SUPREME COURT
STATE OF FLORIDA

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| ECHEVARRIA, McCALLA, RAYMER, BARRETT & FRAPPIER, a Florida general partnership, et. al., | CASE NO.: SC05-564<br>L.T. CASE NO.: 1D03-1686<br>1D03-3828<br>1D02-4746<br>1D02-4982 |

Petitioners,

vs.

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

Respondent.
_____/

**JURISDICTIONAL BRIEF OF PETITIONERS, ECHEVARRIA, McCALLA, RAYMER, BARRETT & FRAPPIER, et. al.**

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

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## STATEMENT OF THE CASE AND FACTS

This is a jurisdictional brief by the defendant Echevarria and the Echevarria law firm concerning a decision by the First District Court of Appeal (copy attached) as rendered on March 21, 2005. The matter before the First District was an appeal from an order granting class certification in a class action suit concerning mortgage foreclosure practice by the firm. The plaintiffs will be a class of homeowner/debtors who failed to repay their home loans and received reinstatement letters from the Echevarria firm which represented the mortgagee banks.

The suit was brought under § 559.77 and § 501.24, Florida Statutes,[1] seeking damages for alleged overcharges of costs for title work (a $150 title search and $175 title examination) and other foreclosure expenses in the cases in which the law firm represented the banks. The Echevarria firm specialized in mortgage foreclosure practice and had staff members who performed some of the necessary title work in-house. (Opinion p.3).

The trial judge granted class certification after previously ruling that the in-house title work by the Echevarria firm could not be shown as a cost in the standard reinstatement letters or foreclosure affidavits routinely used in the hundreds

[1] These statutes, as stated in the opinion, are the Consumer Collection Practices Act and the Deceptive and Unfair Trade Practices Act.

of foreclosure cases handled by the firm. The trial court held that since the Echevarria firm had not made an actual payment to a third party for these in-house services, the amount of the costs were not "incurred" and could not be billed to the delinquent mortgagor in the foreclosure actions nor could they be listed in the reinstatement letters which were preliminary to the actual foreclosure suits. The trial court certified a class defined as all persons to whom Echevarria sent reinstatement letters seeking to collect fees and costs that had not been "incurred" by the Echevarria firm and "whose default or failure to pay their mortgage obligations did not ultimately result in a foreclosure judgment or sale." (Opinion p.6). Both sides appealed.

The First District Court concluded that the action was properly certified but that the trial court had erroneously limited the class by excluding cases which proceeded to a foreclosure judgment or sale. Echevarria argued that any certification was improper and had defended the case based in part on the "judicial immunity rule" adopted by this Court in Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. United States Fire Ins. Co., 639 So. 2d 606 (Fla. 1994). Under Levin, participants in a lawsuit (including attorneys) have no later civil liability for anything said or written during the underlying litigation which is relevant to the case. This rule

bars later litigation even if an untrue statement is made during the litigation. Echevarria contended that his attempt to charge for in-house title work as an incurred cost was absolutely legal but even if it had been illegal, his statements regarding the incurred costs of the title work was within the judicial immunity rule. He asserted he could not be liable under Levin even if there had been a false statement regarding the amounts incurred.

The First District recognized the Levin decision but held that the Levin litigation immunity privilege could not be applied to any statutory cause of action. Because the suit involved Florida Statutes, the privilege recognized in Levin was rejected and litigation immunity could not be applied.

The court also expressly ruled that a prior petition for certiorari by Echevarria which had been denied by the court in an unelaborated denial, constituted an "implicit" ruling on the merits of a certain issue raised in that petition. These rulings are contained in footnotes 2 and 3 at pages 5 and 9 of the opinion.

## SUMMARY OF ARGUMENT

The decision of the First District conflicts with prior decisions by this Court and the Third District Court. Thus this Court should accept jurisdiction and review the case on the merits.

## JURISDICTION

This court has jurisdiction because the decision of the First District Court of Appeal is in direct conflict with decisions by the Third District Court of Appeal and with decisions by this Court.

## ARGUMENT

### I. WHETHER THE DECISION OF THE FIRST DISTRICT CONFLICTS WITH DECISIONS ON THE LITIGATION IMMUNITY PRIVILEGE

There can be no question as to the intent of the First District Court of Appeal. The court explicitly ruled that the litigation immunity privilege recognized in this Court's Levin decision cannot be applied to a statutory cause of action. The court stated:

> Therefore, we conclude that the judicially created judicial immunity rule cannot be applied as a bar to the statutory causes of action in this case.

The law is different in the Third District Court of Appeal. In Boca Investors Group, Inc. v. Potash, 835 So. 2d 273 (Fla. 3d DCA 2002), the Third District ruled directly to the contrary. The Boca Investors case concerned a group of investors who were attempting to purchase certain Fisher Island property. Three lawsuits were filed by other individuals concerning the Fisher Island property and the investors asserted that these lawsuits disrupted their efforts to purchase the property. The

investor/plaintiffs sued the prior litigant and also moved to amend their complaint to add a statutory anti-trust claim. The trial court dismissed the complaint and denied the motion to amend. The anti-trust claim was to be based on statements by the defendants. The Third District analyzed the defendant's reliance on the Levin litigation immunity privilege and concluded:

> "The privilege arises upon the doing of an act necessarily preliminary to judicial proceedings." Burton v. Salzberg, 275 So. 2d 450, 451 (Fla. 3d DCA 1999). Accordingly, those acts must be afforded absolute immunity. We therefore affirm the judgment. In addition, we also affirm the denial of the motion to amend the complaint to add a statutory anti-trust claim. Such a claim is also based on statements covered by the litigation privilege. See Burton, 725 So. 2d at 451.

Thus the Third District Court of Appeal has ruled that the Levin litigation privilege does indeed apply to a cause of action based on an alleged statutory violation. The statutory anti-trust claim was held to be barred by the Levin litigation privilege. The First District Court has ruled directly to the contrary holding that the Levin litigation privilege cannot, under any circumstances, apply to any statutory cause of action. This ruling conflicts with Boca Investors, is overbroad and is in error. It would mean that a false statement by a party or attorney during a dissolution of marriage case under Chapter 61

of the Florida Statutes would not be within the litigation privilege.

In addition, we suggest that the First District's decision is also in direct conflict with the Levin decision itself. There is no such limitation as now imposed by the First District Court in the Levin opinion. 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." (emphasis supplied).

Levin further holds that remedies for misconduct such as false statements in litigation, do exist in Florida but they are the "remedies for perjury, slander, and the like committed during judicial proceedings." The Court noted that discipline for such conduct is in the hands of the circuit courts, the Bar association and the state of Florida. If Mr. Echevarria filed a false affidavit in a mortgage foreclosure case, then he is subject to the court's contempt power and, according to Levin, a compensatory fine as punishment. We respectfully suggest that the First District has directly conflicted with Boca Investors.

## II. WHETHER THE DECISION OF THE FIRST DISTRICT CONFLICTS WITH THIS COURT'S DECISION ON THE MEANING OF A DENIAL OF CERTIORARI

The First District is also in conflict with Topps v. State, 865 So. 2d 1253 (Fla. 2004). Topps is a landmark decision dealing with the issue of whether the denial of an extraordinary writ does or does not constitute a ruling on the merits. This court announced that it would bring consistency to the law on this subject and specifically held that an unelaborated order denying relief in a petition for certiorari, mandamus, prohibition or any other writ, does not constitute a ruling on the merits of the issues presented in the petition for the writ.

Topps was issued January 22, 2004, and announced this clear prospective rule of law. The Echevarria decision by the First District Court of Appeal was issued in December of 2004, and the court is in direct conflict with Topps because the decision includes footnotes 2 and 3 dealing with a prior petition for certiorari by Echevarria. The court noted that Echevarria had filed a petition for certiorari review of a trial court order denying a motion to dismiss based on mootness grounds. The court's initial footnote explained that on July 25, 2001, the court had denied the petition for certiorari. The court provided the citation to this decision as Echevarria, McCalla, Raymer, Barrett & Frappier v. Nabors, 792 So. 2d 452 (Fla. 1st

DCA 2001). This is an unelaborated denial of the writ. Footnote 3 by the First District Court of Appeal states:

> The defendants previously raised the mootness argument in their petition for writ of certiorari to this court in 2001. This court denied the petition, implicitly rejecting the mootness argument; however, we write at this time to address the argument expressly and to clarify our position on the issue.

Thus the First District Court of Appeal has held that it's own unelaborated denial of a petition for certiorari constituted an implicit rejection of an argument on the merits. This ruling is directly contrary to the Topps decision which holds that an unelaborated denial of a petition for certiorari is not a ruling on the merits of any issue whatsoever. This Court cautioned the district courts that they should be careful to issue orders which litigants could read and understand "in terms of scope and impact." Echevarria has now been told by the First District that an argument was previously rejected by that court on the merits and the court has now gone on to explain why it previously issued this implicit ruling. Surprisingly, the First District's opinion at p.10 also recognizes that no Florida court had ever addressed this issue which they now state they had implicitly ruled upon and rejected.

## CONCLUSION

Conflict exists on the issue of whether the Levin litigation privilege can apply to a statutory cause of action and whether an unelaborated denial of the petition for certiorari constitutes an implicit ruling on the merits of any legal issue. This Court should accept jurisdiction and review the case on the merits. The case should not have been certified and the class certainly should not have been greatly expanded on appeal in violation of the abuse of discretion standard applicable to class action certification decisions.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to the following this _____ day of April, 2005.

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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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