SUPREME COURT
STATE OF FLORIDA

ECHEVARRIA, McCALLA, RAYMER, BARRETT & FRAPPIER, a Florida general partnership, et. al.,

Petitioners,

vs.

BRADLEY COLE, individually and on behalf of all others similarly situated,

Respondent.
_____/

CASE NO.: SC05-564
L.T. CASE NO.: 1D02-4746
1D02-4982

BRIEF ON THE MERITS BY PETITIONERS, ECHEVARRIA, McCALLA, RAYMER, BARRETT & FRAPPIER, et. al.

ON REVIEW FROM A DECISION OF THE
FIRST DISTRICT COURT OF APPEAL

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STANDARD OF REVIEW

The rulings of the First District are matters of law and are to be reviewed de novo.

STATEMENT OF THE CASE AND FACTS

This Court has accepted jurisdiction to review the opinion issued by the First District Court of Appeal on December 30, 2004, in Case Number 1D02-4746 and 1D02-4982. These two case numbers were consolidated cases before the District Court. The trial court entered a class certification order on November 8, 2002, and both sides filed notices of appeal directed to that order. (A. V.14 Tab 256 and 258). The plaintiff contended the class definition was in error and should be greatly expanded. The defendants contended that class certification was completely erroneous and in the alternative, that the class definition was a proper exercise of the trial court's discretion.

Since the appeals were taken under Rule 9.130(a)(3)(c)(vi) from the certification order, the record before the district court of appeal consisted of an appendix pursuant to Rule 9.130(e) rather than a normal Clerk's record. Both sides agreed to use the same appendix. The Clerk of the First District Court of Appeal has advised undersigned counsel that this appendix, along with the briefs, will be filed with this Court pursuant to the order accepting jurisdiction and requiring the Clerk to file the "original record" with this Court. Thus all record references herein will be to the Appendix. These references will be as follows: (A. Tab.___ p.___). The appendix is extensive and contains 14 volumes and over 4,500 pages.

This is a petition for review of the First District Court of Appeal's decision announced in its opinion of December 30, 2004, with rehearing granted in part and denied in part in subsequent orders. Rendition occurred on March 21, 2005.

The case in the circuit court is an alleged class action concerning the attempted collection by a law firm of costs in mortgage foreclosure actions. The petitioners herein are the defendant Echevarria and the Echevarria law firm which was a firm engaged in a modern and streamlined mortgage foreclosure practice. In this brief all of the petitioners, including Mr. Echevarria individually, are referred to as "Echevarria." The respondent is Mr. Bradley Cole who is a former bank vice-president who took affirmative steps to contact the Echevarria Law Firm because he knew his mortgage was in default. At Cole's request, Echevarria sent him a February 3, 1998 reinstatement letter listing the expenses and other sums that had to be paid by Cole to reinstate his mortgage and avoid foreclosure. (A. V.14 Tab 249 p.3). The respondent will be referred to herein as "Plaintiff" or "Cole."

The case, as litigated so far, concerns collection of costs in mortgage foreclosure cases in which the Echevarria firm represented the lender banks in their attempts at foreclosing the mortgages. The Echevarria firm specialized in mortgage foreclosure work and handled thousands of such cases. SunTrust

Bank routinely hired the Echevarria firm to foreclose on hundreds of home mortgages and this representation occurred without a formal written contract on each case. In January of 1998, SunTrust requested Echevarria to begin proceedings to foreclose on a mortgage on a home owned by Mr. Bradley Cole. (A. V.3 Tab 84 p.10 of attached Complaint). On February 3, 1998, Echevarria sent Cole a reinstatement letter which included the $325 amount for a title examination and title search as costs incurred by the bank. (A. V.4 Tab 105 Exhibit E). The $325 amount became the centerpiece of this litigation and the trial court entered a summary judgment against Echevarria on the issue before entering the class certification order. (A. V10 Tab 215 p.1-11).

There are a multitude of issues presented by the case but this brief is limited to the issues surrounding the Judicial Immunity Rule and the class definition resulting from the application or nonapplication of that common law Rule.

Mr. Cole asked for a reinstatement letter from the Echevarria firm advising him of what he had to pay to redeem his mortgage which was in default. Mr. Cole received the February 3, 1998, letter which was an offer to settle for less than the full accelerated principal amount, which could have been claimed. Cole paid every cent almost by return mail with a certified check. (A. V.14 Tab 249 p.4). Later discussions

resulted in a $700 refund to Cole and reinstatement of the mortgage. (A. V.14 Tab 249 p.5).

Because Echevarria was a modern law firm doing a volume of thousands of mortgage foreclosure cases the firm had developed an in-house staff of attorneys and title examiners to do the title examination and title search work. The firm initially secured basic title information from an outside source for approximately $55. (A. V.6 Tab 15 p.1-4). Further title search and title examination work was then done by the firm in-house and the bank was charged $325 for these services by the firm. The bank would routinely pay this $325 amount (the amounts were not always the same) to the Echevarria firm and in the mortgage foreclosure case, Echevarria would attempt to collect this $325 amount from the delinquent homeowner/mortgagor and refund it to the bank. (A. V.6 Tab 151 p.1-4). Echevarria never attempted to collect more from the homeowner than he had charged to the bank.

Plaintiff Cole contended, and the trial court ruled, that this in-house cost was an illegal charge and could not be charged to the debtor unless it had been paid out by the Echevarria firm to a third-party vendor. (A. V.10 Tab 215 p.10). The $325 was a reasonable charge for the title work in question and the only issue was the fact that the title services were performed in-house within the Echevarria firm rather than

having paid the same amount of money to a third-party vendor. The sum of $55 dollars had actually been paid to an outside title company. The trial court found Echevarria liable on summary judgment for a knowing attempt to collect on illegal charges. (A. V.10 Tab 215 p.10). Mr. Echevarria testified that he certainly did not have actual knowledge that his attempt to collect these in-house charges was illegal. (A. V.5 Tab 124 p.1-5; Tab 125 p.1-2; Tab 126 p.1-4, V.8 Tab 191 p.17-20, 31, 39, 40, 47, 50, 51, 53, 54, 64, 77, 78, 97, 101-3, 127,155,161). Mr. Echevarria gave his opinion as a very experienced lawyer that it was perfectly legal to charge the bank for these in-house services and then to attempt to collect this as an incurred cost on behalf of his bank client. The validity of the $325 amount for title examination and title search was apparently never litigated in any of the mortgage foreclosure cases.

The circuit court relied upon its own summary judgment findings in certifying the class of all borrowers who received a reinstatement letter seeking similar costs. However, the court ruled that it was limiting the class to persons whose cases had not gone to an actual judgment because the court wanted to avoid the application of the Judicial Immunity Rule which would have protected Echevarria from liability even if the $325 amount had been false.

The Judicial Immunity Rule is often referred to as a "litigation immunity privilege" and the primary Florida case on the doctrine is Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. United States Fire Ins. Co., 639 So. 2d 606 (Fla. 1994). Simply stated the rule is that participants in litigation, including the attorneys, have no later liability for statements or acts made preliminary to or during the judicial proceedings if such statements or acts are relevant to the proceeding. Settlement negotiations are included within the privilege protection. The Immunity Rule applies even if an attorney makes false and malicious statements so long as they are relevant to the case.

The Rule is most often applied in defamation, libel and slander cases where an attorney or a party makes a false statement in prior litigation. However, Levin was an expansion of the rule to cover intentional acts in litigation which were done to harm a law firm.

The Levin decision was issued on a certified question from the Eleventh Circuit Court of Appeals and that court has now expressly held that the Florida "Litigation Privilege" applies in cases based on statutory violations. Jackson v. BellSouth Telecommunications, 372 F.3d (11th Cir. 2004). Jackson will be discussed in detail hereafter in the argument section of this brief.

There has never been any indication that the Florida Legislature has intended to abolish the common law immunity rule. Thus, it was Echevarria's position that even if the $325 charges mentioned in the letter to Cole had been inaccurate, the absolute litigation immunity privilege would bar Echevarria's liability growing out of the reinstatement letter. It is unquestioned that the letter was preliminary to a mortgage foreclosure action against Cole and it was obviously a settlement proposal. It is also unquestioned that there were mistakes in this "form letter" which was sent to Cole early and in anticipation of the foreclosure action. An amount was stated covering service of process and it was clear that the foreclosure complaint had not even been filed at the time of the letter. Obviously service of process had not yet occurred. These were mistakes which Echevarria admitted to and which he remedied. A $700 refund was paid to Cole and the foreclosure case was dismissed. (A. V.14 Tab 249 p.3). Although there were admitted mistakes in the letter, the $325 in title search and examination charges was not a mistake and Echevarria swore it was absolutely correct. In any event, if the litigation immunity privilege had been applied, Echevarria was protected from liability growing out of the letter even if it was intentionally inaccurate, which it was not.

There were four cases pending before the First District Court of Appeal growing out of this class action which is still only in its beginning stages. These cases were 1D02-4746 and 4982, concerning the class certification order; 1D02-3818 seeking certiorari review of the partial summary judgment against Echevarria; and 1D03-1686, an appeal from certain judgments on attorneys fees. Attorneys fees are not an issue in this petition for review. The opinion in the class certification appeal affirmed in part and reversed in part based on appeals by both sides. The court affirmed certification but reversed the definition of the class and greatly expanded that definition to include everyone who had been sent a letter from the Echevarria firm seeking to recover costs based on in-house services by the firm and various other charges which have not yet been litigated. The court further ordered that the language of the class definition be changed by deleting the exclusion of cases which went to judgment or sale.

It must be noted that the class certification order of November 8, 2002, does not mention or address the Judicial Immunity Rule in any way whatsoever. (A. V.14 Tab 249 p.1-19). However, the First District Court of Appeal directly addressed and reversed upon issues concerning the Judicial Immunity Rule which were not actually within the class certification order it was supposed to be reviewing.

All of the trial court's rulings on the Judicial Immunity Rule were contained in the court's Partial Summary Judgment order of August 22, 2002. (A. V.10 Tab 215 p.1-11). This was a summary judgment entered in favor of Cole on the $325 issues without a motion for summary judgment even being filed by Cole and in the face of Echevarria's sworn denials of his own guilty knowledge as to the illegality of the $325 charge. (A. V.5 Tab 125 p.2).

The Partial Summary Judgment order was before the First District Court of Appeal in Echevarria's Petition for Certiorari (Case No. 1D02-3818) which was directed to that order. The First District "dismissed" the Petition for Certiorari on jurisdictional grounds holding that "the threshold requirement of showing irreparable harm" had not been met. See Echevarria et al. v. Cole, 896 So. 2d 779 (Fla. 1st DCA 2004). Despite dismissing certiorari without reaching the merits, the court reversed the trial court's rulings regarding the Judicial Immunity Rule in its opinion on the class certification order. Both rulings occurred on the same day and Echevarria's motions for rehearing on both rulings were denied without comment.

The trial court had ruled that the Judicial Immunity Rule would apply to protect Echevarria if a final judgment of foreclosure had been issued in any of the mortgage foreclosure cases. For that reason the trial court defined the class to

exclude the cases where foreclosure judgments were actually issued. The First District reversed this ruling in the summary judgment order.

Most importantly, the District Court ruled that the Judicial Immunity Rule can have no application whatsoever to a statutory claim. Under these somewhat irregular circumstances, Echevarria has no choice but to seek review and reversal of the only reviewable decision by the First District which is the opinion reported in Echevarria v. Cole, 896 So. 2d 773 (Fla. 1st DCA 2004).

SUMMARY OF ARGUMENT

The First District Court of Appeal created conflict in holding that the Judicial Immunity Rule also known as the absolute litigation privilege could not be applied to a statutory cause of action. Other Florida courts have held directly to the contrary. Litigation immunity is a very old common law concept which forms a part of Florida's statutory law by virtue of Florida's adoption of the English common law in existence prior to July of 1776. There is no indication that the Florida Legislature has every intended to abrogate the time honored and well established judicial immunity doctrine.

This case concerns a letter written by a law firm on behalf of its bank client in a mortgage foreclosure case. Plaintiffs assert and defendant Echevarria agrees that the letter claimed

$325 in in-house costs for title work. The law firm did title work in-house and then charged its bank client for the in-house services. The bank, through its counsel Echevarria, then attempted to recover this same amount as an incurred cost against the debtor in the foreclosure action.

The law firm relied upon the Litigation Immunity Rule and contended it could not be lible for the reinstatement letter even if it were false, which it was not. The First District Court of Appeal held that a suit brought under certain Florida Statutes regarding debt collection practices barred reliance on the Judicial Immunity Rule. The court concluded that this common law rule adopted as a statute in Florida could not be applied to any statutory cause of action. Other Florida courts have held directly to the contrary as have the federal courts. Substantial case law does apply the Immunity Rule in suits alleging a statutory violation. The First District's holding that the privilege has no application to a statutory claim is error and should be reversed. Such a reversal would absolve the defendant law firm from any liability as occurred in the Levin case.

In the alternative, the First District erred in substantially increasing the definition of the class adopted by the trial court based upon the trial court's application of the Judicial Immunity Rule.

JURISDICTION

This Court has jurisdiction pursuant to Art. V, § 3(b)(3), of the Florida Constitution based on direct conflict.

ARGUMENT

I. THE FIRST DISTRICT COURT OF APPEAL ERRED AND CREATED CONFLICT IN HOLDING THAT THE COMMON LAW "JUDICIAL IMMUNITY RULE" PREVIOUSLY ACCEPTED IN FLORIDA COURTS HAS NO APPLICATION TO A STATUTORY CAUSE OF ACTION.

This court has accepted review jurisdiction based on conflict with Boca Investors Group, Inc. v. Potash, 835 So. 2d 273 (Fla. 3d DCA 2002), where the Third District ruled directly contrary to the First District's opinion in the Echevarria case. The First District expressly ruled that the Judicial Immunity Rule cannot be applied to a statutory cause of action whereas the Third District ruled in Potash that a "statutory anti-trust claim was covered by the litigation privilege." In addition, we suggest that the First District's decision is also in conflict with this Court's landmark decision in Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell P.A. v. United States Fire Ins. Co., 639 So. 2d 606 (Fla. 1994). Levin holds that "participants in judicial proceedings must be free from the fear of later civil liability as to anything said or written during litigation so as not to chill the actions of the participants in the immediate claim." Levin does not exclude suits based on a

statute and concludes that the privilege applies in all "subsequent civil actions for misconduct." Levin at p.608.

Levin further explains that remedies for misconduct, including false statements in litigation, do exist in Florida but they are the remedies for "perjury, slander, and the like committed during judicial proceedings." Levin at p.608. This Court noted that discipline for such conduct is in the hands of the circuit courts, and the Florida Bar. If Mr. Echevarria knowingly filed a false affidavit in a mortgage foreclosure case or sent a false reinstatement letter to a prospective defendant, then he is subject to the court's contempt power and, according to Levin, a compensatory fine as punishment.

Immunity Applies to Statutory Claims

We suggest that there has been significant error in the proceeding before the First District Court of Appeal but that many of those issues probably cannot be reached in this review proceeding. The district court dismissed Echevarria's petition for certiorari seeking review of a summary judgment against him while at the same time ruling against Echevarria in reversing the ruling on the Judicial Immunity Rule contained in the summary judgment order. The certiorari ruling in Echevarria v. Cole, 896 So. 2d 779 (Fla. 1st DCA 2004), states that the petition seeking review of the summary judgment against Echevarria failed to meet the threshold requirement of showing

irreparable harm and the petition was thus "dismissed" for lack of jurisdiction. The petitioner recognizes that this certiorari ruling is not subject to review because it is similar to a PCA and not in direct conflict with any other case. The certiorari dismissal also does not constitute a ruling on the merits. However, the District Court then went on in the class certification appeal and reversed a part of the rulings in the summary judgment order which were favorable to Echevarria.

The Third District Court of Appeal was correct in Potash in its holding that the Judicial Immunity Rule does apply to civil claims based upon a statute. The Judicial Immunity Rule is a part of early English common law and is firmly established in the United States and in Florida. The common law of England of a general nature has been adopted and declared to be of force in the state of Florida. See Section 2.01, Florida Statutes, as enacted in 1829. Unlike the federal system, Florida is a common law state and any statute at odds with the common law is to be strictly construed. See McGraw v. R and R Investments, Ltd., 877 So. 2d 886 (Fla. 1st DCA 2004), and In re: Levy's Estate, 141 So. 2d 803 (Fla. 2d DCA 1962).

The Judicial Immunity Rule is an ancient concept stemming from the 1500's. In Briscoe v. LaHue, 460 U.S. 325 (1983), the United States Supreme Court dealt with a case brought by a plaintiff under 42 U.S.C. § 1983. The Court applied the

Judicial Immunity Rule to this statutory § 1983 claim and in doing so stated at p.1113:

> The immunity of parties and witnesses from subsequent damages liability for their testimony in judicial proceedings was well established in English common law. Cutler v. Dixon, 76 Eng.Rep. 886 (K.B. 1585); Anfield v. Feverhill, 80 Eng.Rep. 1113 (K.B. 1614); Henderson v. Broomhead, 157 Eng.Rep. 964, 968; see Dawkins v. Lord Rokeby, 176 Eng.Rep. 800, 812 (C.P. 1866). Some American decisions required a showing that the witness's allegedly defamatory statements were relevant to the judicial proceedings, but once this threshold showing had been made, the witness had an absolute privilege.

The Supreme Court went on to expressly hold that as to private witnesses, § 1983 did not abrogate the absolute immunity existing at common law. Thus Briscoe was a United States Supreme Court case which applied the Judicial Immunity Rule to a statutory cause of action. We of course recognize that Briscoe spoke in terms of "defamation" but the Florida rule is considerably broader. See Levin, supra, and Jackson, supra. Briscoe was cited to the First District Court of Appeal but the court chose not to address it.

Contrary to the inference in the First District's opinion, the Judicial Immunity Rule was not created by this Court's 1994 Levin decision. The rule was recognized as early as 1929. See Ange v. State, 123 So. 916 (Fla. 1929). This was long before

the two state statutes on consumer collection practices now in question were enacted.

The Levin decision is an important milestone in the history of the litigation or judicial immunity privilege in Florida. The privilege is an "absolute privilege" based upon the policy that attorneys and litigants must be able to freely litigate, stating the positions of their clients, without fear that they will thereafter be sued for what they have said or done during the litigation. Levin actually "extended" the litigation privilege to a cause of action for interferences with the attorney-client relationship between a law firm and its clients. In the Levin case, a law firm and its insurance company client took multiple dishonest steps to force another law firm (Levin, Middlebrooks) into being disqualified from representing its clients in ongoing insurance bad faith litigation. All of this conduct, including statements and activity was held by this Court to have been protected by the litigation immunity privilege.

Levin broadens the immunity privilege beyond mere defamation or similar claims. Levin is an example of the expansion of the immunity privilege to meet the ever increasing forms of civil litigation unfolding in the State of Florida. When counsel for an insurance company made a false "certification" to a trial court for the purpose of getting the

opposing Levin law firm disqualified from representing another insurance company, these acts violated the Professional Rules governing attorneys and also violated certain insurance statutes. See § 629.9541 which prohibits "deceptive acts or practices" by an insurance company. If this statute had merely been cited in the Levin complaint against the insurance company defendant, the First District's opinion herein would have required a ruling that the Judicial Immunity privilege would have been of no application whatsoever. Of course this Court found the privilege was applicable and absolute and protected the insurance company and its counsel despite their obvious ethical and statutory violations.

The Levin opinion was the result of a certification by the federal Eleventh Circuit Court of Appeals and that court has recently construed and applied the Levin decision in another major case, Jackson v. BellSouth Telecommunications, 372 F. 3d 1250 (11th Cir. 2004), concerning the Florida Judicial Immunity privilege.

Jackson was a major case brought by African American employees who sued their employer, Bellsouth, and their law firm, Ruden McClosky, contending that they had engaged in numerous forms of serious misconduct in settling the plaintiffs' prior lawsuit and in taking an unfair portion of the proceeds in fees. The alleged misconduct stated in the plaintiffs'

complaints included violations of numerous federal statutes and Florida statutes. The alleged statutory violations included racial discrimination in violation of 42 U.S.C. § 1981, Federal RICO violations under 18 U.S.C. § 1962 and three Florida RICO counts under § 772.103(2)(3) and (4), Florida Statutes. See Jackson at p.1261. The claims against Ruden McClosky even included fraud in the inducement and conspiracy to defraud concerning the attorneys handling of the settlement on behalf of the plaintiffs.

This fraudulent conduct by Ruden McClosky would (according to the attorneys in this Cole case) have been a violation of Chapter 501 of the Florida Statutes as a deceptive practice. See § 501.24, Florida Statutes (2004). These Ruden McClosky attorneys were severally criticized by the Eleventh Circuit for their ethical lapses in engineering an insufficient and unfair $1.6 million dollar settlement for their clients. In the face of all of these statutory violations, the Eleventh Circuit held the Florida Litigation Immunity Rule was applicable to protect both the lawyers and the employer.

The Florida litigation privilege is discussed at length and in detail in Jackson beginning at p.1274. There the court cited to this Court's Levin decision and in reliance thereon stated:

> The privilege initially developed to protect litigants and attorneys from liability for acts of defamation, but has since been extended to cover all acts related to and occurring within judicial proceedings. See

> Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell P.A. v. United States Five Ins. Co., 639 So. 2d 606, 607-08 (Fla. 1994).

The court went on to point out that it was applying Florida law and that Florida's litigation privilege applied to state law claims adjudicated in federal courts. Clearly, the privilege is not limited to only acts of defamation and falsehoods as found by the First District herein. One of the statutory counts against the Jackson defendants was a State RICO count and another was a conspiracy to defraud count. Florida has a White Collar Crime Victim Protection Act contained in § 775.0844, Florida Statutes. This statute outlaws a conspiracy to defraud. The Jackson opinion expressly holds that the Florida litigation privilege is absolutely applicable to all of these statutory claims.

The opinion goes on to hold that the Florida litigation privilege also covers efforts at settlement and at p.1757 the court states: "settlement negotiations, are inextricably linked to" ending litigation. The court even cited and discussed the law of New Jersey and the law of California, which also apply the privilege to settlement efforts by attorneys. See Jackson at p.1276. Here the reinstatement letter by the Echevarria firm was an attempt at settlement. The letter gave Cole the opportunity to pay a certain amount to avoid foreclosure litigation. After the letter was sent on February 3, there were

conversations, a refund and a mortgage reinstatement and dismissal of all foreclosure efforts. As a matter of law, this was a settlement attempt and as a matter of law, the privilege applied.

Clearly, the Eleventh Circuit, acting as the recipient of this Court's Levin decision, has construed it to apply to all types of statutory claims. As the Eleventh Circuit has stated, the litigation privilege is no longer restricted to mere defamation cases. Levin expressly extends the privilege to any "subsequent civil action for misconduct" in the prior litigation. Levin at p.608.

This immunity policy, which is a time honored rule of law throughout the United States, should have been of direct application in this Echevarria situation. Echevarria provided Cole with a reinstatement letter and in that letter stated that one of the sums Cole would need to pay to the bank to reinstate his mortgage was the $325 title search and title examination fee which were costs incurred by the banking client in foreclosing the mortgage. Cole could have paid on the note and simply denied that this was a proper cost or expense and gotten a ruling. If Echevarria had been found to have knowingly filed a false letter or affidavit on costs, the court could have held him in contempt. Echevarria had not paid the $325 amount to

some third-party vendor and Echevarria always agreed that these are indeed the facts.

Echevarria, as counsel to the bank, has now been held personally responsible for the $325 in this very large class action and has been held to have violated the two collection practices statutes by suggesting that the $325 was an incurred cost by the bank. If the reinstatement letter had never been written, surely at some point the bank, through its counsel, would have been able to claim the $325 amount it had paid to its lawyers as an incurred in-house cost.

Judge Smith, who was the presiding judge in the Echevarria case, ruled that the Judicial Immunity Rule does apply but that the Rule would be applicable only if a final judgment was entered in the foreclosure case. Thus, if a judgment was not entered, the immunity rule would not apply. (A. V.13 Tab 237 p.29-42).

Judge Smith's partial summary judgment holds that despite the agreed upon course of conduct in hundreds of foreclosure cases between Echevarria and his banking client, that no contract actually existed between the law firm and SunTrust because there was no specific written contract on individual cases and no specific written agreement to pay the $325. SunTrust had hired the Echevarria firm to foreclose hundreds and probably thousands of mortgages and always paid the in-house

title charges. The bank was pleased with the firm's foreclosure work and a bank officer testified that the $325 amount was reasonable and that he was happy to have the title work done by Echevarria in-house. (A. V.5 Tab 126; VII Tab 229). The attorney representing the federal Fannie Mae mortgage agency also approved the amount ($325) as reasonable and the in-house nature of the services as proper. (A. V.5 Tab 123,126). In-house title work in law firms is simply not an uncommon practice and a relatively new Florida Bar Rule on costs expressly authorizes in-house costs.

Judge Smith, amazingly, held on summary judgment that the law firm was engaged in the unauthorized practice of law and was in violation of the Rules of Professional Conduct governing attorneys in having trained paralegal employees perform in-house title services and charging its bank clients a fee for doing so. (A. V.10 Tab 215, p.8, ¶11). Echevarria's attempts to charge his clients for the nonlawyer, in-house services was held to be a "deceptive practice" and "unconscionable." (A. V.10 Tab 215 p.8 P11). The trial court summarized the position of the Echevarria defendant as follows:

> The defense in this case is predicated solely upon the theory that their "costs" incurred for title search and examination include third party out-of-pocket charges of $55.00 for title search and "in house" services for title examination and other services, for a total charge of $325.00. They contend that their "in house" services,

> described as "title exam" and their other in-house services pertaining to title search, should be treated as a cost, the same as the third party charges for services described as "title search." They contend that such charges were reasonable charges for such "costs" thereby entitling them to summary judgment, based upon Beck. (A. V.10 Tab 215 p.9).

The court's reference to Beck concerned a federal district court case, Beck v. Codilis & Stawiarski, P.A., Case No. 4:99 cv 489-RH (Dec. 27, 2000), U.S. District Court, N. Dist. of Florida, which was a remarkably parallel case. In this federal case, filed the same day as this state case, the same claims were made by the same lawyers against the Codilis law firm. The two firms were both high volume mortgage foreclosure specialists using similar in-house title work.

Judge Hinkle directly held that the Judicial Immunity Rule was applicable to the statutory claims by the Beck plaintiff and cited to the Briscoe case by the United States Supreme Court and the Levin case by this Court in support of this ruling. Thus Judge Hinkle ruled that the Codilis law firm's claims for $300 in incurred in-house costs for title work could not be a basis for asserting liability against the firm. The $300 claim was held to be reasonable and absolutely privileged. Thus the immunity privilege was held directly applicable to the Beck statutory claims.

The exact issue of the legitimacy of title search and title examination costs under the Florida Consumer Collection Practices Act and the Federal Fair Debt Collection Practices Act was before Judge Hinkle who held:

> The firm thus needed title information in every case, and it chose to establish an in-house title operation. Under the firm's agreements with its lender clients, the firm charged a flat rate title search fee usually in the amount of $300.00. As is uncontested, an independent outside title agency would have charged a comparable fee; the $300.00 fee was reasonable. Beck at 13.
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> ***
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> Plaintiffs say that costs are only amounts actually expended by the attorney, and that because the $300 amount here at issue was not an amount actually expended by the law firm, it does not qualify as costs. Plaintiffs say that fees that can be shifted to an adversary must be calculated based on hours worked (either by attorneys or legal assistants), and that, because the law firm kept no track of the time actually spent, the $300 fee could not properly be shifted to plaintiff. Plaintiffs are wrong for two reasons, each of which would be sufficient standing alone.

Judge Hinkle then held that it was entirely permissible for an attorney to own a title agency and that such a fee is not an attorney fee. As stated by Judge Hinkle:

> First, under Florida law, an attorney properly may own and operate a title agency and properly may charge his or her clients a reasonable fee for title services. Such a fee is not an attorney's fee but is instead a title search fee subject to regulation of the Florida law as such. Beck at p. 14.

Florida Statute § 626.8417(4) recognizes that attorneys act as title agents, and that attorneys do and operate their own separate corporations doing business as title agents. See Florida State Bar Committee on Professional Ethics Opinion 73-1: 1973 (Permitting an attorney to establish a separate corporation to act as a title agent). See generally, Section 677.77 *et seq.* Florida Statutes, and Florida Admin. Code R. 4-186.003).

The Beck court concluded the amounts demanded from plaintiffs by the Codilis law firm were a legitimate debt and that the firm did not violate the Federal Fair Debt Collection Practices Act or the Florida Consumer Collection Practices Act. The court held that the charges: "that the lenders in the case at bar incurred these expenses to a law firm rather than to other providers, affected plaintiffs not a whit. The expenses ($300) actually paid by the lender were reasonable." (emphasis supplied) Beck at p. 17.

Judge Smith attempted to avoid the effect of the Beck decision and the immunity privilege. He announced his legal conclusion that judicial immunity did apply but he limited it by holding it applied only in foreclosure cases in which a judgment had actually been entered. He concluded that only when a lawyer secures a judgment would his conduct become protected by immunity. (A. V.13 Tab 237 p.29-42). He therefore defined the class to exclude all debtors whose cases actually proceeded to

judgment. The exclusion of these individuals from the definition of a class was favorable to Echevarria and was by no means an accident or an oversight. The First District stated that it had reviewed the "record from the hearing" and this had to be the hearing on the motion for summary judgment which is the only place where the Judicial Immunity Rule was discussed or ruled upon.[1] (A. V.13 Tab 237 p.29-42).

The statutes in question here are the Florida Consumer Collection Practices Act (FCCPA) and the Florida Deceptive and Unfair Trade Practices Act (FDUTPA) contained in Sections 501.201 et seq. and Sections 559.541 et seq. Both statutes provide for civil damages. Assuming liability, these same damages would have been recoverable by Cole in a normal civil lawsuit without reliance on the statutes. As previously indicated, Cole could have denied that the $325 a proper cost. The issue would have been whether he legally owed the money instead of whether Echevarria would be personally liable for making the statement in the reinstatement letter that he owed it.

As previously indicated, the United States Supreme Court applied the Judicial Immunity Rule in a plaintiff's case brought under 42 U.S.C. § 1983. This occurred in the Briscoe decision which Judge Hinkle expressly relied upon. Briscoe goes on at

[1] We again point out that the class certification order does not mention the Judicial Immunity Rule.

length to discuss the absolute need for full immunity and concludes:

> Neither party, witness, counsel, jury or Judge can be put to answer, civilly or criminally, for words spoken in office.

Thus the Supreme Court expressly extends the privilege to criminal cases and of course all such cases are based on statutes.

In a later U.S. Supreme Court decision construing Briscoe, the Court further stated in Astoria Federal Sav. And Loan Assn. v. Solinio, 501 U.S. 104 (1991) as follows:

> The [litigation immunity] presumption holds nonetheless, for Congress is understood to legislate against a background of common-law adjudicatory principles. See Briscoe v. LaHue, 460 U.S. 325, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983); United States v. Turley, 352 U.S. 407, 411, 77 S.Ct. 397, 399, 1 L.Ed.2d 430 (1957).

The same is true of the Florida Legislature which also legislated with an expectation that the Judicial Immunity Rule would continue in application.

Florida has adopted the English common law as a Florida Statute in Section 2.01, Florida Statutes. Thus Florida is a true common law state and it is not even clear that the federal system has adopted all of the English common law.

The Third District Court of Appeal has applied the Judicial Immunity Rule to a statutory anti-trust claim in the Potash decision and conflict review has been granted on this ground.

Echevarria and Potash simply can not continue to exist side by side. There will be confusion on this issue which will be heightened by the further clear conflict with the Jackson opinion which expressly applies Levin.

In Atlas v. Stolberg, 694 So. 2d 772 (Fla. 4th DCA 1997), the Fourth District applied the Judicial Immunity Rule in a § 1983 claim under the Civil Rights Act. Thus Florida has followed the federal lead in applying the immunity rule to a statutory cause of action based on § 1983.

Ponzoli & Wassenberg v. Zuckerman, 545 So. 2d 309 (Fla. 3d DCA 1989), review denied 554 So. 2d 1170 (Fla. 1989), was a case where a plaintiff sued a lawyer for defamation and extortion under Section 836.05, Florida Statutes. Thus the claim for extortion was a statutory claim and the attorney's statements from previous litigation were held to be absolutely privileged. The Third District Court also recognized in Ponzoli that there was no civil cause of action for the recovery of money damages under the extortion statute (§ 836.05) but still applied the litigation immunity privilege. Thus, Ponzoli is another case applying the Judicial Immunity Rule to a statutory claim even if the complaint therein never stated a cause of action for other reasons.

The First District Court of Appeal cited the Ponzoli decision in its Echevarria opinion stating that it involved a

common law cause of action and not a statutory cause of action. With due respect, the court overlooked that the Ponzoli suit was stated in the Third District's opinion to have been a suit for extortion based upon a Florida statute which the opinion notes to have been § 836.05, Florida Statutes (1987).

This Court also discussed Ponzoli in Levin, holding that it involved a "tortuous claim of extortion" based on fraud by counsel in the course of litigation. The Court directly held that Ponzoli involved conduct committed during the course of a judicial proceeding and that such conduct was thus "immune from civil liability in any subsequent proceeding." The District Court's Ponzoli opinion expressly recognizes that the plaintiff had a reasonable belief that he did have a cause of action under § 836.05. Ponzoli, footnote 5.

Many suits for money damages in Florida courts involve counts for a civil theft under § 772.104 and § 772.11 of the Florida Statutes. Surely these cases are not outside the Judicial Immunity Rule. Almost every tort action involves a statute in some way. Auto accident complaints almost always allege a statutory violation of some sort.

As the above case law indicates, the judicial immunity privilege has been applied to statutory claims in the federal courts and in the courts of Florida; including statutory anti-trust claims, § 1983 claims, statutory extortion claims,

statutory Florida RICO claims and statutory conspiracy to defraud claims. Unquestionably, the immunity privilege is most often used in libel and slander cases where an attorney or a party has made false derogatory comments about another individual in previous litigation. However, the fact that this is the area where the immunity rule is most often used does not mean that it does not also apply in statutory cases. Merely citing a statute in a complaint does not turn the common law immunity rule on its head. The rule of immunity should have been applicable to claims under § 559.55 et seq. and § 501.201 et seq.

The only case actually cited by the First District Court for its ruling that the immunity rule was inapplicable was the case of Delgado v. J.W. Courtesy Pontiac GMC-Truck, Inc., 693 So. 2d 602 (Fla. 2d DCA 1997). Delgado is inapplicable because it did not involve the Judicial Immunity Rule and instead involved the economic loss rule. This court created rule is a much more recently recognized doctrine. Reliance on past judicial treatment of the economic loss rule is a poor policy basis on which to abrogate the effect of the time honored immunity rule stemming from early common law. Instead of relying so heavily on Delgado, the First District should have noted the continual line of cases in Florida restricting and receding from application of the economic loss rule. See

Indemnity Insurance Co. of North America v. American Aviation, Inc., 891 So. 2d 532 (Fla. 2004), which is only the most recent in a line of cases by the Florida Supreme Court severally restricting the application of the economic loss rule. Florida's economic loss rule is a disfavored doctrine and is not the product of early English common law. Also see Comp-Tech International, Inc. v. Milam Commerce Park, Ltd., 753 So. 2d 1219 (Fla. 1999), (receding in part from the application of the economic loss rule).

The Judicial Immunity Rule is actually a part of the Florida Statutes by virtue of its adoption pursuant to Section 2.01, Florida Statutes. The economic loss rule is a totally different and less compelling concept and decisions in this area of the law should not be held to control the immunity rule.

A New Cost Rule

On the overall question of whether the Echevarria firm was charging Cole illegally for in-house services previously billed to the bank, this Court should note its own recent revisions of the Rules of Professional Conduct governing attorneys in Rule 4-1.5(b)(2)(F). This is the rule which has always governed attorney's fees in litigation and it was recently amended to also include costs in litigation. The rule is now entitled "Fees and Costs for Legal Services." (emphasis supplied). The rule was generally amended by adding the words "or costs"

wherever the rule had previously been limited to "fees." Subsection (2)(E) of the rule now provides for consideration of: "The reasonable charges for providing in-house services to a client if the cost is an in-house charge for services." (emphasis supplied). The Comment section of the new rule provides that:

> "A lawyer may agree with the client to charge a reasonable amount for in-house costs or services. In-house costs include items such as copying, faxing, long distance telephone, and computerized research. In-house services include paralegal services, investigative services, accounting services and courier services. The lawyer should sufficiently communicate with the client regarding the costs charged to the client so that the client understands the amount of the costs being charged or the method for calculation of the costs."

The services of the Echevarria paralegals and lawyers in doing in-house title work certainly would be included within this cost rule. This rule was not in effect at the time of the rulings in the trial court in this case but was in effect before issuance of the District Court's opinions. The new rule was brought to the attention of the First District Court of Appeal on March 4, 2003, when the rule was in its proposed form. Obviously this new rule places the trial court's ruling on in-house costs and the district court's ruling on in-house costs in substantial doubt. Every other lawyer in the State of Florida may now perform title search and title examination work in-house

and bill his clients for these costs. Those incurred costs may then be recovered by the client in appropriate proceedings in litigation against debtors in mortgage foreclosure cases. This rule would specifically allow Echevarria to recover these in-house charges on behalf of his bank clients. There is not even a requirement for a written contract between counsel and client on "costs."

The Rising Tide of Legislation

As legislation increases there are almost no civil suits which could not rely on some statute. Auto accidents, premise liability cases, breach of contracts, mortgage foreclosures and almost every other kind of suit involve some statute and all of these cases are still within the Judicial Immunity Rule. The fact that a statute is mentioned in a complaint does not automatically abrogate the Judicial Immunity Rule as the First District Court of Appeal has directly ruled.

The Immunity Rule is most often used in tort cases including libel and slander, but this is not its only application. Statutes such as the FCCPA and the FDUTPA have simply taken existing common law causes of action and enhanced and clarified them. These are now actions which are combined common law and statutory claims. This Court so indicated in its discussion of the Ponzoli case in the Levin decision. Obviously the Legislature can create a tort cause of action, but that does

not mean that all of the existing common law rules cease to exist as to that statutory cause of action based on a common law right. The decision of the First District Court of Appeal abrogating the Judicial Immunity Rule in all statutory claims will result in a statute being cited in every lawsuit in an attempt to avoid the common law immunity rule. The immunity rule was directly applicable here.

II. ALTHOUGH CLASS CERTIFICATION SHOULD HAVE BEEN TOTALLY DENIED BASED ON THE "JUDICIAL IMMUNITY RULE," THE DISTRICT COURT FURTHER ERRED IN GREATLY EXPANDING THE DEFINITION OF THE CLASS AS FOUND IN THE EXERCISE OF THE TRIAL COURT'S DISCRETION BASED ON THE "JUDICIAL IMMUNITY RULE."

Echevarria contended below that the trial court erred in certifying a class and that proper findings on the Judicial Immunity Rule would have resulted in a dismissal of the class action. Somehow the First District Court of Appeal affirmed class certification while at the same time reversing the definition of the class adopted by the trial court under his view of the Levin Judicial Immunity Rule. When substantial error is found in the definition of the class adopted by a circuit court, the appropriate remedy is to remand the matter to the trial court for further consideration and an exercise of trial court discretion on the definition of the class. In Philip Morris USA, Inc. v. Hines, 883 So. 2d 291 (Fla. 4th DCA 2003), the Fourth District concluded that an error required

decertification of the class. However, in so holding, the court also noted on rehearing that the parties still had the right to return to the trial court and litigate over a modified class. Assuming the First District was correct on litigation immunity, this should have been the result and remedy herein instead of the appellate court simply stepping in and redefining the class on terms which were expressly rejected by the trial court under that court's view of the Judicial Immunity Rule as applied in Levin. The trial court, rather than the appellate court, has the discretion to define the class. The certification of the class is a matter within the discretion of the trial court. Seven Hills, Inc. v. Bentley, 848 So. 2d 345 (Fla. 1st DCA 2003).

The opinion in the present case is a dramatic departed from established class action law. The court has affirmed certification while finding the definition of the class to be error and in doing so has not addressed numerosity, commonality, typicality or adequate representation. These four elements are essential under Rule of Civil Procedure 1.220 and the trial court is required to make express and clear findings on each element.

The First District has held that the trial court had no discretion in certifying and defining the class. This is directly at odds with overwhelming case law establishing the

discretionary standard for trial court class certification. See Hutson v. Rexall Sundown, Inc., 837 So. 2d 1090 (Fla. 4th DCA 2003) and Pinellas County School Bd. V. Crowley, 911 So. 2d 881 (Fla. 2d DCA 2005).

If the Judicial Immunity Rule is held applicable, the definition of the class will be unimportant. However, if the Court does not address immunity, then the expanded definition should be subject to the trial court's discretion.

CONCLUSION

This court should hold that the Judicial Immunity privilege applied and that this absolute immunity barred the plaintiff's action based upon the reinstatement letters and any later affidavits. In the alternative, this court should hold that the expansion of the class definition was improper and should be the subject of the trial court's discretion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to the following this 13th day of March, 2006.

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CERTIFICATE OF TYPE SIZE AND STYLE

This brief is typed using Courier New 12 point, a font which is not proportionately spaced.

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