

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,**

Respondent.

**PETITIONERS' INITIAL BRIEF IN
SUPPORT OF JURISDICTION TO REVIEW
A DECISION OF THE DISTRICT COURT OF
APPEAL FOR THE FOURTH DISTRICT OF FLORIDA**

HOLIDAY HUNT RUSSELL
HOLIDAY RUSSELL, P.A.
3858 Sheridan Street
Hollywood, Florida 33021

BRUCE S. ROGOW
CYNTHIA E. GUNTHER
BRUCE S. ROGOW, P.A.
Broward Financial Centre, Suite 1930
500 East Broward Blvd.
Fort Lauderdale, FL 33394

Counsel for Petitioners

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STATEMENT OF THE CASE AND FACTS

The Fourth District Court of Appeal affirmed a summary judgment in favor of Attorney Arthur Rodgers Traynor and his law firm, Akerman, Senterfitt & Eidson, P.A. (Collectively, “Respondents”), based on litigation immunity. *DelMonico and MYD Marine Distributor, Inc. v. Traynor and Akerman, Senterfitt & Eidson, P.A.*, ___ So. 3d. ___, 2010 WL 2382570 (4th DCA June 16, 2010). Appendix at 1.

The court below, over the dissent of Judge Warner, held that Traynor, while acting as defense counsel in a suit brought by DelMonico against a competitor, “published to DelMonico’s ex-spouses and business peers . . . [that] DelMonico hired prostitutes to get business and that DelMonico faced prosecution for prostitution.” *Id.* DelMonico sued Traynor and his law firm for defamation and tortious interference, but the trial court granted summary judgment based on *Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell P.A. v. U.S. Fire Ins. Co.*, 639 So. 2d 606 (Fla. 1994).

The Fourth District affirmed, citing *Levin, Middlebrooks*, saying: “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.

Appendix at 3.

The court below set forth the allegations of Traynor's defamation and tortious interference statements, which, for summary judgment purposes, were accepted as true:

The appellee [Traynor] 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 contacted the former owner of a business and stated that DelMonico was "being prosecuted for prostitution." The appellee also contacted another ex-wife of the appellant 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. Subsequently, New Nautical, a manufacturer with whom MYD Marine Distributor had an exclusive contract, received calls from companies stating they no longer wanted to purchase products from MYD Marine Distributors.

Appendix at 2. Traynor made the statements "during potential witness interviews." *Id.*

The Fourth District held that "[i]nterviewing a witness in preparation for and connected to pending litigation is absolutely privileged." *Id.* at 3.

Judge Warner dissented:

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 facts as to whether the attorney made the statements and whether they were made with the intent to injure the appellant, I would reverse.

For the reasons set forth below, Petitioners DelMonico and MYD, seek to invoke the jurisdiction of this Court because the decision below expressly conflicts with the principles and policies of the *Levin, Middlebrooks*.

SUMMARY OF THE ARGUMENT

Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. United States Fire Ins. Co., 639 So. 2d 606, 608 (Fla. 1994) 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.” The holding of the court below 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 proceeding,” as that phrase must be viewed in order to serve the policies that underlie *Levin, Middlebrooks*.

This Court should accept jurisdiction to resolve the conflict between the decision below and *Levin, Middlebrooks*.¹

ARGUMENT

THE DECISION BELOW EXPRESSLY CONFLICTS WITH LEVIN, MIDDLEBROOKS

Levin, Middlebrooks, followed by *Echevarria, McCalla, Raymer, Barrett & Frappier v. Cole*, 950 So. 2d 380 (Fla. 2007), stand for the proposition that “the perceived necessity for candid and unrestrained communications in those [judicial] proceedings, free of the threat of legal actions, predicated upon those communications, . . . is at the heart of the [absolute immunity] rule.” *Id.* at 384.

The trial court in this case had a doubt about *Levin, Middlebrooks* application here: “In a case such as this, I have a question as to whether or not

¹ In the court below, DelMonico’s appellate counsel accepted “[f]or the purposes of this appeal” that the statements at issue “were made during the course of a judicial proceeding.” DelMonico and MYD Marine Amended Initial Brief, p. 2, n.2. Because that concession was limited to “this appeal,” not all appellate purposes, and because the court below decided and discussed “course of judicial proceedings,” despite the footnoted concession, we focus on the conflict with that aspect of *Levin, Middlebrooks*.

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. Judge Warner's dissent, acknowledging the unrestrained communication purpose espoused by *Levin, Middlebrooks*, saw the downside as applied to the facts in this case:

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. This case serves as an example If the attorney had made statements at a deposition, at least DelMonico's attorney could have been present to object. As it is, the witness hears defamatory information regarding DelMonico from a member of a respected law firm. DelMonico has no protection from such damaging falsehoods when uttered essentially in secret.

Appendix at 10-11 (Warner, J., dissenting). Judge Sharp, dissenting in *Stucchio v. Tinch*, 726 So. 2d 372 (Fla. 5th DCA 1999), had a similar doubt about the "course of a judicial proceeding" reach of *Levin, Middlebrooks*: "Testimony given in court and testimony given pursuant to a subpoena remains as "encompassed within a judicial proceeding," and thus are completely privileged. However in my view, that puts investigative interviews by attorneys of potential witnesses within the qualified privilege category." *Id.* at 375 (Sharp, J.,

dissenting) (internal citations omitted). Judge Sharp focused on the fact that the defamatory remarks “were made in an investigative mode, preliminary to calling him as a witness in a judicial proceeding or deposing him under oath. . . .” *Id.*

The conflict posed within *Levin, Middlebrooks* is tied to the meaning of “course of judicial proceedings.” Does “course of judicial proceedings” have no boundary once a lawsuit is filed? The court below applied absolute immunity, *a la Levin, Middlebrooks*, because Traynor “was acting as defense counsel in the underlying litigation, and the statements bore ‘some relation’ to the proceeding.” Appendix at 3. The court applied absolute immunity “to the parties, judges, witnesses, and counsel involved and related to the judicial proceedings. *Levin*, 639 So. 2d at 608.” Appendix at 3. That statement is broader than the *Levin, Middlebrooks* “course of a judicial proceeding” language, and conflicts with the policy behind *Levin, Middlebrooks*: “the right of the public interest to a free and full disclosure of facts in the conduct of judicial proceedings.” *Levin v. Middlebrooks*, 639 So. 2d at 608.

The public interest is not served by non-judicial, ex-parte, false, defamatory statements made by lawyers to potential witnesses, outside of the presence of, and unknown to, the defamed party or his lawyer; statements that are subject to no supervision or redress and therefore are not “in the course of the

judicial proceeding.” Giving absolute immunity to “counsel involved and related to the judicial proceedings” (Appendix at 3) so broadens *Levin, Middlebrooks* scope that it poses a conflict triggering this Court’s jurisdiction pursuant to Article V, § 3(b)(3), Florida Constitution.

CONCLUSION

For the foregoing reasons, the Court should accept jurisdiction to review the decision below.

Respectfully submitted,

BRUCE S. ROGOW
Florida Bar No. 067999
CYNTHIA E. GUNTHER
Florida Bar No. 0554812
BRUCE S. ROGOW, P.A.
500 East Broward Blvd., Suite 1930
Fort Lauderdale, FL 33394
Ph: (954) 767-8909

and

HOLIDAY H. RUSSELL
Florida Bar No. 955914
HOLIDAY RUSSELL, P.A.
3858 Sheridan Street
Hollywood, FL 33021
Ph: (954) 920-5153

By: _____
BRUCE S. ROGOW
Counsel for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to counsel listed below, by U.S. Mail this 30th day of July, 2010:

JANE KREUSLER-WALSH
KREUSLER-WALSH, COMPIANI, et
al.
501 South Flagler Drive, Suite 503
West Palm Beach, FL 33401

WILLIAM M. MARTIN
PETERSON BERNARD
707 SE Third Avenue, Suite 500
Fort Lauderdale, FL 33316

BRUCE S. ROGOW

CERTIFICATE OF COMPLIANCE

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.

BRUCE S. ROGOW