341 F.3d 1292, 1302-03 (11th Cir. 2003) (defendant held entitled to absolute immunity under litigation privilege for alleged misconduct that induced plaintiffs to settle), *cert. denied*, --- U.S. ---, 124 S. Ct. 2094 (2004); *Drum v. Bleau, Fox & Assocs.*, 107 Cal. App. 4th 1009, 132 Cal. Rptr. 2d 602, 612 (2003) ("[m]uch as the litigation privilege has escaped from the initial confines of defamation and publication, so, too, has the privilege been affixed to matters beyond the courtroom," including settlement negotiations); *Baglini v. Lauletta*, 338 N.J. Super. 282, 768 A.2d 825, 833 (App. Div.) (litigation privilege applies to settlement negotiations), *certification denied*, 169 N.J. 607, 782 A.2d 425 (2001).

3. The Fourth District's Rationale for Refusing to Apply the Litigation Privilege to the Parties-Only Settlement Cannot be Reconciled With the Right of Parties to Settle Without Their Lawyers.

a. The Fourth District's Mistaken Creation of a New Litigation Privilege Exception.

The majority opinion ignores the *Levin* "relation to" test because it finds that the privilege is inapplicable, in the first instance, to a parties-only settlement where the plaintiff's counsel has been employed pursuant to a contingency-fee contract. *Ingalsbe*, 869 So. 2d at 32-33. (A:4). According to the majority, the parties-only

settlement between Stewart and the Lesueurs "does not fit within [*Levin*'s] rationale" because – notwithstanding the acknowledged privilege to settle one's case – "there is nothing inherent in the right to settle lawsuits that would compel a corollary right to interfere with a fee contract between one of the settling parties and his lawyer." *Id.* at 32-33. (A:4).

[9]

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[9] As Judge Gross correctly observed in his dissent, the majority's focus on whether there is a "corollary *right* to interfere with a fee contract" in settling a case, *id*. at 33 (Gross, J., dissenting); (A:4), (emphasis added), is fundamentally misconceived. *Id.* at 37 (Gross, J., dissenting). (A:4). "[T]he litigation privilege does not depend on a party's 'right' to commit a tort; no one has a 'right' to commit perjury, libel or slander, yet the litigation privilege applies because policy considerations favor the freedom in prosecuting or defending a lawsuit." *Id.* (Gross, J., dissenting). (A:4). The majority's holding, at least in this respect (if not in its totality), speaks to the *merits* of Ingalsbe and Brown's tortious interference claim. The trial court, because it dismissed the action based on the litigation privilege, did not address the merits of Stewart's motion to dismiss, in which motion Stewart sought a dismissal both under the litigation privilege and because Ingalsbe and Brown could not state a claim for tortious interference. (R:50-54). Stewart, relying on the "tipsy coachman" rule, defended the trial court's dismissal on appeal by arguing, in the alternative, that Ingalsbe and Brown cannot bring a claim for tortious interference based on a parties-only settlement. The majority opinion, while not directly addressing that argument, spoke at some length to the question whether dismissal was appropriate on the face of the complaint, ultimately concluding that, "if [Ingalsbe and Brown] can prove the allegations in [their] complaint, any resulting money judgment would survive an appellate argument that [the] underlying legal theory of relief was defective for the immunity reason argued in this case." *Ingalsbe,* 869 So. 2d at 35. (A:4). The dissent argues that "[t]he primacy of the [Lesueurs'] right to settle a lawsuit compels the conclusion that [Ingalsbe and Brown] have failed to state a cause of action for tortious interference" because Stewart "acted in furtherance of a legitimate business interest to settle the lawsuit" and "did not use improper means to settle." *Id.* at 36 (Gross, J., dissenting). (A:4). As both opinions plainly show, the merits of the tortious interference claim are inextricably bound up with the question whether parties can settle without their lawyers in a contingency-fee case. See n.4, *supra.*

The contingency-fee agreement between the Lesueurs and their lawyers provided for the possibility of a statutory fee award, and that the lawyers' fees "will be those awarded by the court ... or in accordance with" a sliding-scale contingency clause, "whichever is greater." (R:10; A:2). The lowest percentage is 33 1/3% of the recovery, with a provision for 40% "of any recovery up to $1 million after a defendant has answer[ed] and denied liability." *Id.* The contract further provides:

> If, during the pendency of this case, [Stewart] makes a settlement offer and I accept the settlement offer against the advice of my attorneys, then I agree to pay my attorneys $300 per hour for all hours spent on the case to that point plus the attorneys' out-of-pocket and other expenses....

Id.

[10]

The majority opinion holds that, by entering into an agreement that provided for an award under the fee agreement's contingency provisions, Stewart "was interfering with [Ingalsbe and Brown's] entitlement to a fee under the alternative fee provisions regarding a fee set by the court and a fee based on an hourly rate." *Ingalsbe,* 869 So. 2d at 34. (A:4). That is, the court concluded that Ingalsbe and Brown's right to seek a court-ordered fee (presumably at the conclusion of the case) and/or the $300-per-hour *quantum meruit* contractual fee (for a settlement accepted against the lawyers' advice) *prevented the Lesueurs from settling with Stewart*.[11]

[10] See n.1, *supra.*

[11] The "alternative fee provisions" to which the majority alluded were, in actuality, (continued...)

The majority's holding cannot, of course, be squared with this Court's *Sentco* decision, in which the Court refused to rule "that a litigant is required to hazard the outcome of litigation, rather than settle the suit, simply because his attorneys are employed on a contingent fee basis." 84 So. 2d at 499. Here, the result of the Fourth District's decision is to bar parties-only settlements because a lawyer has the right to insist on whichever clause of the fee agreement might provide the lawyer with the greatest recovery.

The dissent correctly castigates the majority for this holding, *Ingalsbe*, 869 So. 2d at 37 ("[t]o distinguish *Levin*, the majority relies on horseback opinions, not legal authority"), and closely analyzes the issues:

> [Stewart] did not use improper means to settle; its offer to settle honored one of the contractual provisions. [Stewart] tendered $14,000 (forty percent of $35,000) plus $10,000 for the appeal to [Ingalsbe and Brown]. A provision in the contract contemplated that it might be settled without the approval of [Ingalsbe and Brown]. [Ingalsbe and Brown] retained their right under the contract to enforce their contract against [the Lesueurs]. There was therefore no "unjustified" interference with [Ingalsbe and Brown's] rights under the contract that would justify the imposition of tort liability.
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> * * * *

(...continued)

> *not* available to Ingalsbe and Brown. They could not obtain a court-ordered fee under the Florida Deceptive and Unfair Trade Practices Act, which provides that a court "may" award fees, but only to a "prevailing party, after judgment in the trial court and exhaustion of all appeals." § 501.2105(1), Fla. Stat. (2003). The $300 per hour fee is available only to a settlement accepted by the plaintiffs "against the advice" of the lawyers (R:11; A:2) – but the complaint alleges that the settlement was entered into without Ingalsbe and Brown's "knowledge or consent" (R:3; A:2), not "against the[ir] advice." (R:11; A:2).

> ... The majority reasons that *Levin* does not apply because [Stewart] did not have a "legally recognized right" to "interfere with a fee contract between one of the settling parties and his lawyer." That approach fails, because the litigation privilege does not depend upon a party's "right" to commit a tort; no one has a "right" to commit perjury, libel or slander, yet the litigation privilege applies because policy considerations favor the freedom in prosecuting or defending a lawsuit over the preservation of those tort claims when they are connected to a judicial proceeding.

Id. at 36-37 (Gross, J., dissenting) (citation omitted). (A:4).

The majority's attempt to bolster its conclusion by relying on this Court's pre-*Levin* decision in *Bankers Multiple Line Ins. Co. v. Farish,* 464 So. 2d 530 (Fla. 1985), is unavailing. *Farish* does not even address the litigation privilege; as Judge Gross's dissent correctly states, "there is nothing in *Farish* even 'remotely related to the litigation privilege' that the supreme court extended some nine years later in *Levin*." *Ingalsbe,* 869 So. 2d at 37 (Gross, J., dissenting). (A:4).

In *Farish,* John D. MacArthur, the president of Bankers Multiple Line Insurance Company (Bankers), successfully convinced the plaintiff in a wrongful death action against a Bankers' insured to discharge Farish as her counsel. 464 So. 2d at 531. After discharging Farish and retaining a lawyer selected by MacArthur, the plaintiff ultimately went to trial with Farish as her counsel. *Id.* The plaintiff prevailed, albeit with damages that were "less than [Farish] had anticipated." *Id.* Farish thereafter brought an action for tortious interference against both MacArthur and Bankers. *Id.* Farish obtained an award of compensatory and punitive damages against Bankers, but the trial judge granted Bankers a new trial on several grounds, including the court's error in the jury charge on punitive damages. *Id.* at 532. The Fourth District reversed the new trial order. *Id.* at 531.

This Court agreed with the reversal on grounds related to liability. *Farish,* 464 So. 2d at 532. On the punitive damages issue, the Court held that there was a reasonable basis for the trial court's decision to grant the new trial. *Id*. at 532-33. In so ruling, the Court noted that, "[i]n order to prevail in his suit Farish had to prove, among other things, that Bankers intentionally and unjustifiably interfered with the [contingency] contract." *Id*. at 532 (citations omitted).

[12]

It is impossible to read *Farish* as having prospectively created an exception to the then-unannounced *Levin* rule. Indeed, as Judge Gross's dissent notes, this Court stated in *Levin* that the question whether the litigation privilege applied to torts such as tortious interference had "not been previously addressed by this Court." *Levin*, 639 So. 2d at 608. "This statement indicates that, absent an effort to extend the law, there was no basis for the defendant to claim the privilege in *Farish* from 1973-85, when that case was winding through the court system" because "the privilege did not apply to tortious interference during that time frame." *Ingalsbe,* 869 So. 2d at 37 (Gross, J., dissenting). (A:4). And, of course, "no

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[12] On the question whether Stewart could even be liable for tortious interference, the dissent correctly concludes that the facts as pled in Ingalsbe and Brown's complaint are "very different" from *Farish*:

> There the tortfeasor convinced the client to discharge the attorney in an attempt to deprive him of any fee whatsoever. The conduct in this case, which was consistent with the fee contract, does not give rise to an independent tort with the full panoply of tort damages.

Ingalsbe, 869 So. 2d at 36 (Gross, J., dissenting). (A:4).

decision is authority on any question not raised and considered, although it may be involved in the facts of the case." *State ex rel. Helseth v. Du Bose*, 99 Fla. 812, 128 So. 4, 6 (1930). There is simply no doctrinal basis for the Fourth District's purported "exception" to the litigation privilege's applicability to claims of tortious interference.

b. The Fourth District's "exception" will bar parties-only settlements in contingency-fee cases.

"Allowing a tortious interference cause of action in this case will severely impinge on a client's right to settle the lawsuit, a right which takes paramount importance in our system." *Ingalsbe,* 869 So. 2d at 35 (Gross, J. dissenting). (A:4). The effect of the Fourth District majority's opinion is nothing less than to take parties-only settlements out of the litigation privilege.

And it does so, as the dissent accurately notes, by decrying a defendant's "interference" with a plaintiff lawyer's contingency fee – when the very *essence* of the litigation privilege is to *immunize* otherwise-tortious conduct. *Levin*, 639 So. 2d at 608 ("absolute immunity must be afforded to any act occurring during the course of a judicial proceeding, regardless of whether the act involves a defamatory statement or other tortious behavior … so long as the act has some relation to the proceeding"). Judge Gross's dissent correctly concludes that, "[i]ntent on stretching the law to cover the facts of this case, the majority has expanded the law of tortious interference to create tort liability in conflict with *Levin.*" *Ingalsbe*, 869 So. 2d at 37 (Gross, J., dissenting). (A:4).

And the impact of the majority opinion goes far beyond its evisceration of the litigation privilege in the parties-only settlement context. Stewart reached a voluntary settlement with the plaintiffs, including a payment of attorney's fees to which plaintiffs also agreed. The attorney's fee contract itself *expressly contemplates* that plaintiffs might settle without the involvement – or for that matter, without the approval – of the lawyers. (R:10-12; A:2). And it was the *Lesueurs*, not *Stewart*, who were bound by the fee agreement to pay their lawyers $300 per hour if the plaintiffs settled in contravention of the lawyer's advice.

[13]

Thus, although, as the dissent correctly notes, Ingalsbe and Brown "retained their right under the contract to enforce their contract against [plaintiffs]," *Ingalsbe*, 869 So. 2d at 36 (Gross, J., dissenting) (A:4), the majority opinion holds that Ingalsbe and Brown should have been allowed to *prevent* the settlement so that the lawyers could elect the attorney's fee provision that is most to *their* liking. This holding is particularly extraordinary because one of the fee alternatives is a *statutory* award of attorney's fees which, under the Florida Deceptive and Unfair Trade Practices Act (the statutory provision invoked in the plaintiffs' complaint), only a "prevailing party" is entitled to seek a fee recovery after judgment. § 501.2105(1), Fla. Stat. (2003).[14] The ineluctable result of the panel majority's decision is that

[13] As noted earlier, that fee alternative was not available to Ingalsbe and Brown under their own allegations. See n.11, *supra*.

[14] The majority opinion ignores that, in the underlying litigation, Ingalsbe and Brown sought to recover attorney's fees, but the trial court dismissed the Lesueurs' action with prejudice. (R:47). The Lesueurs' action against Stewart (continued...)

contingent-fee cases *cannot* be settled by the parties themselves.

This is so because the parties *must* provide for an award of attorney's fees in a parties-only settlement. A parties-only settlement that is entered into without knowledge or notice to the plaintiff's attorney is improper *absent a payment of attorney's fees to plaintiff's counsel. Heller v. Held,* 817 So. 2d 1023, 1025 (Fla. 4th DCA 2002) (*en banc*), *review denied*, 839 So. 2d 698 (Fla. 2003).[15] But the majority held that compliance with this requirement subjects the *defendant* to a tortious interference claim where, as here (and in most, if not all, contingency cases) there are alternative fee arrangements.[16]

The Fourth District's opinion thus creates an insoluble dilemma, one that will, contrary to this Court's adjuration in *Sentco*, 84 So. 2d at 499 (parties "may

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(...continued)

would have been the proper vehicle for pursuing post-settlement fee awards under Section 501.2105, if indeed any such entitlement existed. Surely the majority is not suggesting that a lawyer should be able to maximize a statutory fee recovery by insisting that his client *go to trial* on a claim that the client unambiguously wishes to settle directly with the defendant.

[15] *Heller* reaffirms the established principle that, while litigants may settle controversies themselves, "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." *Miller v. Scobie,* 152 Fla. 328, 11 So. 2d 892, 894 (1943); *accord, e.g., Forman v. Kennedy*, 156 Fla. 219, 22 So. 2d 890, 891 (1945). That rule, as the dissent correctly observes, "does not apply here because the settlement included an offer of attorney's fees consistent with the fee contract." *Ingalsbe*, 869 So. 2d at 38 (Gross, J., dissenting). (A:4).

[16] Indeed, the majority opinion could be construed to *forbid* virtually *any* settlement by a plaintiff, without the participation of plaintiff's counsel, that diminishes the attorney's share of the ultimate recovery – so that, in theory, a parties-only settlement *before* trial could be barred because the lawyer's percentage is higher *after* trial.

settle ... without the intervention of their attorneys" and plaintiff cannot be compelled "to hazard the outcome of litigation, rather than settle the suit, simply because his attorneys are employed on a contingent fee basis"), effectively bar a plaintiff from entering into a parties-only settlement. If the plaintiff, in attempting to comply with the Fourth District's new rule, makes no provision for attorney's fees, the plaintiff has thereby acted fraudulently and the attorney is entitled to a charging lien. *Heller*, 817 So. 2d at 1025-26. On the other hand, if the parties attempt to comply with the contingency arrangement, the defendant – like Stewart – is subject to a tortious interference claim.

Thus placed between Scylla and Charybdis, parties will necessarily refrain from attempting to settle without the consent of the plaintiff's lawyers. That, of course, takes the ultimate settlement decision out of the plaintiff's hands, in contravention of established Florida law and The Florida Bar's rules. The result that the Fourth District's decision makes inevitable cannot be squared with this Court's precedents on the litigation privilege, tortious interference, or a party's right to settle directly with an adversary. The Fourth District's certified question should be answered with a resounding "no."

CONCLUSION

Based on the foregoing, Stewart requests the Court to quash the Fourth District's decision, to remand with directions to affirm the trial court's dismissal order, and to grant such other and further relief as the Court shall deem appropriate.

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I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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