IN THE SUPREME COURT OF FLORIDA

CASE NO. SC10-1397

DANIEL DELMONICO, an individual, and MYD MARINE DISTRIBUTOR, INC., a Florida corporation,

Petitioners,

v.

ARTHUR RODGERS TRAYNOR, JR., an individual, and AKERMAN, SENTERFITT & EIDSON, P.A., a Florida professional association,

Respondents.
_____/

L.T. CASE NOS.:
4DCA NO. 4D08-4035
17th Cir. Ct. No. 07-027602 (08)

RESPONDENTS' BRIEF ON JURISDICTION

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PREFACE

Petitioners/plaintiffs, Daniel DelMonico and MYD Marine Distributor, Inc., a Florida corporation ("plaintiffs"), seek discretionary review of the Fourth District's decision in DelMonico v. Traynor, 35 Fla. L. Weekly D1331 (Fla. 4th DCA June 16, 2010). The decision emanates from a final summary judgment for respondents/ defendants, an attorney, Arthur Rodgers Traynor, Jr., and his law firm, Akerman, Senterfitt & Eidson, P.A., a Florida professional association, in plaintiffs' action for defamation and tortious interference.

The citations to the Fourth District's decision are to the slip opinion in the appendix attached to plaintiffs' jurisdictional brief (A:1-11). The abbreviation (JB:___) refers to plaintiffs' jurisdictional brief. All emphasis is supplied unless stated otherwise.

STATEMENT OF THE CASE AND FACTS

Plaintiffs brought this action for defamation and tortious interference against defendants, an attorney and his law firm, based on their actions as defense counsel in an underlying suit (A:1-2). In the underlying suit, DelMonico sued Donovan Marine, Inc., and its employee, Tony Crespo, for defamation (A:1). DelMonico alleged that Crespo "told several people that DelMonico supplied prostitutes to the owner of a

company previously doing business with Donovan Marine as their method to take away business from Donovan and bring it to DelMonico" (A:1). Defense counsel, attorney Traynor, repeated these allegations "during potential witness interviews" that were conducted "for the purpose of defending his client during pending and active litigation" (A:1-2).

Plaintiffs then brought this action against attorney Traynor and his law firm, Akerman, Senterfitt & Eidson, P.A. (A:1-2). Plaintiffs alleged the attorney's statements during witness interviews constituted defamation and tortious interference (A:1-2).

The trial court granted final summary judgment for the attorney and the law firm (A:1-2). The trial court concluded the attorney and law firm were immune from suit based on the litigation privilege in Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. United States Fire Insurance Co., 639 So. 2d 606, 607-08 (Fla. 1994) (A:2).

Plaintiffs appealed and the Fourth District affirmed (A:1-5). The Fourth District recognized that under Levin, "**[A]bsolute immunity must be afforded to any act occurring during the course of a judicial proceeding**, regardless of whether the act

involves a defamatory statement or other tortious behavior . . . **so long as the act has some relation to the proceeding**." (A:2-3) (quoting Levin, 639 So. 2d at 608, and citing Echevarria, McCalla, Raymer, Barrett & Frappier v. Cole, 950 So. 2d 380 (Fla. 2007)). Plaintiffs conceded that the attorney's statements "were made during the course of a judicial proceeding" (JB:4 n.1) (quoting plaintiffs' Fourth District Initial Brief). Consistent with this concession, the Fourth District concluded that the attorney's statements to potential witnesses "were made **in connection with**, and **during the course of, an existing judicial proceeding**" (A:2).

The Fourth District's decision also found the statements had "some relation to the proceeding":

> **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; see also Fernandez v. Haber & Ganguzza, LLP, 30 So. 3d 644 (Fla. 3d DCA 2010) (concluding that the actions of the law firm in preparing and filing a notice of lis pendens were privileged because they occurred during the course of a judicial proceeding); Stucchio v. Tincher, 726 So. 2d 372 (Fla. 5th DCA 1999) (concluding that statements made by lawyer during interview of potential witness in preparation for trial were absolutely privileged). **Interviewing a witness in preparation for and connected to pending litigation is absolutely privileged.** Stucchio, 726 So. 2d at 373.

(A:2-3).

The DelMonico decision recognized the policy rationale supporting "the rule of absolute immunity is that 'the public interest of disclosure outweighs an individual's right to an unimpaired reputation' and '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.'" (A:3) (quoting Levin, 639 So. 2d at 608). Without a rule of absolute immunity, there would be a "chilling effect" on the adversary system (A:3-5). "[I]f we were to find that absolute immunity [is] conferred on the participants only at formalized hearings or court proceedings, we would have the unintended consequence of attorneys not being able to question witnesses in preparation for eventual formalized proceedings without fear of civil liability." (A:3).

Plaintiffs filed this petition for discretionary review of the Fourth District's decision on the basis of alleged direct and express conflict. Plaintiffs argue that DelMonico conflicts with this Court's decision in Levin because the attorney's statements were not made in the course of a judicial proceeding.

SUMMARY OF ARGUMENT

The Fourth District in DelMonico held that an attorney's statements to potential witnesses while defending pending litigation are absolutely privileged. In this Court,

plaintiffs argue that the attorney's statements were not made in the course of a judicial proceeding. Plaintiffs waived this argument. Plaintiffs conceded in the Fourth District that the statements were made in the course of a judicial proceeding (JB:4 n.1). The Fourth District's decision applies the same rule of law that this Court set forth in Levin. Both decisions held that absolute immunity from litigation protects acts during the course of a judicial proceeding, as long as the acts have some relation to the judicial proceeding. The decisions do not reach different results despite similar facts. No conflict exists. Discretionary review should be denied.

ARGUMENT

DELMONICO DOES NOT CONFLICT WITH LEVIN BECAUSE BOTH DECISIONS HOLD THAT THE LITIGATION PRIVILEGE IMMUNIZES ACTS IN THE COURSE OF A JUDICIAL PROCEEDING THAT ARE RELATED TO THE PROCEEDING.

This Court only has discretion to review decisions that expressly and directly conflict with the decisions of this Court or another district court of appeal. See Art. V, § 3(b)(3), Fla. Const.; Jenkins v. State, 385 So. 2d 1356, 1359 (Fla. 1980). Express and direct conflict exists where the decision: (1) announces a rule of law conflicting with a rule previously announced by this Court; or (2) applies the rule of law to a case with similar facts, but reaches a different result. See Aravena v. Miami-Dade County, 928 So. 2d 1163, 1166 (Fla. 2006) (explaining conflict exists when the holdings of two

decisions "are irreconcilable" because they "reached the opposite result" despite similar facts); Mancini v. State, 312 So. 2d 732, 733 (Fla. 1975). Rather than establish conflict, plaintiffs reargue the merits of the case. As this Court observed in Mancini, "Our jurisdiction cannot be invoked merely because we might disagree with the decision of the district court." 312 So. 2d at 733. There is no conflict. Review must be denied.

Plaintiffs argue that the Fourth District's decision applies a litigation privilege to statements "not made in the 'course of the judicial proceeding,'" creating conflict with Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. United States Fire Insurance Co., 639 So. 2d 606 (Fla. 1994) (JB:3). Plaintiffs waived this argument. To preserve an argument for review in this Court, plaintiffs must have made the specific legal argument in both the trial and appellate courts. See, e.g., Sunset Harbour Condo. Ass'n v. Robbins, 914 So. 2d 925, 928 (Fla. 2005); Tillman v. State, 471 So. 2d 32, 35 (Fla. 1985). In the Fourth District, plaintiffs agreed that the attorney's statements "were made during the course of a judicial proceeding," a fact plaintiffs acknowledge in a footnote in their jurisdictional brief (JB:4 n.1) (quoting plaintiffs' Fourth District Initial Brief). Hence, it was not an issue below. Plaintiffs cannot reverse course in this Court. Doing so would defeat judicial economy and allow parties to seek discretionary review on an unpreserved basis.

Further, the Fourth District's decision applied the same rule of law set forth in Levin, 639 So. 2d at 608. This Court in Levin held that "'absolute immunity must be afforded to any act **occurring during the course of a judicial proceeding**, regardless of whether the act involves a defamatory statement or other tortious behavior . . . **so long as the act has some relation to the proceeding**.'" Id. Under Levin, "[t]he immunity afforded to statements made during the course of a judicial proceeding extends not only to the parties in a proceeding but to judges, witnesses, and counsel as well." Id. This Court reiterated the Levin rule of absolute litigation immunity in Echevarria, McCalla, Raymer, Barrett & Frappier v. Cole, 950 So. 2d 380, 383-84 (Fla. 2007).

As in Levin and Echevarria, the decision in DelMonico held that acts "in connection with, and during the course of, an existing judicial proceeding" are immunized by the litigation privilege if the acts have "'some relation to the proceeding.'" (A:2) (quoting Levin, 639 So. 2d at 608). The statements in DelMonico "occurred during potential witness interviews, were performed by [Traynor] in his role as an attorney, and were made purportedly for the purpose of the defending his client during pending and active litigation" (A:2). The underlying lawsuit involved allegations about prostitution (A:1-2). In this action, plaintiffs claimed that the attorney repeated these allegations during interviews with potential witnesses (A:1-2).

The Fourth District's decision reasoned that "[c]learly, speaking to potential witnesses during the pendency of litigation is of 'some relation to the proceeding'" under Levin (A:3).

There is no conflict between this Court's decision in Levin and the Fourth District's decision in DelMonico. Both decisions apply the same rule of law. The decisions do not reach different results despite similar facts.

Finally, this case is not of exceptional importance warranting that this Court exercise its discretionary review. The Fourth District's decision is in harmony with the Fifth District's decision (A:2-5). See Stucchio v. Tincher, 726 So. 2d 372, 374-75 (Fla. 5th DCA 1999). In Stucchio, during an attorney's interview of a potential witness for trial, the potential witness made allegedly defamatory statements. See id. The Fifth District held the witness's statements were absolutely privileged because made "'in connection with' or 'in the course of' an existing judicial proceeding." Id. at 374. Thus, the two district court decisions directly addressing this issue agree that the litigation privilege immunizes statements made while an attorney is interviewing potential witnesses during litigation (A:2-5). See Stucchio, 726 So. 2d at 374-75. There is no conflict for this Court to resolve.

The decision in DelMonico follows the public policy set forth by this Court in Levin and Echevarria. The policy rationale supporting this rule of absolute immunity is 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, 639 So. 2d at 608. In Echeverria, this Court reiterated that "[i]t is the perceived necessity for candid and unrestrained communications in those proceedings, free of the threat of legal actions predicated upon those communications, that is at the heart of the rule" of absolute litigation immunity. 950 So. 2d at 384.

Consistent with Levin and Echevarria, the Fourth District recognized that if an attorney's interviews with potential witnesses are not immunized, many witnesses will refuse to speak to attorneys without a subpoena (A:3-5). This would have a chilling effect on litigation (A:3-5).

There is no direct and express conflict or question of exceptional importance for this Court to review. This Court should deny jurisdiction.

CONCLUSION

There is no conflict. The petition to invoke this Court's discretionary jurisdiction should be denied.

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CERTIFICATE OF SERVICE

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