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' REPLY BRIEF

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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES **Page**

I.
THE COURT HAS JURISDICTION

The Respondents ask the Court to discharge jurisdiction because in the District Court of Appeal Petitioners' brief said that Traynor's statements "were made during the course of judicial proceedings." Thus Respondents assert that this Court should not review the scope of *Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell v. United States Fire Insurance Co.*, 639 So. 2d 606 (Fla. 1994) because Petitioners "never presented the issue of whether the attorney's statements were made in the course of a judicial proceeding to the Fourth District . . . ." Respondents' Answer Brief, p. 10.

The discharge request has no merit. First, Petitioners' Brief on Jurisdiction alerted the Court to the Petitioners' District Court appellate brief's "course of a judicial proceeding" acknowledgment, anticipating that Respondent might seize on it. *See* Petitioners' Brief on Jurisdiction, p. 4, n.1. The Court accepted jurisdiction, despite the Respondents' waiver/no jurisdiction argument in their Brief on Jurisdiction, p. 5.

Second, there can be no dispute about the fact that the struggle is not about "the course of a judicial proceeding," but about whether *Levin* meant that language

encompassed protection of intentional *ex-parte* lies to claimed potential witnesses. Both the trial court and the District Court of Appeal grappled with that conundrum. The trial court said "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*." R2:354-355 (emphasis supplied). The majority opinion below, recognizing that everyone acknowledged that there was an extant case, read *Levin* to mean that as long as "the statements bore 'some relation' to the proceeding, they were absolutely privileged as a matter of law. *Levin*, 639 So. 2d at 608." *Delmonico v. Traynor*, 58 So. 3d 4 (Fla. 4th DCA 2010), Appendix A to Petitioner's Initial Brief on the Merits, p. 3. Thus both courts recognized that the focus is not on the "course of judicial proceedings," but on the relevancy and relatedness of the complained of statements to those proceedings.

The trial court had a doubt about the scope of *Levin*. Judge Warner's dissent below had a similar doubt. Judge Sharp's dissent in *Stucchio v. Tincher*, 726 So. 2d 372, 375 (Sharp, J. dissenting), is in the same camp, citing *Demopolis v. Peoples National Bank of Washington*, 59 Wash. App. 105, 796 P.2d 426 (Wash. App. 1990) as supporting only a qualified privilege where a lawyer, in a courtroom hallway "falsely accus[ed] a plaintiff of being a convicted perjurer," and "[t]he court held that extrajudicial defamatory allegations relating to a

person's honesty are not sufficiently 'pertinent' to a judicial proceeding to clothe them with an absolute privilege. . . ." *Stucchio*, 726 So. 2d at 375 (Sharp, J., dissenting).

Thus it is clear that Petitioners' acknowledgment that there was an ongoing judicial proceeding did not abandon or waive the crux of the *Levin* question: at what point does the absolute litigation privilege become a qualified privilege. The majority opinion below said never – it is always absolute.

The cases offered by Respondents in support of their discharge of jurisdiction request do not carry any weight here. *Sunset Harbor Condominium Assoc. v. Robbins*, 914 So. 2d 975 (2005) involved a failure to object: "We hold that *Sunset Harbor* waived any objection to the validity of the asserted affirmative defense because no objection was raised in either the trial court or the district court." *Id.* at 928. *Tillman v. State*, 471 So. 2d 32 (Fla. 1985) involved an argument not raised "at trail or on appeal." *Id.* at 35. No one can say that the issue in this case was not raised at trial and on appeal. Therefore there is jurisdiction and the Court should address the merits.

II.
LEVIN HAS LIMITS

Levin's language is more elaborate than the Respondents' view of it. The

Court wrote: "defamatory statements made in the course of judicial proceedings are absolutely privileged, no matter how false or malicious the statements may be so long as the statements are relevant to the subject of the inquiry." The statements must have "some relation to the proceeding." 639 So. 2d at 607. The decision below concluded that "speaking to potential witnesses during the pendency of litigation" was sufficient to trigger *Levin* absolute immunity. The court did not consider whether the parties to whom the untruths were told were actually potential witnesses, or the purpose behind speaking to them. *Levin* requires relatedness and relevancy. *Id.* The court below abjured any inquiry other than the fact that there was a pending case, and so the District Court concluded that the lawyer was thus cloaked with absolute immunity.

The Respondents' reliance on various cases that echo *Levin* (and one that pre-dates it – *Sussman v. Damian*, 355 So. 2d 809 (Fla. 3d DCA 1977)) does not support their overbroad view of *Levin*. *Sussman* actually supports the dichotomy we advance: absolute privilege for some conduct and qualified privilege for other conduct. Lawyer Sussman called lawyer Damian "a damned liar" during a deposition; lawyer Damian accused Sussman of improprieties in the handling of client monies and trust funds unrelated to the subject matter of the lawsuit which they were litigating. Judge Hubbart wrote that the "liar" statement was absolutely

privileged because it "was uttered in a deposition taken in a pending civil action in which Sussman represented one of the parties involved." But Damian's slur, while uttered to opposing counsel in a pending lawsuit "was in no sense relevant or material to the cause at hand," and therefore only a qualified privilege applied. 355 So. 2d at 811-812.

Here, the court below summarized Traynor's transgressions: "Traynor, while acting as counsel for Donovan Marine, published to Delmonico's ex-spouses and business peers the same allegation that Delmonico hired prostitutes to get business and that Delmonico faced prosecution for prostitution." *Delmonico, supra,* Appendix A to Initial Brief, p. 1. Traynor "stated that he was part of the prosecution of Delmonico for procuring prostitutes and illegal business dealings." *Id.* at 2.

The fact that a case was pending in which Traynor was a lawyer does not make Traynor's statements to ex-spouses and business peers relevant or material to the case. Traynor was not asking witnesses questions; he was telling people lies. *Stucchio v. Tichner*, 726 So. 2d 372 (Fla. 5th DCA 1999) helps Delmonico, not Traynor. In *Stucchio*, a lawyer in a pending matter had good reason to ask Ms. Stucchio's former boss (the Chief of Police) for her personnel file, and then the Chief's answer caused him to be sued by Stucchio. The court posed a

hypothetical question from the lawyer to the witness and his answer, to make its point that the Chief's testimony was absolutely privileged:

> "Chief Tincher, why did Ms. Stucchio resign from her job with your department?"
>
> "She was forced to resign because she falsified her job application concerning her use of illegal drugs. I think she is still using them."

726 So. 2d at 373.

Clearly, a witness *answering* a lawyer's question is clothed with an absolute privilege. A lawyer *asking* a question would also be protected, *i.e.*, "Chief, was Ms. Stucchio forced to resign because she lied on her application concerning her use of illegal drugs?" But a lawyer falsely *telling* ex-spouses and business peers that a man is utilizing prostitutes and that the lawyer is a prosecutor, and is prosecuting the man for using prostitutes, is a different genre; one that cannot claim the *Levin* cloak.

Ross v. Blank, 958 So. 2d 437 (Fla. 2007), another of Respondents' main cases, again makes our point, not Respondents'. Dr. Blank reported Ross for suspected child abuse. A Florida statute provides immunity for such reporting. Dr. Blank also allegedly told the court-appointed evaluator in a custody dispute, and the guardian ad litem, of her view that Ross was a sexual

abuser. *Id.* at 441. Her reporting was privileged, the former by statutory immunity, and the latter by the litigation privilege. *Id.* Obviously there was a judicial proceeding in *Ross* and the doctor's views were relevant to, and related to the proceeding. The doctor did not gratuitously go to outsiders and announce her professional views to ex-spouses and business peers of Ross, nor falsely pretend to be someone she was not.

The thrust of Respondents "public policy" argument is that curtailing the absolute privilege "would 'inhibit potential parties or witnesses from coming forward and impede the investigatory ability of litigants or potential litigants."' Respondents' Answer Brief, p. 25, quoting *Simpson Strong-Tie Co. v. Stewart, Estes & Donnel*, 232 S.W. 3d 18, 27 (Tenn. 2007). Not so. There is no suggestion made here that parties and witnesses providing information in the course of a judicial proceeding to investigators, lawyers and courts should be stripped of absolute immunity. The issue is much narrower. It is whether a lawyer's *affirmative false and defamatory statements* made *ex-parte*, outside the presence of any participant in the pending judicial proceeding, should be accorded only qualified immunity, not absolute immunity.

Qualified immunity is not a lack of immunity. In *Fridovich v. Fridovich*, 598 So. 2d 65 (Fla. 1992), statements were made to investigators prior

to the institution of a judicial proceeding and the Court balanced important and competing interests, concluding that "a qualified privilege 'is sufficiently protective of [those] wishing to report events concerning crime and balances society's interest in detecting and prosecuting crime with a defendant's interests not to be falsely accused.'" *Id.* at 69, *quoting Fridovich v. Fridovich*, 573 So. 2d 65, 70 (Fla. 4th DCA 1990). The Court explained that a qualified privilege was enough to protect the speaker, because

> a plaintiff's burden of proof for establishing a case under a qualified privilege would likely deter most frivolous suits. In overcoming a qualified privilege, a plaintiff would have to establish by a preponderance of the evidence that the defamatory statements were false and uttered with common law express malice-i.e., that the defendant's primary motive in making the statements was the intent to injure the reputation of the plaintiff.

Id. at 69.

Similarly, a qualified privilege in situations like the one in *Delmonico* would deter attorneys from abusing the process and protect potential witnesses from undue influence, while at the same time protecting attorneys from frivolous suits.

The court in *Delmonico* held that attorneys should not be worrying "they will be made subject to litigation for *merely inquiring* into areas deemed

controversial, unfair, or unjust by the opposing side. Counsel must be able *to inquire* unfettered into areas with some relation to the pending litigation." *Delmonico*, 58 So. 3d at 8, Appendix A to Initial Brief, p. 5. (emphasis supplied). The holding in *Stucchio* was based upon the hypothetical question written by the court to demonstrate that an *answer to a question* can lay claim to an absolute privilege. But Traynor's statements were not "inquiries" or "answers." They were false assertions that Delmonico was being prosecuted for procuring prostitutes and that Traynor himself was part of the prosecution team. Those false statements did not *inquire* into anything; they were not related to, or relevant to, the proceedings other than to thwart the proceedings' search for truth by attempting to poison the surrounding atmosphere. *Levin* was not meant to protect efforts to compromise the integrity of judicial proceedings by such abusive conduct.

CONCLUSION

For the foregoing reasons, and those advanced in the Initial Brief in Support of Jurisdiction and the Initial Brief on the Merits, 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,

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 _____ day of March, 2011:

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