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' REPLY BRIEF

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

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ARGUMENT

1. The Litigation Privilege.

While this Court flatly held in *Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. United States Fire Ins. Co.,* 639 So. 2d 606 (Fla. 1994), that "absolute immunity must be afforded to any act occurring during the course of a judicial proceeding, regardless of whether the act involves … tortious behavior …, so long as the act has some relation to the proceeding," *id.* at 608, Ingalsbe and Brown seek to characterize *Levin* as merely having "elaborated on the 'litigation privilege' under distinguishable facts." Respondents' Answer Brief (Answer Brief) at 12. The asserted basis for their attempt to minimize *Levin* is that, "[i]f 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." Answer Brief at 13-14 (citing *Bankers Multiple Line Ins. Co. v. Farish,* 464 So. 2d 530 (Fla. 1985)).

As noted in Stewart's opening brief, this argument assumes that this Court, in *Farish*, prospectively created an exception to the as-yet unannounced *Levin* rule. Petitioner's Initial Brief (Initial Brief) at 24-25. If the illogic of respondents' argument is insufficient to collapse it, there is this Court's declaration in *Levin* that the question whether the litigation privilege applies to intentional torts, such as tortious interference, had "not been previously addressed by this Court." *Levin,* 639 So. 2d at 608.

In a passing comment, Ingalsbe and Brown insinuate that the Fourth District alternatively ruled that the litigation privilege cannot be raised as it was here, on a motion to

dismiss. Answer Brief at 22. In actuality, there is no "alternative reason," *id.*, in the Fourth District's decision. Rather, with respect to the procedural status of the case, the court stated:

> It is also crucial to appreciate the procedural context of the trial court's determination in this case. The ruling was made on a motion to dismiss the complaint for failure to state a cause of action. [Stewart] argues that an affirmative defense of litigation immunity appears on the face of [Ingalsbe & Brown's] complaint. Rule 1.110(d) does provide that such defenses "appearing on the face of a prior pleading may be asserted as grounds for a motion or defense under rule 1.140(b)." Fla. R. Civ. P. 1.110(b). Here, however, even if [Stewart] could theoretically have claimed some immunity, he could not have properly done so by motion to dismiss because no immunity appears on the face of [Ingalsbe and Brown's] complaint in this case. The complaint is permissively sketchy. It merely alleges the fee agreement, [Stewart's] unjustifiable interference … and damages suffered by [Ingalsbe and Brown].
>
> Because no affirmative defense appears on the face of the pleading, we are required to treat the factual allegations of the complaint as true and consider them in a light most favorable to the plaintiff.…
>
> A motion to dismiss for failure to state a cause of action may be granted only by looking exclusively at the pleading itself, without reference to any defensive pleadings or evidence in the case. We conclude that if [Ingalsbe and Brown] can prove the allegations in [their] complaint, any resulting money judgment would survive an appellate argument that his underlying legal theory of relief was defective for the immunity reason argued in this case.

Ingalsbe v. Stewart Agency, Inc., 869 So. 2d 30, 34-35 (Fla. 4th DCA 2004) (citations omitted). The Fourth District did not rule as Ingalsbe and Brown suggest it did.

[1]

> That this is so is perhaps most clearly shown by Ingalsbe and Brown's *disavowal*

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[1] And, of course, *after* issuing its decision, the Fourth District certified the question of great public interest to this Court, its purported "alternative reason" notwithstanding. *Id.* at 38-39.

of any argument in the Fourth District that "it was premature for the court to reach the immunity issue." Initial Brief, *Ingalsbe, et al. v. Stewart Agency, Inc., et al.*, Fourth District Nos. 4D03-618 & 4D03-2618 at 7. Ingalsbe and Brown presented *no* procedural challenge to the trial court's ruling on their appeal to dismiss the order. *Id.*

The trial court ruled that, "in this case, the existence of the litigation privilege appears on the face of [the] complaint," and reached the merits. (R:61). It is an established principle that where, as here, the complaint pleads the *facts* that establish 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). The Fourth District's discussion concerning the procedural status of the appeal notwithstanding, Ingalsbe and Brown should not be permitted to pursue an argument that they did not raise in the Fourth District. *Trushin v. State*, 425 So. 2d 1126, 1130 (Fla. 1982); *Simmons v. State*, 305 So. 2d 178, 180 (Fla. 1974).

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.

Ingalsbe and Brown concede, as they must, that "a defendant can settle a claim directly with the Plaintiff without the consent of the Plaintiff's attorney." Answer Brief at 8. They say, however, that "the point to this case" is that a defendant "cannot tortiously entice the plaintiff to breach the agreement under which the plaintiff's attorney was retained and worked for six years." *Id.* at 8-9. But, insofar as the litigation privilege is concerned, Judge Gross's dissent correctly observes that "the litigation privilege does not depend upon a party's 'right' to commit a tort," *i.e.*, the privilege applies "because policy considerations favor the freedom

in prosecuting or defending a lawsuit over the preservation of … tort claims when they are connected to a judicial proceeding." *Ingalsbe,* 869 So. 2d at 37 (Gross J. dissenting) (citation omitted). (A:4).

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

Nowhere in their brief do Ingalsbe and Brown offer any cogent explanation for why it is that this parties-only settlement is beyond the pale of the litigation privilege. Answer Brief at 9-22. Instead, they employ strident rhetoric in the place of legal analysis, *e.g.,* "[i]f 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?" Answer Brief at 10. But Ingalsbe and Brown, in their contract with the Lesueurs, *agreed* that the Lesueurs were free to settle without their attorneys' participation. (R:10). And, because doing so is well within the ordinary scope of civil proceedings, *e.g., Sentco, Inc. v. McCulloh,* 84 So. 2d 498, 499 (Fla. 1955), see Initial Brief at 14-18, the litigation privilege applies, as *Levin* commands.

The Eleventh Circuit recently has held, in affirming the decision in *Jackson v. BellSouth Telecommunications, Inc.,* 181 F. Supp. 2d 1345 (S.D. Fla. 2001), *aff'd.* 372 F.3d 1250 (11th Cir. 2004), upon which Stewart has relied, Initial Brief at 18-19, that allegedly fraudulent conduct in the course of settlement negotiations is "inextricably linked to the process of guiding ongoing litigation to a close," such that Florida's litigation privilege applies. *Jackson v. BellSouth Telecommunications, Inc.,* 372 F.3d 1250, 1275-76 (11th Cir. 2004) ("[b]ecause we believe that the settlement negotiations ... occurred during the course

of a judicial proceeding *and* had a substantial relationship to that proceeding, we conclude that [the] district court's application of Florida's absolute litigation privilege to the conduct at question was appropriate") (citing *Levin*) (footnote omitted).

[2]

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.

With the exception of their mistaken reliance on this Court's *Farish* decision, see Point 1, *supra*; Initial Brief at 24-25, the heart of Ingalsbe and Brown's defense of the Fourth District's decision is that this Court should declare, as a matter of law, that — while parties may "settle between themselves" — "[w]hen the plaintiff's attorney accepts a case on the strength of a statutory fee award which would factor in a 'contingency multiplier,'" the parties must "settle and simply leave the fee issue open for the court to determine under the statute" or settle in some other manner that "does not unilaterally diminish the attorney's contractual right to be paid a statutory fee award." Answer Brief at 9. This argument warps established

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[2] The dispute in *Jackson* was between civil rights plaintiffs and their lawyers, with the plaintiffs claiming that the lawyers had defrauded them in the settlement negotiations. *Id.* at 1276. The Eleventh Circuit rejected the plaintiffs' reliance on the Fourth District's decision in this case as authority for the proposition that the "litigation privilege does not bar a tortious interference claim arising out of settlement negotiations." 372 F.3d at 1275 n.26. The court also distinguished the Fourth District's decision because Ingalsbe and Brown had asserted tortious interference in their "professional or business activities." *Id.* But, as Stewart has explained, *every* parties-only settlement that complies with Florida law necessarily affects the lawyer's "professional or business activities." Initial Brief at 27-29.

principles of Florida law beyond recognition.

Ingalsbe and Brown cite *Miller v. Scobie*, 152 Fla. 328, 11 So. 2d 892 (1943), as a "good example" of "attempts to defraud attorneys" out of their fees. Answer Brief at 14-15. But that decision, as Stewart has noted, Initial Brief at 28 n.15, requires that a parties-only settlement *include* arrangements for payment of attorney's fees. *Heller v. Held*, 817 So. 2d 1023, 1025 (Fla. 4th DCA 2002) (*en banc*), *review denied,* 839 So. 2d 698 (Fla. 2003). If no provision is made for payment of fees, the plaintiff's lawyer is free to continue the action against the defendant to recover fees. *Miller*, 11 So. 2d at 894. Ingalsbe and Brown's wholly unsupported proposal runs directly counter to the very precedent upon which they purport to rely.

[3]

Ingalsbe and Brown insist that, their clients' undisputed right to settle directly with Stewart notwithstanding, the lawyers were entitled to seek a statutory fee award under the Florida Deceptive and Unfair Trade Practices Act (FDUTPA) at "the moment the Lesueurs' case was settled." Answer Brief at 17. That is, while the Settlement Agreement plainly contemplated the payment of a contingency percentage to Ingalsbe and Brown

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[3] Brown and Ingalsbe's attempt to find support in other jurisdictions fares no better. They rely on *Schiavoni v. Steel City Corp.*, 133 Ohio App. 3d 314, 727 N.E.2d 967 (1999), in which the court allowed a claim of tortious interference to go forward against an employer who secretly had negotiated a settlement of the employee's worker compensation claim. 727 N.E.2d at 970-71. Answer Brief at 15-16. There is, however, *no* mention of the litigation privilege in the decision. 727 N.E.2d at 968-71. The same is true of the decisions in *Katopodis v. Liberian S/T Olympic Sun,* 282 F. Supp. 369, 371-72 (E.D. Va. 1968), and *Keels v. Powell*, 207 S.C. 97, 34 S.E.2d 482, 483-84 (1945), upon which decisions Brown and Ingalsbe also rely. Answer Brief at 15-17.

(R:19-21; A:1) and Stewart tendered a check in the appropriate amount (R:47), Ingalsbe and Brown maintain that the Settlement Agreement gives rise to a claim that survives the litigation privilege because the lawyers could not seek a fee award under FDUTPA. Answer Brief at 17-18.

In making this argument, Ingalsbe and Brown ignore their motion for attorney's fees under Section 501.2105, Florida Statutes (2003), in the Lesueurs' action, which motion was filed following the parties-only settlement. (R:47). The trial court dismissed the Lesueurs' action with prejudice — which is the act that barred Ingalsbe and Brown's purported entitlement to statutory attorney's fees. Ingalsbe and Brown failed to invoke their purported entitlement to statutory attorney's fees as a basis for continuing the action under *Miller v. Scobie*, 11 So. 2d at 894, but now assert that they can seek entitlement to such fees in the guise of damages for tortious interference without running afoul of the litigation privilege. Answer Brief at 17-18.

Ingalsbe and Brown inadvertently make precisely that point when they argue that, "[w]hen 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." Answer Brief at 17 (citations omitted). While, as Stewart noted, Section 501.2105(1), Fla. Stat. (2003), only *allows* — rather than *requires* — an award of fees to a "prevailing party *after judgment in the trial court* and exhaustion of all appeals," (emphasis added), Initial Brief at 22 n.11, Ingalsbe and Brown assert that they would be entitled to a FDUTPA fee award after a parties-only settlement that does not result in a judgment for

the plaintiff. Answer Brief at 17-18. But the sole authority upon which they rely for this proposition, *Gardner v. Nimnicht Chevrolet Co.*, 532 So. 2d 26, 27-28 (Fla. 1st DCA 1988), holds only that the plaintiff in that case was entitled to recover fees *after prevailing at trial and obtaining a judgment*. A favorable judgment is an essential prerequisite to an award of fees under Section 501.2105. *Ghodrati v. Miami Paneling Corp.*, 770 So. 2d 181, 183 (Fla. 3d DCA 2000); *Heindel v. Southside Chrsyler-Plymouth, Inc.*, 476 So. 2d 266 (Fla. 1st DCA 1985); *Nolan v. Altman*, 449 So. 2d 898, 900-01 (Fla. 1st DCA), *review denied*, 458 So. 2d 271 (Fla. 1984).[4]

The flaw in that argument is the same as that which undoes the Fourth District's analysis. See Initial Brief at 27-29. However Ingalsbe and Brown attempt to disguise the implications of their position, the inevitable consequence of the rule that they urge is that parties-only settlements will effectively be barred in contingency or statutory fee cases.

In the end, Ingalsbe and Brown's strident — and doctrinally unsupportable — argument that the Court should extend *Levin* immunity only "to cases where the rationale

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[4] Ingalsbe and Brown accuse Stewart of "taking inconsistent positions" by arguing that they have no entitlement to a fee award under the FDUTPA fee statute because Stewart obtained an "appellate attorney fee award against the Lesueurs after the first appeal in this case." Answer Brief at 18. While Stewart's memorandum of law in support of its motion to dismiss mistakenly states that Stewart had obtained a judgment against the Lesueurs "for appellate costs and appellate fees in the amount of $6,643,78" (R:46), what Stewart actually obtained was a simple appellate costs judgment under Rule 9.400(b) of the Florida Rules of Appellate Procedure, *i.e.*, an award of costs for filing fees, preparation of the record, and bond charges. *Lesueur, et al. v. Stewart Agency, Inc., etc.*, No. CL 96-5029 AD (Fla. 15th Jud. Cir. Nov. 5, 2001) (copy attached).

supporting the immunity is very strong," because "[i]mmunity breeds irresponsibility," Answer Brief at 22, cannot mask what they are really saying — which is that attorneys in a contingency or statutory fee case should have the power to *prevent* a parties-only settlement. Their attempt to escape the inevitable consequences of their position is entirely transparent: no responsible litigant would enter into a parties-only settlement without providing for attorney's fees, lest that party find itself continuing to defend the settled action, with the plaintiff's lawyer as its adversary.

If Ingalsbe and Brown have their way, and the protections of the litigation privilege are removed from parties-only settlements when the plaintiff's lawyer is retained on a contingency/statutory fee basis, the plaintiff's lawyer would be given veto power over any purported parties-only settlement, simply by insisting that a statutory fee provision, such as Section 501.2105, trumps the settlement, on pain of a tortious interference action against the settling defendant. But that is precisely what this Court in *Sentco* said is *not* the law of this state, 84 So. 2d at 499, and precisely what The Florida Bar's fee rules prohibit. R. Reg. Fla. Bar 4-1.5, Statement of Client's Rights for Contingency Fees, ¶ 10. See Initial Brief at 14. A lawyer "has no authoritarian settlement thwarting rights by virtue of his employment."[5] *Ingalsbe*, 869 So. 2d at 36 (Gross, J. dissenting). See Initial

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[5] Ingalsbe and Brown's sardonic suggestion that the parties agree to the answer to the certified question (Answer Brief at 23), takes the statement in Stewart's Initial Brief at 29 out of context. Obviously, Stewart has vigorously invoked the litigation privilege. The "no" answer suggested in the initial brief, while perhaps confusing, is to the Fourth District Court of Appeal's stated assumption that the parties-only settlement deprived Ingalsbe and Brown of a fee to which they were otherwise lawfully entitled. The overarching question whether the litigation privilege applies to this parties-only settlement must be answered in the affirmative.

Brief

at 15.[6]

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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[6] As noted in Stewart's Initial Brief at 20 n.9, the majority and dissenting opinions show that the merits of Ingalsbe and Brown's tortious interference claim are inextricably entwined with litigation privilege issue. Ingalsbe and Brown take Stewart to task for addressing the merits of their claim because "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." Answer Brief at 21. Stewart, however, raised the viability of the tortious interference claim before the trial court (R:36-40, 45-46), but the trial court elected to rule only on the litigation privilege. (R:61; A:3). On Ingalsbe and Brown's appeal to the Fourth District, Stewart raised the merits of Ingalsbe and Brown's claim as an alternative basis for upholding the trial court's dismissal. Initial Brief, *Ingalsbe, et al. v. Stewart, et al.*, 4th District Nos. 4D03-618 & 4D03-2618 at 18-21. The Fourth District reached the merits of Ingalsbe and Brown's claim. *Ingalsbe,* 869 So. 2d at 35. So too did the dissent. *Id.* at 36 (Gross, J. dissenting). On a certified question, this Court is empowered to consider all issues in the case. *State v. Herny,* 781 So. 2d 1067, 1068 (Fla. 2001).

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I certify that a copy of the foregoing brief was mailed on August 10, 2004 to:

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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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