IN THE SUPREME COURT OF FLORIDA

CASE NO. SC10-1397

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

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

Petitioners,

v.

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

Respondents.

_______________________________________/

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TABLE OF CONTENTS

Page

Preface 1

Statement of the Case and Facts 2

Summary of Argument 6

Argument 8

THE ABSOLUTE LITIGATION PRIVILEGE IMMUNIZES AN ATTORNEY'S STATEMENTS TO POTENTIAL WITNESSES.

A. This Court should discharge jurisdiction because plaintiffs waived the argument that the attorney's statements were not made in the course of a judicial proceeding. 8

B. An attorney's statements to potential witnesses while defending a pending lawsuit are absolutely privileged because they are made "in the course of" the litigation. 11

C. Public policy supports an absolute privilege when an attorney defending a pending suit interviews potential witnesses. 18

D. An attorney's statements to a potential witness about pending litigation are subject to an absolute privilege under Levin, not a qualified privilege. 20

E. The weight of authority in other jurisdictions holds that an attorney's statements to a potential witness are made in the course of the judicial proceeding. 22

TABLE OF CONTENTS (Cont.)

	Page
F. The attorney's statements were relevant to the judicial proceedings.	28
Conclusion	30
Certificate of Service	31
Certificate of Font	31

TABLE OF CITATIONS

Case	Page
Auriemma v. Montgomery, 860 F.2d 273 (7th Cir. 1988)	26, 27
Castor v. State, 365 So. 2d 701 (Fla. 1978)	10
Companioni v. City of Tampa, 35 Fla. L. Weekly S738 (Fla. Dec. 16, 2010)	10
DelMonico v. Traynor, 50 So. 3d 4 (Fla. 4th DCA), review granted, 47 So. 3d 1287 (Fla. 2010)	passim
Dolan v. Von Zweck, 477 N.E.2d 200 (Mass. App. Ct. 1985)	24
Echevarria, McCalla, Raymer, Barrett & Frappier v. Cole, 950 So. 2d 380 (Fla. 2007)	5, 12, 18
Fariello v. Gavin, 873 So. 2d 1243 (Fla. 5th DCA 2004)	13
Fernandez v. Haber & Ganguzza, LLP, 30 So. 3d 644 (Fla. 3d DCA 2010)	6
Fridovich v. Fridovich, 598 So. 2d 65 (Fla. 1992)	20, 21
Hawkins v. Harris, 661 A.2d 284 (N.J. 1995)	24, 26
Hearst Corp. v. Skeen, 130 S.W.3d 910 (Tex. App. 2004), rev’d other grounds, 159 S.W.3d 633 (Tex. 2005)	25

TABLE OF CITATIONS (Cont.)

Case	Page
Hoover v. Van Stone, 540 F. Supp. 1118 (D. Del. 1982)	23, 25
Hope v. Nat'l Alliance of Postal & Fed. Employees, Jacksonville Local No. 320, 649 So. 2d 897 (Fla. 1st DCA 1995)	28
Jackson v. BellSouth Telecomms., 372 F.3d 1250 (11th Cir. 2004)	13
Jenkins v. State, 385 So. 2d 1356 (Fla. 1980)	11
Jones v. Coward, 666 S.E.2d 877 (N.C. Ct. App. 2008)	24
Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. U.S. Fire Ins. Co., 639 So. 2d 606 (Fla. 1994)	1, 4-9, 12, 13, 15, 17-22, 28
Marxe v. Marxe, 558 A.2d 522 (N.J. Super. Ct. Ch. Div. 1989)	26
Metro. Dade County v. Chase Fed. Hous. Corp., 737 So. 2d 494 (Fla. 1999)	9, 10
Mitchell v. Forsyth, 472 U.S. 511 (1985)	27
Ross v. Blank, 958 So. 2d 437 (Fla. 4th DCA 2007)	13, 14, 19
Russell v. Clark, 620 S.W.2d 865 (Tex. Civ. App. 1981)	24-26

TABLE OF CITATIONS (Cont.)

Case	Page
Silberg v. Anderson, 786 P.2d 365 (Cal. 1990)	23-25
Simon v. Navon, 951 F. Supp. 279 (D. Me. 1997)	23
Simpson Strong-Tie Co. v. Stewart, Estes & Donnell, 232 S.W.3d 18 (Tenn. 2007)	22, 24, 25
State v. Barnum, 921 So. 2d 513 (Fla. 2005)	11
State v. Fleming, 36 Fla. L. Weekly S50 (Fla. Feb. 3, 2010)	9
Stucchio v. Tincher, 726 So. 2d 372 (Fla. 5th DCA 1999)	6, 13, 14, 18, 20
Sunset Harbour Condo. Ass'n v. Robbins, 914 So. 2d 925 (Fla. 2005)	9, 10
Sussman v. Damian, 355 So. 2d 809 (Fla. 3d DCA 1977)	13, 15
Tillman v. State, 471 So. 2d 32 (Fla. 1985)	9, 10

Other Authorities

Art. V, § 3(b), Fla. Const.	11
Fla. R. App. P. 9.030 (Committee Notes, 1980 Amendment)	11

TABLE OF CITATIONS (Cont.)

Other Authorities	**Page**
Restatement (Second) of Torts, § 586 (1977)	22, 23
T. Leigh Anenson, Absolute Immunity from Civil Liability: Lessons for Litigation Lawyers, 31 Pepp. L. Rev. 915 (2004)	22

PREFACE

Petitioners/plaintiffs, Daniel DelMonico and MYD Marine Distributor, Inc., a Florida corporation ("plaintiffs"), ask this Court to review the Fourth District's decision in DelMonico v. Traynor, 50 So. 3d 4 (Fla. 4th DCA 2010). Plaintiffs brought an action for defamation and tortious interference against respondents/defendants, an attorney, Arthur Rodgers Traynor, Jr., and his law firm, Akerman, Senterfitt & Eidson, P.A., a Florida professional association. The Fourth District affirmed the summary judgment for defendants. It held that the attorney's statements to potential witnesses while defending a pending lawsuit were absolutely privileged under the litigation privilege set forth in Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. United States Fire Insurance Co., 639 So. 2d 606, 607-08 (Fla. 1994).

Dispositive to the issues before this Court, in the Fourth District, plaintiffs explicitly **conceded** that defendants' statements had been made in the course of a judicial proceeding, as required by Levin. Now, plaintiffs' sole basis for jurisdiction is an alleged conflict with the requirement in Levin that statements must be made in the course of a judicial proceeding. Plaintiffs waived this basis for review and cannot establish conflict with Levin.

All emphasis is supplied unless stated otherwise. The parties are referred to as plaintiffs and defendants or by proper name. The following symbols are used:

A	-	Appendix to Plaintiffs' Supreme Court Initial Brief;
IB	-	Plaintiffs' Supreme Court Initial Brief;
R	-	Record on appeal;
SR	-	Supplemental record;
4IB	-	Plaintiffs' Fourth District Amended Initial Brief;
4AB	-	Defendants' Fourth District Answer Brief;
4RB	-	Plaintiffs' Fourth District Reply Brief.

STATEMENT OF THE CASE AND FACTS

Plaintiffs brought this action for defamation and tortious interference against defendants, attorney Arthur Rodgers Traynor, Jr., and his law firm, Akerman Senterfitt & Eidson, P.A., based upon statements made by Traynor to prospective witnesses while acting as defense counsel in an underlying suit (R1:1-10; A-B).[1] Plaintiffs' original complaint alleged that "the acts that form the basis of this complaint arose out of pending litigation in this Court, Daniel DelMonico v. Tony Crespo and Donovan Marine, Inc." (R1:2). For ease of reference, this underlying suit will be called the

[1] The Second Amended Complaint is found in the Appendix to the Initial Brief (A-B) and the supplemental record (SR:410-27).

Crespo litigation (R1:66-67).

In the Crespo litigation, DelMonico sued a competing business, Donovan Marine, Inc., and its employee, Tony Crespo, for defamation (R1:66-67). DelMonico alleged that Crespo had told several people in the marine industry that DelMonico lured away business from Donovan Marine by supplying customers with prostitutes (R1:67). Specifically, Delmonico alleged in this complaint that Crespo told people that DelMonico "had supplied the owner of a company doing business with Defendant DONOVAN, with prostitutes in a successful attempt to have that company take its account away from Defendant CRESPO and give it to Plaintiff DELMONICO." (R1:67). DelMonico claimed that this statement allegedly defamed him by imputing to him "criminal activity amounting to a felony" (R1:67).

In the Crespo litigation, attorney Traynor and his law firm, Akerman Senterfitt, represented Crespo's employer and co-defendant, Donovan Marine (R1:60 & n.4; SR:378 at 29, 384 at 54). Attorney Traynor repeated the allegations of the Crespo complaint to potential witnesses during interviews (SR:384-85 at 56-57, 60). He conducted these witness interviews as defense counsel while defending his clients in the pending Crespo litigation (SR:378 at 29, 384-85 at 54, 56-57, 60).

In this action, plaintiffs, DelMonico and his business, MYD Marine Distributor, Inc., sued attorney Traynor and his law firm (R1:1-10; A-B). Plaintiffs alleged that attorney Traynor's statements during witness interviews constituted defamation and tortious interference (A-B). Plaintiffs alleged that attorney Traynor had contacted one of MYD's former employees, some of MYD's business associates, and two of DelMonico's ex-wives (A-B:3-4). Attorney Traynor purportedly told them that "DelMonico had wrongfully taken a customer from his client by enticing his purchasing agent with prostitutes" or that DelMonico "was being prosecuted for prostitution." (A-B:3-4).

Attorney Traynor and the law firm moved for summary judgment based on the absolute 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) (R1:55-88; R2:318-30, 352-54). In his deposition, attorney Traynor acknowledged having interviewed prospective witnesses, but denied stating to anyone that DelMonico was being prosecuted for prostitution (SR:377 at 25, 378 at 29, 384-85 at 54, 56-60, 64). The motion for summary judgment essentially contended that the statements to a potential witness about pending litigation were immune from suit (R1:61; R2:320-21; SR:378 at 29, 384-85 at 54, 56-60, 64). The trial court granted final summary

judgment for the attorney and the law firm, concluding both were immune from suit under Levin (R1:186-88; R2:354-55).

Plaintiffs appealed and the Fourth District affirmed (R1:189-93; A-A:1-5). In the Fourth District, plaintiffs explicitly **conceded** that attorney Traynor's statements "were made during the course of a judicial proceeding, thus satisfying the first prong of the Levin, Middlebrooks test" (4IB:2 n. 2; see 4IB:10 n.6, 21). As a result of this concession, neither party briefed whether the statements were made in the course of a judicial proceeding (4IB; 4AB:6; 4RB:1, 3); thus, that specific issue was not before the Fourth District. Consistent with plaintiffs' concession, the Fourth District reasoned that the attorney's statements to potential witnesses "were made **in connection with**, and **during the course of, an existing judicial proceeding**" (A-A:2).

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-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)). The Fourth District held the attorney's statements had "some relation to the proceeding":

> **Because the statements complained of were made by the appellee [attorney Traynor] 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-A:3-4). This was the issue on appeal.

Plaintiffs filed this petition for discretionary review of the Fourth District's decision. Plaintiffs now argue for the first time that DelMonico expressly and directly 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 correctly concluded that an attorney defending a pending lawsuit has an absolute privilege to discuss the case with potential witnesses. In the underlying lawsuit, DelMonico had alleged that a business competitor's salesman,

Crespo, had defamed him by telling people in the marine industry that he got customers by supplying them with prostitutes. DelMonico then sued opposing counsel for defamation and tortious interference because he repeated these allegations to potential witnesses while defending the pending suit. The trial court granted summary judgment for the attorney and law firm based on the absolute litigation privilege. The Fourth District correctly affirmed.

This Court held in Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. United States Fire Insurance Co., 639 So. 2d 606 (Fla. 1994), that an absolute litigation privilege immunizes acts taken in the course of a judicial proceeding that have some relation to the judicial proceeding. In this Court, plaintiffs claim that the Fourth District's decision conflicts with the first prong of Levin because the attorney's statements to potential witnesses were not made in the course of a judicial proceeding. In the Fourth District, plaintiffs explicitly conceded that the statements had been made in the course of a judicial proceeding. Thus, plaintiffs waived this argument. This Court should discharge jurisdiction and decline to reach an unpreserved argument.

Even if this Court reaches the merits, an attorney's statements to potential witnesses regarding the defense of a pending suit are made in the course of the judicial proceedings. All the Florida decisions addressing this issue agree that the absolute

litigation privilege encompasses events that take place outside the courtroom, such as an attorney's private discussion with potential witnesses about the case. This Court should not limit the absolute litigation privilege to those actions that take place in a courtroom or while a witness is under oath. The majority of courts around the country agree that an attorney and potential witness must have the freedom to speak about pending litigation without fear of a retaliatory lawsuit. This promotes access to the court system and finality in litigation. This Court should approve the decision of the Fourth District.

ARGUMENT

THE ABSOLUTE LITIGATION PRIVILEGE IMMUNIZES AN ATTORNEY'S STATEMENTS TO POTENTIAL WITNESSES.

A. This Court should discharge jurisdiction because plaintiffs waived the argument that the attorney's statements were not made in the course of a judicial proceeding.

In this Court, plaintiffs' sole argument supporting jurisdiction is that the Fourth District's decision expressly and directly conflicts with Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. United States Fire Insurance Co., 639 So. 2d 606 (Fla. 1994), because the statements were not made in the course of a judicial proceeding. Plaintiffs failed to preserve this argument because they never raised it in the Fourth District.

In the Fourth District, plaintiffs **conceded** that the statements had been made in the course of a judicial proceeding (4IB:2 n.2, 10 n.6, 21). Plaintiffs specifically **conceded** that the attorney's statements "**were made during the course of a judicial proceeding, thus satisfying the first prong of the Levin, Middlebrooks test**." (4IB:2 n.2). Plaintiffs added that "we now **do not dispute that the false statements were made in the course of a judicial proceeding**." (4IB:10, n.6). Instead, plaintiffs argued that defendants had not satisfied Levin because the statements were not relevant to the judicial proceedings:

> In this case, **having now admitted that the statements were made in the course of a judical proceeding** (supra, p. 2, n. 1), **we focus on the second "relevancy" requirement**, and urge the Court to find, as a matter of law, that the false statements that DelMonico was being prosecuted for prostitution were neither relevant nor material to the underlying proceeding, and therefore were not protected by the absolute litigation privilege.

(4IB:21).

To preserve a basis for review in this Court, a party must make the specific legal argument in **both** the trial and appellate courts. See, e.g., State v. Fleming, 36 Fla. L. Weekly S50, S54 n.3 (Fla. Feb. 3, 2010); Sunset Harbour Condo. Ass'n v. Robbins, 914 So. 2d 925, 928 (Fla. 2005); Metro. Dade County v. Chase Fed. Hous. Corp., 737 So. 2d 494, 499 n.7 (Fla. 1999); Tillman v. State, 471 So. 2d 32, 35 (Fla. 1985).

Plaintiffs cannot seek review in this Court based on an argument never raised in the appellate court, let alone based on an issue they conceded. See Sunset Harbour Condo., 914 So. 2d at 928; Tillman, 471 So. 2d at 35. Because plaintiffs never presented the issue of whether the attorney's statements were made in the course of a judicial proceeding to the Fourth District, this Court cannot quash the decision on that basis.

The public policies of judicial economy and fairness compel this result. As this Court recently explained, "**[d]elay and an unnecessary use of the appellate process result** from a failure to cure early that which must be cured eventually." Companioni v. City of Tampa, 35 Fla. L. Weekly S738, S740 (Fla. Dec. 16, 2010); see also Castor v. State, 365 So. 2d 701, 703 (Fla. 1978) (discussing the policy rationale supporting the preservation requirement). The district court must be given an opportunity to decide the issue and possibly eliminate the need for Supreme Court review. For these reasons, this Court routinely refuses to address issues that have not been raised in or addressed by the district court. See, e.g., Sunset Harbour, 914 So. 2d at 928; Metro. Dade County, 737 So. 2d at 499 n.7; Tillman, 471 So. 2d at 35.

Requiring parties to raise an argument in the district court before seeking review in this Court also accords with the constitutional limits on this Court's jurisdiction. See

Art. V, § 3(b), Fla. Const.; State v. Barnum, 921 So. 2d 513, 522-23 (Fla. 2005). The only applicable basis for this Court's jurisdiction here is express and direct conflict with a decision of this Court or another district court. See, e.g., Art. V, § 3(b)(3), Fla. Const. Under article V of the Florida Constitution, in the vast majority of cases, district courts of appeal are the court of last resort. See, e.g., Barnum, 921 So. 2d at 522-23; Jenkins v. State, 385 So. 2d 1356, 1357-59 (Fla. 1980); Fla. R. App. P. 9.030 (Committee Notes, 1980 Amendment). Allowing a party to raise an argument for the first time in this Court violates this constitutional framework and would expand this Court's limited jurisdiction.

Because plaintiffs never raised this specific legal argument in the Fourth District, and, in fact, conceded the correctness of the trial court's ruling on this issue, this Court should discharge jurisdiction. In all events, this Court should not reverse the Fourth District's decision on the basis of an argument that plaintiffs never raised in that court.

B. An attorney's statements to potential witnesses while defending a pending lawsuit are absolutely privileged because they are made "in the course of" the litigation.

If this Court reaches the merits of this issue, it should hold that the Fourth District correctly concluded that an attorney's statements to potential witnesses while

defending a pending lawsuit are absolutely privileged. The only issue plaintiffs asked the Fourth District to decide was whether the statements were relevant to the pending Crespo litigation. It correctly concluded that they were.

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**." 639 So. 2d at 608. This rule of absolute immunity applies "no matter how false or malicious the statements may be, so long as the statements are relevant to the subject of inquiry." Id. at 607. 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. at 608.

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). The decision in Echevarria held that the Levin rule of absolute immunity bars both statutory and common law causes of action. See id. The absolute litigation privilege applies if the acts "occur[] during the course of a judicial proceeding . . . so long as the act has some relation to the proceeding." Id. at 384 (quoting Levin, 639 So.

2d at 608). This Court emphasized that "[i]t is the perceived necessity for candid and unrestrained communications in those proceedings, free from the threat of legal actions predicated upon those communications, that is at the heart of the rule." Id. at 384.

All Florida decisions construing the absolute privilege agree that an attorney's actions during "the course of a judicial proceeding" extend beyond the formal proceedings in the courtroom and the court file (A-A:2-5). See Ross v. Blank, 958 So. 2d 437, 441 (Fla. 4th DCA 2007); Fariello v. Gavin, 873 So. 2d 1243, 1244 (Fla. 5th DCA 2004); Stucchio v. Tincher, 726 So. 2d 372, 374-75 (Fla. 5th DCA 1999); Sussman v. Damian, 355 So. 2d 809, 810-11 (Fla. 3d DCA 1977); see also Jackson v. BellSouth Telecomms., 372 F.3d 1250, 1276 (11th Cir. 2004) ("Florida law suggests that the Florida courts would agree that 'events taking place outside the courtroom during discovery or settlement discussions are no less an integral part of the judicial process, and thus deserving of the protection of the [litigation] privilege, than in-court proceedings."). These decisions reason that "'[s]tatements made 'in connection with' or 'in the course of' an existing judicial proceeding are protected by an absolute immunity, **even if they are not necessarily made under oath**.'" Ross, 958 So. 2d at 441 (quoting Fariello, 873 So. 2d at 1244).

The decision in Stucchio is closely analogous and also involves out-of-court statements between an attorney and a potential witness. 726 So. 2d at 374-75. The potential witness made allegedly defamatory statements while an attorney interviewed him to prepare for trial. Id. at 373. The Fifth District held the witness's statements were absolutely privileged because they were made "'in connection with' or 'in the course of' an existing judicial proceeding." Id. at 374.

Other decisions have explored the absolute litigation privilege in the context of statements made outside the courtroom and formal judicial proceedings. For example, one decision involved a father in a dissolution action who sued a psychologist for defamation. See Ross, 958 So. 2d at 441. The psychologist had told a custody evaluator and guardian ad litem that the father met the criteria for a pedophile or sex abuser. See id. The decision in Ross held that an absolute litigation privilege immunized the psychologist's statements, even though the statements had not been made while the psychologist was under oath. See id. As the court reasoned, "[S]tatements made 'in connection with' or 'in the course of' an existing judicial proceeding are protected by absolute immunity, even if they are not necessarily made in court or under oath." Id.

The decision in Sussman provides another example of a court applying the absolute litigation privilege to statements made outside the context of the formal judicial proceedings or court filings. 355 So. 2d at 810-12. In Sussman, after a hearing, an attorney made a defamatory statement to opposing counsel in a courthouse hallway and elevator. Id. at 810-11. The decision reasoned that "defamatory words published by lawyers during the due course of a judicial procedure are absolutely privileged and cannot form the basis for a defamation action so long as the statements uttered are connected with, or are relevant or material to the cause at hand or subject of inquiry no matter how false or malicious such statements may in fact be." Id. at 811. The privilege "extends to . . . conversations between opposing counsel in a pending civil action in which the attorney represents one of the parties involved." Id. at 811. Importantly, this Court cited Sussman when establishing the boundaries of the privilege in Levin, 639 So. 2d at 608.

In line with these decisions, the Fourth District 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-A:2-3) (quoting Levin, 639 So. 2d at 608). The statements in this case "occurred during potential witness interviews, were performed by [Traynor] in his role as an attorney, and were made purportedly for the purpose of defending his client

during pending and active litigation" (A-A:2). The court concluded that "[i]nterviewing a witness in preparation for and connected to pending litigation is absolutely privileged." (A-A:3).

In the underlying Crespo complaint, DelMonico made very specific allegations regarding prostitution (R1:67; A-B:3-5). DelMonico alleged the defendant, Crespo, told people in the marine industry that DelMonico "had supplied the owner of a company doing business with Defendant DONOVAN, with prostitutes in a successful attempt to have that company take its account away from Defendant CRESPO and give it to Plaintiff DELMONICO" (R1:67). DelMonico also alleged Crespo's statement defamed him because it "imputed to Plaintiff DELMONICO, criminal activity amounting to a felony" (R1:67).

In this action, DelMonico and his business, MYD Marine, claimed that attorney Traynor defamed them by repeating these allegations during interviews with potential witnesses in the Crespo case (A-B:3-17; A-A:1-2). The statements attorney Traynor made while interviewing these potential witnesses were related to his role as defense counsel in that case (SR:378 at 29, 384 at 54). He explained to these prospective witnesses that his client was being sued for a lot of money in a lawsuit claiming that his client's sales staff had accused DelMonico of involvement with prostitution to

procure business (SR:384-86 at 56-57, 60, 64). Attorney Traynor described the allegedly defamatory statements that were the subject matter of the lawsuit he was defending--prostitution (SR:385-87 at 59-60, 64-65). Attorney Traynor denied stating that DelMonico was being prosecuted for prostitution (SR:377 at 25). But even if he had made these statements, they were directly related to the subject of the lawsuit.

An attorney defending a lawsuit alleging defamation must be allowed to explore available defenses without fear of a retaliatory lawsuit. Plaintiffs filed nothing to dispute attorney Traynor's deposition testimony that he was defending Donovan Marine in the Crespo litigation when the allegedly defamatory statements were made, a fact they conceded in the Fourth District (SR:377 at 25-26, 378 at 29, 384 at 54-55, 386-87 at 64-65; 4IB:2 n.2, 10 n.6, 21). As discussed above in point I.A, on appeal in the Fourth District, plaintiffs argued only that Traynor's statements were not related to the judicial proceeding (4IB:15, 18-23; 4RB:3-10). The Fourth District's decision correctly reasoned that "[c]learly, speaking to potential witnesses during the pendency of litigation is of 'some relation to the proceeding'" under Levin (A-A:3).

This Court should not limit the privilege in Levin to actions that take place in the courtroom. An attorney's defense of pending litigation includes many necessary steps that take place outside the courtroom, such as interviewing potential witnesses. An

attorney's private discussions with potential witnesses about the issues in a pending case are "in the course of" the judicial proceedings and immune from suit.

C. Public policy supports an absolute privilege when an attorney defending a pending suit interviews potential witnesses.

The decisions in DelMonico and Stucchio follow the public policy this Court established in Levin and Echevarria. This Court explained in Levin 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." 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-A:3-5). This would have a chilling effect on litigation (A-A:3-5). As explained in Stucchio, if the rule of absolute litigation immunity did not apply,

> witnesses would be subjected to retaliatory law suits for statements made pre-deposition. This might cause many witnesses to refuse to talk to lawyers without first being

> subpoenaed. Proper preparation for depositions would thus become difficult, if not impossible.

726 So. 2d at 374.

Illustrating this principle, in Ross a psychologist faced personal liability for defamation after voicing concern to a custody evaluator and guardian ad litem in a dissolution case that a father might be a pedophile or sexual predator. 958 So. 2d at 441. The absolute litigation privilege protected the psychologist even though these statements had been made outside the formal courtroom. The court system needs potential witnesses, especially those with information related to sensitive issues regarding potential child abuse, to come forward without fear of civil liability.

Plaintiffs contend that this Court should decline to follow Levin because, under its holding, parties to lawsuits are deprived of notice and an opportunity to be heard before an opposing attorney interviews a potential witness (IB:10, 14). If plaintiffs were correct, attorneys could never gather information about a pending lawsuit without a subpoena. Any statement by an attorney or a potential witness made outside the courtroom or without the protection of a subpoena would subject both to potential personal liability. This Court should reject plaintiffs' countervailing policy argument,

consistent with the courts in the majority of states that have considered this issue as discussed in point I.E, supra.

D. An attorney's statements to a potential witness about pending litigation are subject to an absolute privilege under Levin, not a qualified privilege.

Tellingly, plaintiffs' primary authorities are the **dissents** in DelMonico and Stucchio (IB:9-10). Similar to these dissents, plaintiffs ask this Court to adopt a qualified privilege under the reasoning of Fridovich v. Fridovich, 598 So. 2d 65, 69 (Fla. 1992). The decision in Fridovich is distinguishable and does not support a qualified privilege here.

In Fridovich, a son shot and killed his father in what the police initially determined to be an accidental shooting. He brought an action against his siblings, who conspired to have him criminally convicted for his father's death. The conspiracy included buying a stress analyzer to see which sibling could lie the most convincingly and presenting false testimony in a criminal trial. This Court framed the issue as "whether defamatory statements made to the authorities **prior to** the initiation of criminal proceedings are absolutely privileged as within the course of judicial proceedings." Id. at 66 (emphasis in original). This Court reasoned that the siblings'

"carefully orchestrated plots to do harm are not lightly protected under the umbrella of absolute immunity." Id. at 68.

This Court in Fridovich considered the interests of people "wishing to report events concerning crime and balance[d] society's interest in detecting and prosecuting crime with a defendant's interest not to be falsely accused." 598 So. 2d at 69. This Court found "no benefit to society or the administration of justice in protecting those who make intentionally false and malicious defamatory statements to the police." Id. This tipped the scale to favor the rights of private individuals to be free of false and defamatory accusations of criminal conduct. See id. As a result, this Court applied a qualified privilege to "defamatory statements voluntarily made by private individuals to the police or state's attorney prior to the institution of criminal charges." Id. (footnote omitted).

The public policy that weighed so heavily in Fridovich--discouraging people from making false police reports--does not apply here. Unlike Fridovich, the statements at issue here are attributed to an attorney who was actively defending a **pending** lawsuit (SR:378 at 29, 384 at 54). The attorney made the statements to potential witnesses in a **civil** case (SR:384-86 at 56-57, 60, 64; R1:67). Attorney Traynor never attempted to initiate criminal proceedings against DelMonico. Instead,

as in Levin, the balancing of the policies weighs in favor of allowing attorneys to communicate freely with potential witnesses without the shadow of personal civil liability. This promotes the right of all litigants to access the court system. Witnesses can come forward with relevant information necessary for the courts to decide issues. Attorneys are free to zealously represent their clients within the bounds of professional responsibility. As this Court recognized in Levin, attorneys who exceed these bounds face sanctions from the trial court and discipline by The Florida Bar. 639 So. 2d at 608-09.

E. The weight of authority in other jurisdictions holds that an attorney's statements to a potential witness are made in the course of the judicial proceeding.

To avoid a chilling effect on litigation, courts have recognized this common law privilege for over 400 years. See Simpson Strong-Tie Co. v. Stewart, Estes & Donnell, 232 S.W.3d 18, 22 (Tenn. 2007); T. Leigh Anenson, Absolute Immunity from Civil Liability: Lessons for Litigation Lawyers, 31 Pepp. L. Rev. 915, 918-19 (2004). All states except two have adopted this privilege as set forth in Restatement (Second) of Torts, section 586 (1977). See Anenson, supra, at 917 & n.7.

As the Restatement provides, attorneys have a broad, absolute privilege to make defamatory statements in the course of judicial proceedings:

> An **attorney** at law is **absolutely privileged to publish defamatory matter** concerning another in communications preliminary to a proposed judicial proceeding, **or in the institution of, or during the course and as a part of, a judicial proceeding in which he participates as counsel**, if it has some relation to the proceeding.

Restatement (Second) of Torts § 586. The commentary to this section explains that the privilege is based in the "public policy of securing to attorneys as officers of the court the utmost freedom in their efforts to secure justice for their clients." Id. cmt. a. It applies not only "in the conduct of litigation before a judicial tribunal, but **in conferences and other communications** preliminary to the proceeding." Id.

Numerous federal courts and courts from other states have recognized that the absolute litigation privilege applies to an attorney's discussions about pending litigation with potential witnesses or interested third parties. See Simon v. Navon, 951 F. Supp. 279, 282-83 (D. Me. 1997) (holding that an attorney's letters to third parties who were interested in the lawsuit were subject to the absolute privilege); Hoover v. Van Stone, 540 F. Supp. 1118, 1122-23 (D. Del. 1982) (explaining that statements made during "conferences between witnesses and counsel" are protected by the absolute privilege based on "an unimpeachable premise that events taking place outside the courtroom during discovery . . . are no less an integral part of the judicial process, and thus deserving the protection of the privilege, than in-court proceedings"); Silberg

v. Anderson, 786 P.2d 365, 370 (Cal. 1990) (analyzing a similar statutory privilege and observing that "witnesses should be free from the fear of protracted and costly lawsuits which otherwise might cause them either to distort their testimony or refuse to testify altogether"); Dolan v. Von Zweck, 477 N.E.2d 200, 201-02 (Mass. App. Ct. 1985) (holding that a psychiatrist's letter to opposing counsel about proposed expert testimony was absolutely privileged); Hawkins v. Harris, 661 A.2d 284, 289-90 (N.J. 1995) (explaining the privilege "is not limited to statements made in a courtroom during trial" and "also protects a person while engaged in a private conference with an attorney regarding litigation"); Jones v. Coward, 666 S.E.2d 877, 879-80 (N.C. Ct. App. 2008) (holding that "an attorney's statement or question to a potential witness regarding a suit in which that attorney is involved, whether preliminary to trial, or at trial, is privileged and immune from civil action for defamation" if it was related to the controversy); Russell v. Clark, 620 S.W.2d 865, 868-70 (Tex. Civ. App. 1981) (adopting Restatement section 586 and holding that an attorney's letter to the plaintiff's investors regarding a lawsuit was absolutely privileged).

The absolute privilege frees "lawyers to render candid and zealous advice and representation to their clients without fear of retaliatory harassment from their adversaries." Simpson Strong-Tie Co. v. Stewart, Estes & Donnell, 232 S.W.3d 18, 27 (Tenn. 2007). This zealous representation promotes finality of judgments by exposing

any bias or problems with a witness' testimony during the original trial. See Silberg, 786 P.2d at 370. An attorney's defense of pending litigation extends beyond the halls of the courtroom. See Russell, 620 S.W.2d at 868. An attorney must "often resort to ingenious methods to obtain evidence; thus he must not be hobbled by the fear of reprisal by actions for defamation." Id. Limiting the absolute privilege to the courtroom and filed pleadings would "inhibit potential parties or witnesses from coming forward and impede the investigatory ability of litigants or potential litigants." Simpson, 232 S.W.3d at 27; see Hoover, 540 F. Supp. at 1122-23.

The out-of-state cases plaintiffs cite do not support their position. Plaintiffs mischaracterize Hearst Corp. v. Skeen, 130 S.W.3d 910, 925-26 (Tex. App. 2004), rev'd other grounds, 159 S.W.3d 633 (Tex. 2005), as limiting the privilege to court proceedings (IB:12-13). Plaintiffs' quotation omitted the operative word "including" (IB:13). The decision actually describes the privilege as "**including** 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." Id. The decision held that the litigation privilege does not apply to comments in the press. See id. at 915, 925-26. This is because, unlike potential witnesses, members of the press are third parties unconnected to the judicial proceeding. The decision does not recede from Russell, where the Texas Court of Civil Appeals squarely held that an

attorney's out-of-court letter to the plaintiff's investors was absolutely privileged. 620 S.W.2d at 868-69.

The trial-level New Jersey case plaintiffs cite involved a different issue--whether a witness attending a deposition was immune from service of process (IB:13). See Marxe v. Marxe, 558 A.2d 522, 523-24 (N.J. Super. Ct. Ch. Div. 1989). A later case from the New Jersey Supreme Court established that the litigation privilege "protects a person while engaged in a private conference with an attorney regarding litigation." Hawkins, 661 A.2d at 289-90.[2]

The remaining out-of-state case plaintiffs cite is not persuasive because it involves the qualified privilege afforded to investigative activities by government officials (IB:11-12). See Auriemma v. Montgomery, 860 F.2d 273, 278 (7th Cir. 1988). In Auriemma, a city hired attorneys and an investigative firm to defend an

[2] It should be noted that the decision in Hawkins suggests that statements regarding a party's infidelity may not be relevant to the proceeding. See id. at 290. Here, however, DelMonico's underlying complaint was premised upon allegations regarding his obtaining prostitutes to promote business (R1:67; A-B:3-5). As discussed below in part I.F., supra, the subject of the statements attributed to Traynor fit comfortably within the broad definition of relevancy.

employment discrimination lawsuit. The attorneys and investigative firm violated federal law by obtaining credit reports to embarrass and intimidate the plaintiffs. See id. at 274-75. The court reasoned that "investigative activities by attorneys or other executive officials are generally not entitled to absolute immunity," citing Mitchell v. Forsyth, 472 U.S. 511, 521-24 (1985). See Auriemma, 860 F.2d at 278.

As the cited Mitchell decision explained, there is a distinction between the absolute immunity applicable during litigation and the qualified privilege for government officials. 472 U.S. at 521-24. While "[t]he immunities for judges, prosecutors, and witnesses established by our cases have firm roots in the common law," there is no analogous common law absolute privilege for government officials. Id. at 521. The reason is that "[t]he judicial process is an arena of open conflict, and in virtually every case there is, if not always a winner, at least one loser" who may retaliate by bringing a lawsuit. Id. at 521-22. A government official, in contrast, does not face the "same obvious risks of entanglement in vexatious litigation." Id. at 521. Thus, the discussion of the qualified privilege for government officials in Auriemma is not persuasive. To the extent it could be read as applying a qualified privilege to an attorney's investigative activities, Auriemma is out-of-step with the majority of courts addressing this issue, discussed above.

F. The attorney's statements were relevant to the judicial proceedings.

Plaintiffs make a token argument that the statements attributed to Traynor had no relation to the judicial proceedings because they were intentional lies (IB:14). This Court has already squarely rejected that argument in Levin. The rule of absolute immunity applies "no matter how false or malicious the statements may be, so long as the statements are relevant to the subject of inquiry." Levin, 639 So. 2d at 607. Florida courts apply a relaxed relevancy requirement. See, e.g., Hope v. Nat'l Alliance of Postal & Fed. Employees, Jacksonville Local No. 320, 649 So. 2d 897, 901 (Fla. 1st DCA 1995). As the First District explained:

> [C]ourts have **not imposed a strict relevancy test** in determining whether a statement made in the judicial process is entitled to immunity; rather, courts provide for absolute immunity if a statement is made during the course of the proceeding and '**has some relation to the proceeding**.'. . . We, therefore, must analyze the statements . . . in accordance with the **relaxed relevancy standard** utilized in the restatement in order to determine if they were absolutely privileged.

Id. (quoting Levin, 639 So. 2d at 608).

Plaintiffs also erroneously suggest that the statements they attribute to attorney Traynor were not relevant because they amount to criminal accusations. "The fact that the alleged defamation statement involved an accusation of criminal acts does not mean that it was not relevant to the subject of the grievance." Hope, 649 So. 2d at 901.

Here, attorney Traynor testified at deposition that his statements to potential witnesses were in furtherance of his active defense of the pending Crespo litigation (SR:377 at 25-26, 378 at 29, 384-85 at 54, 56-57). He outlined to prospective witnesses the allegations of the Crespo complaint he was defending--that Crespo had defamed DelMonico by stating he had procured prostitutes for customers to get business (SR:385 at 60, 386-87 at 64-65). The complaint specifically alleged that Crespo had imputed "criminal activity amounting to a felony" to DelMonico (R1:67).

An attorney defending a defamation lawsuit has an absolute privilege to speak privately to potential witnesses to determine whether they have knowledge of the facts that support a defense of truth or other defenses. Plaintiffs' novel suggestion--first raised in this Court--that both the attorney and witness should face potential liability for defamation merely because they did not invite opposing counsel to listen in during witness interviews makes no sense legally or factually. It would chill the ability of attorneys to speak with potential witnesses without a subpoena and increase the cost of litigation.

The Fourth District correctly concluded that attorney Traynor's statements to the potential witnesses in the Crespo litigation were related to those proceedings and

absolutely privileged. This Court should approve the decision of the Fourth District in DelMonico.

CONCLUSION

This Court should discharge jurisdiction as improvidently granted because plaintiffs conceded in the Fourth District that the statements had been made in the course of the judicial proceedings. The issue is unpreserved. In the alternative, this Court should approve the decision of the Fourth District.

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