IN THE SUPREME COURT OF FLORIDA

CASE NO. SC10-1397

DANIEL DELMONICO AND MYD MARINE DISTRIBUTOR, INC.,

Petitioners,

vs.

ARTHUR RODGERS TRAYNOR, JR. and AKERMAN, SENTERFITT & EIDSON,

Respondents.

PETITIONERS' INITIAL BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

A. INTRODUCTION

The Court accepted jurisdiction to review the Fourth District Court of Appeal decision in *DelMonico and MYD Marine Distributor, Inc. v. Traynor and Akerman, Senterfitt & Eidson, P.A.*, 2010 WL 2382570 (4th DCA 2010). A copy of the opinion is attached as Appendix A. The decision below, with a dissent from Judge Warner, affirmed a summary judgment in favor of Traynor and Akerman, based on this Court's holding in *Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. U.S. Fire Ins. Co.*, 639 So. 2d 606 (Fla. 1994).

Review was sought because the Fourth DCA's decision "conflicts with *Levin, Middlebrooks* by applying an absolute privilege to statements defaming a party outside of a judicial proceeding, at a time when the defamed party and/or his lawyer are not present, not provided an opportunity to be heard, and not able to have any judicial recourse because the defamatory statements are not made in the 'course of the judicial proceedings,' as that phrase must be viewed in order to serve the policies that underlie *Levin, Middlebrooks*." Petitioners' Brief on Jurisdiction, p. 1. Review was granted on November 12, 2010.

B. THE CASE AND FACTS

The case and facts are wrapped up together because the decision below (trial and appellate) rested on a single principle, i.e., that whatever the false, defamatory, or slanderous statements were, and wherever he made them, lawyer Traynor had an absolute privilege to make them under *Levin.*

The Second Amended Complaint's allegations formed the factual basis of the case. A copy of that Complaint is attached as Appendix B to this Brief. The panel opinion recounted the alleged facts. DelMonico had sued Donovan Marine and its employee alleging that the Donovan employee had falsely "told several people that DelMonico supplied prostitutes to the owner of a company previously doing business with Donovan Marine" in order "to take away business from Donovan and bring it to DelMonico." App. A at 1. Traynor represented Donovan Marine in that case and he, during "witness interviews," allegedly perpetuated the falsehoods:

> The complaint alleged that the appellee had contacted DelMonico's ex-wife and told her that DelMonico had taken a customer away from Donovan by enticing the purchasing agent with prostitutes. The appellee also contacted a former employee of DelMonico's company, MYD Marine Distributor, and stated to him that DelMonico's method to take an account was to supply a prostitute to the owner. The appellee encouraged the former employee to provide additional examples of DelMonico's "unethical business practices." The

> appellee contacted the former owner of a business and stated that DelMonico was being prosecuted for using prostitution to get business. The appellee also contacted principals of other marine services companies about the prosecution of DelMonico for procuring prostitutes and growing his business in this manner. The appellee stated that he was part of the prosecution of DelMonico for procuring prostitutes and illegal business dealings.

Id. at 1-2.

As a result of Traynor's statements, "a manufacturer with whom MYD Marine Distributor had an exclusive contract, received calls from companies saying they no longer wanted to purchase products from MYD Marine Distributor." *Id.* at 2. The lost business was widespread and substantial. *Id.* at 6 (Warner, J., dissenting). DelMonico and MYD's suit against Traynor and Akerman sought damages for the defamation and tortious interference that were the result of Traynor's conduct. Appendix B. Traynor moved for summary judgment claiming *Levin* absolute immunity because the alleged misconduct occurred while he was representing Donovan Marine.

The trial court granted summary judgment in Traynor's favor, but voiced its doubt about the wisdom of applying *Levin* absolute immunity on the facts of this case: "In a case such as this, I have a question as to whether or not developing a witness for litigation is in the course of a judicial proceeding that's

contemplated by *Levin* . . . . And certainly should the Supreme Court wish to revisit its position on the matter, it won't ruin my day." R2:354-355.

The appellate panel, over the dissent of Judge Warner, had no reservations. "Because the statements complained of were made by the appellee while he was acting as defense counsel in the underlying litigation, and the statements bore 'some relation" to the proceeding, they were absolutely privileged as a matter of law. *Levin*, 639 So. 2d at 608 . . . ." App. A at 3.

Judge Warner's dissent accepted the *Levin* principle, but thought it inapplicable here.

> An attorney has absolute immunity for events occurring during a judicial proceeding. However, where as it is alleged here, an attorney makes defamatory statements which injure a person outside of those "judicial proceedings," the attorney should be entitled only to qualified immunity. Thus, because on the motion for summary judgment there remain disputed issues of material fact as to whether the attorney made the statements and whether they were made with the intent to injure the appellant, I would reverse.

App. A at 5 (Warner, J., dissenting).

DelMonico and MYD Marine Distributor urge the Court to adopt the rationale of Judge Warner's dissent: that where a lawyer is "defaming a party to a witness outside of a proceeding at a time when both parties are not present and do

not have an opportunity to be heard," qualified immunity strikes the proper "balance between the individual's right to his reputation and a free and full disclosure of facts in a judicial proceeding." App. A at 10-11 (Warner, J., dissenting).

SUMMARY OF THE ARGUMENT

The absolute immunity litigation privilege language in *Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. U.S. Fire Ins. Co.*, 639 So. 2d 606 (Fla. 1994) should not preclude a victim of defamation and tortious interference from legal recourse where the victim has had no knowledge or notice of the misconduct because it occurred extra-judicially; has had no opportunity to be heard or to rebut the falsities; and where there is no practical way to invoke contempt or supervisory powers to remedy the wrong. In such a situation – and this case is an example of that genre – qualified immunity, not absolute immunity should be the rule.

The *Levin* "in the course of a judicial proceeding" language (639 So.2d at 608) presumes that the complained of conduct was known to the aggrieved party in the course of the proceeding. The cases following the *Levin* principle confirm that such knowledge was present, and the *Levin* remedies of use of "the inherent power" of the court and "contempt" assume that the ongoing

judicial proceeding provided a forum of some sort. But where the alleged misconduct occurs not within the litigation field, but in the dark passageways that prevent a party from knowing of the misconduct, absolute immunity is contrary to the public policy balance with which *Levin* was concerned.

In addition, *Levin's* mandate that absolute immunity applies only "so long as the act has some relation to the proceeding" (*id*. at 608) precluded summary judgment in this case. Here, a lawyer told witnesses false facts that defamed and injured a party. "[S]ome relation to the proceeding" is not a lawyer's license to lie to witnesses, and at the least, the trial court should have allowed the facts to be fully developed to determine whether the alleged misconduct fell outside the "some relation" prong of *Levin's* construct.

ARGUMENT

DEFAMATORY STATEMENTS MADE TO WITNESSES OUTSIDE THE PRESENCE OF A PARTY OR THE SUPERVISION OF A JUDICIAL OFFICER ARE ENTITLED TO A QUALIFIED PRIVILEGE, NOT AN ABSOLUTE PRIVILEGE

A. STANDARD OF REVIEW

The standard of review of the granting of a motion for summary judgment is *de novo*. *See Florida Atlantic University Board of Trustees v. Lindsey*, 2010 WL 5174015 *1 (Fla. 4DCA December 22, 2010). The same

standard applies in this Court. *See Major League Baseball v. Morsani*, 790 So. 2d 1071, 1074 (Fla. 2001) ("The standard of review governing a trial court's ruling on a motion for summary judgment posing a pure question of law is *de novo*").

B. THE DEFAMATIONS/TORTIOUS INTERFERENCE

In *DelMonico v. Crespo and Donovan,* DelMonico sought damages for Crespo and Donovan's defamatory statements causing DelMonico's company the loss of its largest customers. During that litigation, Traynor was alleged to have called various people, including DelMonico's ex-wives, DelMonico's business associates, a former employee, an employee of MYD's most important customer, and the father of the president of MYD's most important supplier. App. A at 5. Among the things said to these people was "that he [Traynor] was 'prosecuting' DelMonico for prostitution; that DelMonico was "enticing" purchasing agents with prostitutes; that DelMonico was being "prosecuted for prostitution;" and to one of DelMonico's ex-wives, that he "had been unfaithful to her during their marriage." *Id.* at 5-6. *See also* App. B, ¶¶ 13-21.

None of the alleged statements were made within formal discovery processes; all were made outside the presence of DelMonico and/or his lawyers and were unknown to DelMonico and/or his lawyers at the time they were made.

The issue presented is whether summary judgment was appropriate; whether there is no genuine issue of material fact whether the statements were "in the course of a judicial proceeding" and whether "the statements are relevant to the subject of the inquiry." *Levin,* 639 So. 2d at 607. As we show below, *Levin's*

absolute immunity rule should not have been applied to DelMonico's claims of defamation and tortious interference.

C. QUALIFIED, NOT ABSOLUTE IMMUNITY, APPLIES HERE

Levin's language is broad: "Traditionally, defamatory statements made in the course of a judicial proceeding are absolutely privileged, no matter how false or how malicious the statements may be, so long as the statements are relevant to the subject matter of the inquiry. Consequently, the torts of perjury, libel, slander, defamation, and similar proceedings that are based on statements made in connection with a judicial proceeding are not actionable," *Levin*, 639 So. 2d at 607 (internal citations omitted).

Levin literally says that once a lawsuit is filed, anything said, anywhere or in any place, cannot be the subject of a subsequent civil action. In *Levin*, what was said was said in court. An insurance company certified to a court that there was a basis to disqualify a law firm because a partner would be called as a witness at trial. The firm was disqualified, but the lawyer was never called as a witness. The firm lost its fee. The United States Court of Appeals certified to this Court the question of whether absolute immunity precluded a suit for tortious interference under those facts, and this Court "answer[ed] the certified question in

the affirmative." *Id.* at 609.

The seemingly limitless *Levin* language has been followed in myriad Florida appellate cases. *See Echevarria, McCalla, Raymer, Barrett & Frappier v. Cole*, 950 So. 2d 380 (Fla. 2007); *Stucchio v. Tincher*, 726 So. 2d 372 (Fla. 5th DCA 1999); *Ross v. Blank*, 958 So. 2d 437 (Fla. 4th DCA 2007); *Fernandez v. Haber & Ganguzza*, 30 So. 3d 644 (Fla. 3d DCA 2010); *Hope v. National Alliance of Postal & Federal Employees, Jacksonville Local No. 320*, 649 So. 2d 897 (Fla. 1st DCA 1995).

But there have been calls for boundaries. That is so because the competing "policy considerations" *Levin* sought to balance, i.e., "the chilling effect on free testimony" versus "the right of an individual to enjoy a reputation unimpaired by defamatory attacks" (639 So. 2d at 608), is better served by qualified immunity when the misconduct occurs in an extra-judicial setting.

Judge Sharp, dissenting in *Stucchio*, noted that this Court in *Fridovich v. Fridovich*, 598 So. 2d 65 (Fla. 1992), held that only a qualified privilege applied to parties making reports to the police. *Stucchio*, 726 So. 2d at 375. *Fridovich*, as Judge Sharp reminded, viewed testimony given in court and given under subpoena as "encompassed within a judicial proceeding" (*Stucchio*, 726 So. 2d at 375, citing *Fridovich*, 598 So. 2d at 69, n.7) and therefore absolutely privileged.

Judge Sharp wrote: "[I]n my view, that puts investigative interviews by attorneys of potential witnesses within the qualified privilege category." *Stucchio*, 726 So. 2d at 375 (Sharp, J., dissenting).

Judge Warner, dissenting in this case, pointed to a *Fridovich* footnote that distinguished the judicial / investigative processes, quoting that footnote: "'the potential harm which may result from the absolute privilege is somewhat mitigated by the formal requirements such as notice and hearing, the comprehensive control exercised by the trial judge whose action is reviewable on appeal, and the availability of retarding influences such as false swearing and perjury prosecutions."' *DelMonico*, App. A., p. 8 (Warner, J., dissenting), quoting *Fridovich*, 598 So. 2d at 69, n.5. And Judge Warner also noted this Court's *Fridovich* approval of the *Restatement (Second) of Torts*, §587, cmt. f definition of judicial proceedings as "all proceedings in which an officer or tribunal exercises judicial functions."' App. A., p. 8.

Levin did seek to provide some solace to those victimized during the course of a judicial proceeding, suggesting that bar discipline and a trial judge's "power to do those things necessary to enforce its orders, to conduct its business in a proper manner, and to protect the court from acts obstructing the administration of justice," and the "contempt power" could provide a remedy. *Levin*, 639 So. 2d

at 608-609.

Those palliatives are not persuasive where the defamations occur in situations where a party and/or his or her counsel have no way of knowing that they have occurred, save some later disclosure by a friend (or foe). Indeed, the harmed party may not even learn of the misconduct until after the "judicial proceeding" has been completed, rendering illusory the notion of court remediation. Nor does offering a bar complaint as a method of salving a defamatory/tortious interference wound that inflicts millions of dollars of damage strike a fair balance between the "competing policy" interests when a qualified privilege would better protect those interests.

In *Echevarria, McCalla, Raymer, Barrett & Frapier v. Cole*, 950 So. 2d 380 (Fla. 2007), the absolute immunity litigation privilege was held applicable to all causes of action. The *raison d'etre* for the asserted statutory causes of action were letters sent by a law firm "to the plaintiffs at the outset of the foreclosure proceedings stating that the plaintiffs were in default . . . . [and] owed certain costs incurred by the lenders . . . ." *Id.* at 381. Thus, the plaintiffs had notice of the alleged misconduct under the Florida Consumer Collection Practices and the Florida Unfair Deceptive Trade Practices Act. In such a situation, the contempt and/or disciplinary proceedings might serve a purpose. But where the

misconduct is not only extra-judicial, but hidden from the party or victim, those remedial measures serve no valid purpose.

In those situations, the Seventh Circuit's comments are pertinent and persuasive:

> When an attorney in a civil suit steps beyond the rules of discovery to obtain facts in an extra-judicial investigation, he steps into a gray area where his actions start closely resembling those of a police officer or private investigator. Although there is certainly nothing wrong with an attorney conducting extra-judicial investigations, the conduct of such investigations is removed from the judicial process and is not a function that rests uniquely within the duties of an advocate. More important, such investigations take place outside the adversarial arena with its attendant safeguards that provide real and immediate checks to abusive practices . . . . False or unreliable evidence presented at trial is subject to immediate exposure "through cross-examination, rebuttal, or reinterpretation by opposing counsel." *Butz*, 438 U.S. at 516-17, 98 S.Ct. at 2916. Likewise, the presence of opposing counsel and opposing counsel's ability to seek swift protection from the court serve as substantial checks upon abusive discovery practices. An allegedly unlawful investigation conducted outside the discovery process is not subject to these significant safeguards and protections. . . .
>
> This is particularly so given that many, if not most, extra-judicial investigations will be conducted without the knowledge of the opposing side. Thus, people who are injured by extra-judicial investigations may not know that their rights have been violated, much less know the identity of the persons who violated their rights. Moreover, even if the injured party is aware of all the

> facts, there is little incentive to invoke these sanctions except in particularly egregious situations.

Auriemma v. Montgomery, 860 F.2d 273, 278-79 (7th Cir. 1988).

The absolute immunity litigation privilege has a long pedigree. The Supreme Court of Pennsylvania has declared it to be for the general good: "Wrong may at times be done to a defamed party, but it is *damnum absque injuria*. The inconvenience of the individual must yield to a rule for the good of the general public." *Greenberg v. Aetna Ins. Co.*, 235 A. 2d. 576, 578 (Pa. 1967) (quoting *Kemper v. Fort*, 67 A. 991, 995 (Pa. 1907). However, other courts have recognized that the individual cannot be sacrificed on the altar of "general good" without an opportunity to have notice, and to be heard. Those courts have provided more precise privilege confines. Texas applies the privilege to "any statement made by the judges, jurors, counsel, parties or witnesses in open court, pre-trial hearings, depositions, affidavits, and any of the pleadings or other papers in the case." *Hearst Corp. v. Sheen*, 130 S.W. 3d 910, 925-926 (Tex. App. 2004), *rev'd on other grounds*, 159 S.W. 3d (Tex. 2005). New Jersey specifically defines a "judicial proceeding," and does not include depositions as such a proceeding protected by the absolute immunity privilege. *Marxe v. Marxe*, 558 A. 2d 522, 524 (N.J. Super. Ct. 1989).

Judge Warner's dissent below strikes the appropriate balance:

> If the purpose of absolute immunity is to preserve the attorney and party's right to present their case at trial without fear of intimidation, I do not think that policy is advanced by protecting a lawyer who is defaming a party to a witness outside of a proceeding at a time when both parties are not present and do not have an opportunity to be heard. In fact, rather than enhance the truth-seeking function of trials, such conduct as alleged here may taint the entire process by influencing witnesses with false and defamatory information about the adversary.
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> * * *
>
> When balancing the two competing interests set forth in *Levin*, I think extending absolute immunity to the conduct alleged in this case upsets a fine balance between the individual's right to his reputation and a free and full disclosure of facts in a judicial proceeding. I would apply only a qualified privilege to such conduct. Just as in *Fridovich*, that standard would deter frivolous lawsuits as it would require the plaintiff to prove both that the statements were false, and that they were made with express malice, i.e., "that the defendant's primary motive in making the statements was the intent to injure the reputation of the plaintiff." 598 So. 2d at 69. But it would also deter participants in the investigatory process outside judicial proceedings from intentionally harming their adversary with impunity.

Judge Warner's last thought presents another reason for reversing the decision below, even if this Court hues to *Levin's* rigid rule. An important part of that rule is that to qualify for absolute immunity the "act has some relation to the

proceeding." *Levin*, 609 So. 2d at 608. To say that an intentional lie by a lawyer to a witness "has some relation to the proceeding" perverts the premise of a "judicial proceeding." In *Levin*, Justice Overton wrote that "the chilling effect on free testimony would seriously hamper the adversary system if absolute immunity were not provided." *Id.* Justice Overton, and the Court, wanted witnesses to be free to tell what they know without fear of reprisal. But *Levin* cannot mean that lawyers are free to falsely tell witnesses "facts" that they do not know, and which the lawyer knows are patently untrue. That is the antithesis of "free testimony;" it compromises honest testimony.

When that is done, in an extra-judicial, no opportunity to know, no opportunity to be heard, no opportunity to seek relief in the extant judicial proceeding setting, such conduct has no relation to a judicial proceeding and cannot claim safe harbor under *Levin*.

CONCLUSION

For the foregoing reasons, the decision below should be reversed with instructions to the District Court of Appeal to reverse the summary judgment entered by the trial court and remand the case for trial.

Respectfully submitted,

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I HEREBY CERTIFY that this Brief is in compliance with Rule 9.210, Fla.R.App.P., and is prepared in Times New Roman 14 point font.

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