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

REPLY 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

JOHN BERANEK
Fla. Bar No. 0005419
Ausley & McMullen
227 South Calhoun Street
P.O. Box 391 (zip 32302)
Tallahassee, Florida 32301
(850) 224-9115 – telephone
(850) 222-7560 – facsimile

Attorneys for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

JURISDICTION 1

ARGUMENT... 1

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. 1

The Case Before the Court 5

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.".............................. 15

CONCLUSION.. 15

CERTIFICATE OF SERVICE 15

CERTIFICATE OF TYPE SIZE AND STYLE............................ 15

TABLE OF AUTHORITIES

CASES

Atlas v. Stolberg,
694 So. 2d 772 (Fla. 4th DCA 1987) 14

Beck v. Codilis,
2000 W.L. 34490402 (N.D. Fla. 2000) 9, 12, 14

Boca Investors Group, Inc. v. Potash,
835 So. 2d 273 (Fla. 3d DCA 2002) 6, 13

Burton v. Salzberg,
725 So. 2d 450 (Fla. 3d DCA 1999) 10

ETAPA v. Asset Acceptance Corp.,
373 F.Supp. 2d 689 (E.D. Kentucky 2004) 9

Jackson v. BellSouth Telecommunications,
372 F.3d (11th Cir. 2004)............................ 7, 8, 14

Jenkins v. Heintz,
514 U.S. 291 (1995) 6

Levin, Middlebrooks, Mabie, Thomas, Mays & Mitchell, P.A. v. United States Fire Insurance Co.,
639 So. 2d 606 (Fla. 1994)................................... 7

Ponzoli and Wassenderg, P.A. v. Zuckerman,
545 So. 2d 309 (Fla. 3d DCA 1989) 13

Sandlin v. Shapiro & Fishman,
919 F.Supp. 1564 (M.D. Fla. 1996) 11

Seven Hills, Inc. v. Bentley,
848 So. 2d 345 (Fla. 1st DCA 2003) 15

Thomas v. Smith,
882 So. 2d 1037 (Fla. 2d DCA 2004) 4

Todd v. Welman, Weinberg and Reis Co. LPA,
434 F.3d 432 (6th Cir. 2006)............................. 8, 9

STATUTES

Section 559.77(3), Florida Statutes.......................... 12

Section 836.05, Florida Statutes (1987).................. 13, 14

Section 90.408, Florida Statutes............................. 11

OTHER AUTHORITIES

Art. V, § 3(b)(3), Florida Constitution 1

RULES

Rule 4-1.5(b)(2)(E), Rules of Professional Conduct 5
Rule 4-1.5(b)(2)(F), Rules of Professional Conduct 5, 14

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.

The Answer Brief by the plaintiff Cole makes continual accusations that attorney Echevarria has been found guilty of attempting to steal money in violation of the CCPA and the DUTPA. The plaintiff states Echevarria was found guilty of attempting "to cheat consumers for his own profit," and "to cheat consumers for the lawyers' own profit." (Br. 29,30). These and other similar statements run throughout the brief.

Mr. Echevarria has not been found guilty by any judicial fact finder of knowingly attempting to steal and he has denied such intent under oath. There has not yet been a trial in this case and the present appeal to the First District was a non-final appeal from a class certification order. Echevarria has simply not been found guilty by any fact finder of having subjective guilty knowledge (scienter) of attempting to collect illegal charges. This is the applicable standard of proof on Cole's claims as found by the trial court in the summary

judgment of August 22, 2002. Someday there may be a trial but it has not occurred yet.

Although Cole has made numerous allegations regarding various expenses, the only charges which have actually been litigated so far concern the $325 in title search and title examination fees. The mortgagee bank was billed this $325 charge and then Echevarria attempted to collect the $325 charge from the debtor and return it to the bank. There is not even a hint that Echevarria attempted to collect more than the $325 for the title work.

Echevarria denied under oath having subjective guilty knowledge and gave a perfectly reasonable explanation for the $325 charge which the trial court summarized:

> 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 for title search and "in-house" services for title examination and other services, for a total charge of $325. They contend that their "in-house" services...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.... (A. V.10 Tab 215 ¶ 10).

Echevarria routinely secured the basic title information from Attorneys' Title Services for approximately $50 and then had his in-house staff perform additional title work which he

charged as an in-house cost.[1] His bank client was then billed for this in-house charge and the SunTrust client was absolutely happy to pay this charge and a bank vice-president testified that it was reasonable and proper and that he approved of the in-house nature of the services. (A. V.5 Tab 126 p.1-4). Amazingly, the trial court rejected this explanation in a partial summary judgment despite Echevarria's sworn testimony. The summary judgment was entered in favor of plaintiff Cole when plaintiff Cole did not even have a pending motion for summary judgment. Echevarria contends the summary judgment is blatantly erroneous, but Echevarria has not yet been able to seek direct appellate review because the First District denied certiorari on jurisdictional grounds in Case No. 1D02-3818. Notwithstanding this denial of certiorari, the First District did address issues decided within the summary judgment proceedings and reversed the trial court's class definition which was based on the trial court's attempts to avoid the Judicial Immunity Rule. The District Court actually addressed one of the arguments from the Petition for Certiorari at the bottom of p.776 where it states: "Echevarria argues that..." This referred to a certiorari argument by Echevarria. (A. V.10 Tab 215 ¶7).

[1] Echevarria denied under oath attempting to collect any amount while knowing it was not legally due. (A. V.14 Tab 125 p.2 and V.8 Tab 191 p.17,18; V.5 Tab 124 p.1-5). Numerous depositions and affidavits supported this position. (V.5 Tab 124 p.1-5; V.5 Tab 125 p.1-2; V.5 Tab 126 p.1-4). The Fannie Mae representative stated the in-house $325 charge was reasonable and within agency guidelines. (A. V.5 Tab 123).

The trial judge had held that the Judicial Immunity Rule would apply unless a final judgment had been entered in the mortgage foreclosure case.[2] (A. V.10 Tab 215 ¶7). For that reason the trial court defined the class to exclude cases in which a final judgment occurred. Now plaintiff Cole repeatedly argues that the summary judgment cannot be reviewed but Cole relies upon findings and supposed conclusions from that summary judgment and the rulings leading up to it.[3] Thus Cole inconsistently urges that the summary judgment order cannot be reviewed while at the same time relying on this order to support arguments that Echevarria has been found guilty of stealing.

The District Court reversed the definition of the class which was based upon the trial court's rulings from the summary judgment which were relied upon in the later class certification order. Thus the District Court is in the inconsistent position of holding that the summary judgment will not be reviewed while at the same time rejecting arguments from the certiorari petition and portions of the summary judgment rulings on the Judicial Immunity Rule which were favorable to Echevarria by limiting the class size. The errors in the summary judgment infected the class certification order. Echevarria's subjective intent could not be decided summarily and without a motion. Thomas v. Smith, 882 So. 2d 1037, 1042 (Fla. 2d DCA 2004).

[2] This is also an erroneous view of the law.
[3] Cole's Brief at p.38 makes specific reference to (V.10 T.215) which is the 11 page summary judgment.

The Case Before the Court

This was an appeal from the class certification order which says absolutely nothing about Echevarria having been found guilty of stealing. Indeed the certification order states in paragraph 3 that the trial court has "examined" the disputed issues "without resolving the disputed issues." (emphasis supplied). Thus the certification order does not find Echevarria guilty because this is one of the primary disputed issues.

The court went on to hold that in-house services are "general overhead" and that the $325 would have been legal only if it had been actually paid to a third party. This view is unsupported by any existing Florida law and the Rules Governing Attorneys on fees and costs now specifically allow a law firm to bill "in-house services" to a client as a cost, particularly where a "course of conduct" between client and counsel exists. This is the precise situation presented here. See Rule 4-1.5(b)(2)(E) and (F) governing fees and costs.

After wading through all the name calling and accusations, we now address what is actually contained in the Answer Brief and, more tellingly, what is not contained in that brief. Beginning at page 19 the brief goes into extensive argument concerning the overall application of the CCPA and the DUTPA. Cole argues that attorneys can be "debt collectors" and can be "persons" under these statutes. Cole argues that lawyers were

initially excluded from these statutes and then included. While Echevarria certainly does not agree with all of these arguments, they will not be dealt with because they do not concern the Judicial Immunity Rule which is what this petition for review is all about. Cole heavily relies on Jenkins v. Heintz, 514 U.S. 291 (1995); which held that a lawyer could be a debt collector under federal law. However, Jenkins never mentions the Judicial Immunity Rule. We assume that counsel did not raise the issue. Jenkins is similar to many of Cole's cases which do not deal with the issue in question.

The Answer Brief does not address the ruling of the District Court that the Florida Judicial Immunity Rule cannot be applied to a statutory cause of action by reason of the doctrine of separation of powers and because it is not a tort case. This is the ruling which directly conflicts with Boca Investors Group, Inc. v. Potash, 835 So. 2d 273 (Fla. 3d DCA 2002), which holds that the Judicial Immunity Rule does apply to statutory causes of action. The initial Echevarria merits brief also demonstrated that numerous Florida cases and federal cases have directly applied the Judicial Immunity Rule to various kinds of statutory causes of action. The Cole Answer Brief addresses Potash only in-passing and totally fails to even mention the major cases argued in the merits brief.

The Answer Brief does not cite Jackson v. BellSouth Telecommunications, 372 F.3d (11th Cir. 2004). Jackson analyzes Levin, Middlebrooks, Mabie, Thomas, Mays & Mitchell, P.A. v. United States Fire Insurance Co., 639 So. 2d 606 (Fla. 1994), which answered certified questions from the 11th Circuit Court. Jackson was a major case by African American employees of BellSouth who had previously sued BellSouth in a case that was settled. These employees later sued BellSouth and their own law firm, Ruden McClosky, contending that they had engaged in a "sell-out" in settling the prior lawsuit and in actually taking an exorbitant portion of the settlement as their fees. The plaintiffs alleged violations of numerous federal statutes and Florida statutes. These statutes are all listed in detail at page 19 of the merits brief. Apparently Cole wants this court to shut its eyes to Jackson which directly concerned Florida and federal statutory violations. The Eleventh Circuit, as the recipient of this court's Levin decision, has construed it to apply to all types of statutory claims. Cole does not respond.

At p.1757 Jackson also holds that the same immunity covers efforts at settlement. This reinstatement letter by Echevarria was an attempt at settlement. The letter gave Cole the opportunity to pay a certain amount to avoid foreclosure litigation. Both before and after the letter of February 3, 1998, there were conversations between Cole and the staff at the

Echevarria firm. As a result of these conversations, a refund, a mortgage reinstatement and an eventual abandonment of all foreclosure efforts was accomplished. (A. V.14 Tab 299 p.5). The note was not accelerated. This was a settlement attempt which was open for 24 days and as a matter of law the immunity privilege applied.

In addition to disregarding the direct and current authority in Jackson, Cole relies upon Todd v. Welman, Weinberg and Reis Co. LPA, 434 F.3d 432 (6th Cir. 2006), which directly contradicts Cole's arguments that the passage of the CCPA and the DUTPA impliedly repealed the Florida Judicial Immunity Rule. Todd holds at p.439:

> Both plaintiff and defendant agree that Congress did not intend to abrogate the well established absolute immunity of a witness when it enacted the FDCPA. This court agrees that nothing in the FDCPA itself or the Legislative history of the act remotely suggests such an abrogation.

Todd is an extensive opinion analyzing the Judicial Immunity Rule and it adopts a completely different approach relying on the theory that a "complaining witness" is not covered by Judicial Immunity. This is a doctrine which has not been applied in Florida and has not been asserted or addressed in any way in this Echevarria case.

The Todd opinion recognizes Beck v. Codilis, 2000 W.L. 34490402 (N.D. Fla. 2000) and ETAPA v. Asset Acceptance Corp., 373 F.Supp. 2d 689 (E.D. Kentucky 2004), both of which concern affidavits in FDCPA claims and hold that Judicial Immunity does apply even if the affidavits are false. Todd holds in footnote 3 that neither case is applicable because they did not address the "complaining witness" theory. Most importantly, Todd is 11 pages long and never mentions even the possibility that Judicial Immunity might not be applicable to the underlying Ohio garnishment case which was a statutory cause of action.

Echevarria's Initial Brief argued that the reinstatement letter was preliminary to litigation and that it was a settlement offer. The Cole brief argues that these letters were not "sent in relation to litigation" and that they were not "preliminaries to litigation." The brief goes even further and argues the District Court based its ruling on the "non-litigation character of the letters" which were "outside of litigation." (Br. p.8;15).

The opinion of the First District Court of Appeal states:

> Echevarria sent reinstatement letters to the plaintiffs <u>at the outset of the foreclosure</u> proceedings, stating that the plaintiffs were in default on their respective mortgages and faced foreclosure. (emphasis supplied).

Thus the Court of Appeal held that this letter was preliminary to litigation and said so. If the letter had not been sent as a

preliminary, Cole would have defended a subsequently filed mortgage foreclosure suit arguing that he had demanded a reinstatement letter and one had not been sent.

Clearly the Cole letter was sent as a preliminary to litigation as authorized by Burton v. Salzberg, 725 So. 2d 450 (Fla. 3d DCA 1999). Cole was a former bank vice-president and he contacted SunTrust Bank and stated his loan was in default and that he wanted to avoid foreclosure. The bank advised him to contact the Echevarria firm which he did and asked for the letter. Cole was not an easily misled consumer as his brief attempts to infer. Cole knew exactly the purpose of the letter because he had demanded it.

On the issue of the letter as a settlement step, the Answer Brief is also misleading. Beginning at p.34, Cole repeatedly states that the circuit court made a "factual finding" that the letters were not settlement offers. This assertion is made three times on p.34 and Cole even states that the ruling was a "factual ruling based on the parties' intent, the content and circumstances of the letters, and how debtors would reasonably perceive the letters." However, the trial court made no such factual finding. Understandably, the Cole brief provides absolutely no reference to a page where such a "factual finding" might have been made. Again, there has not yet been a trial and

if there is ever to be a full trial, then this issue will be determined as a factual issue.

At p.35, Cole relies upon Sandlin v. Shapiro & Fishman, 919 F.Supp. 1564 (M.D. Fla. 1996) and quotes from the federal district judge's order. Sandlin is not applicable because it concerned solely the admissibility of a letter under § 90.408, Florida Statutes. The federal district judge simply held that the letter which added a "payoff fee" did not constitute "a settlement agreement." Section 90.408 excludes evidence of an offer to settle when that evidence will be used "to prove liability or absence of liability for the claim or its value." Echevarria contends that Sandlin is a misinterpretation of § 90.408 but in any event the case is not applicable because, again, it does not concern the common law Judicial Immunity Rule. Instead, the case concerns a Florida statute which the federal judge actually held to be invalid.

Unfortunately there were mistakes in the premature reinstatement letter which was sent out promptly after Cole's demand for the letter. Echevarria always admitted that there had been errors in the letter. He admitted this in discovery and so testified at p.394 of the class certification hearing. The letter listed service of process and a filing fee as expenses when the foreclosure suit had not even been filed. Echevarria agreed this was a mistake and it obviously occurred

when the paralegal who sent the letter reacted immediately to Cole's demands. The February 3 letter was a form letter designed to furnish normal debtors with payoff information which would remain valid up to a future date certain. In this case, that date was February 27, 1998, which was 24 days beyond the date of the letter. During that time it was normally anticipated that a suit would be filed.

Section 559.77(3) provides an exception from liability if a "violation was not intentional and resulted from a bona fide error." There has never been a factual trial on whether this was an excusable mistake under the statute. Although Echevarria has admitted to certain mistakes, he most definitely does not admit to any intentional errors. He testified $325 in title work was not a mistake and that it was not dishonest.

Contrary to the Answer Brief, the First District Court did not "agree with the circuit court that the 'Judicial Immunity Rule' has no application in this case." Indeed, the circuit court concluded just to the contrary. Judge Smith announced in the summary judgment proceedings that the Judicial Immunity Rule would apply under the federal Beck decision but that it would become an inapplicable doctrine if a final judgment had been entered in the mortgage foreclosure case. (A. V.10 Tab 215 ¶7). The trial court had discretion to define the class and the District Court erred in taking away that discretion.

Plaintiff concludes his brief by stating:

> The ruling below, that petitioners' mortgage reinstatement letters contained false or deceptive statements that violate the CCPA and the DUTPA and are not within any common law litigation privilege, is one of first impression in the Florida Appellate courts.

This statement is not even close to describing the district court's ruling. There is no factual ruling that Echevarria is guilty because there has never been a trial before a fact finder. Cole admits that there are undetermined factual issues. The district court concluded its opinion with the statement that the Judicial Immunity Rule should not be applied to this case because of two reasons. Initially they state that the Immunity Rule can only apply to "common law causes of action [and] not statutory ones" and further that under "separation of powers," judicial immunity "must not be used to limit the application of a legislatively created, statutory cause of action." (Opinion at 777). The First District has clearly conflicted with the Potash decision which expressly holds that the rule does apply to a statutory cause of action. The two cases cannot exist side by side.

It is also noteworthy that the First District's reliance on Ponzoli and Wassenderg, P.A. v. Zuckerman, 545 So. 2d 309 (Fla. 3d DCA 1989), is a mistake. The case involved extortion and the court failed to note that extortion is a statutory offense under § 836.05, Florida Statutes (1987). The Third District's Ponzoli

opinion expressly recognizes that the plaintiff sued under § 836.05. (Ponzoli, footnote 5).

Both federal and Florida courts recognize the application of the Judicial Immunity Rule in § 1983 claims under the Federal Civil Rights Act. See Atlas v. Stolberg, 694 So. 2d 772 (Fla. 4th DCA 1987), and Jackson v. BellSouth, supra, also applying it to statutory RICO claims. We also again suggest that Beck v. Codilis, supra, is the most similar case which directly holds the Judicial Immunity Rule applicable in suits growing out of false (but absolutely privileged) affidavits in mortgage foreclosure cases.

The question is whether the Judicial Immunity Rule can apply to a statutory cause of action. The answer to this question should be in the affirmative. Thus the Court should review this case and conclude that the District Court has erred in its overbroad restriction on the doctrine. The Court should strike the curtailment of the Judicial Immunity Rule. No remand should be necessary but if the Court so orders, expansion of the class definition should be stricken and the case should proceed before the trial court under the current Rule 4-1.5(b)(2)(F) and (E) which specifically allows a law firm to bill for in-house services based on a course of conduct.[4] The First District chose not to address this rule.

---

[4] Echevarria represented SunTrust in thousands of foreclosures where the same in-house services were paid and then collected from the defendants. A course of conduct existed.

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."

The Cole brief does not address this issue and most certainly does not dispute the fact that the trial court has the discretion to define the class membership. See Seven Hills, Inc. v. Bentley, 848 So. 2d 345 (Fla. 1st DCA 2003).

CONCLUSION

A reversal of the district court ruling is appropriate.

CERTIFICATE OF SERVICE

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

Thomas J. Guilday
Claude Walker
1983 Centre Point Boulevard
Suite 200
Tallahassee, FL 32308

Kelly Overstreet Johnson
215 S. Monroe Street, Ste. 400
Tallahassee, FL 32301

CERTIFICATE OF TYPE SIZE AND STYLE

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

JOHN BERANEK
Florida Bar No. 0005419
Ausley & McMullen
Post Office Box 391
Tallahassee, FL 32302
850/224-9115

MICHAEL J. McGIRNEY
Marshall, Dennehey, Warner,
Coleman & Goggin
201 E. Kennedy Blvd., Ste. 1100
Tampa, FL 33602
813/472-7800