

Florida Supreme Court Limits Use of Absolute Privilege as a Defense

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Mar 20, 2013

[*DelMonico v. Traynor*, ___ So. 3d ___, 2013 WL 535451 \(Fla. 2013\)](#)

Brief Summary

The Florida Supreme Court held that the absolute privilege did not extend to an attorney's alleged defamatory *ex parte*, out-of-court statements to potential, nonparty witnesses, limiting prior Florida cases. But the statements were nevertheless connected with or related to the subject of the underlying suit such that a qualified privilege applied.

Complete Summary

The president of a business competitor (the "Company President") filed claims for defamation and tortious interference against an attorney who, while defending his client in an underlying action brought by the business competitor, allegedly made false statements about the Company President to various individuals the attorney had contacted as potential witnesses in that case. The trial court entered summary judgment in the attorney's favor, finding that the statements were made in the course of judicial proceedings and thus were absolutely privileged. The appellate court affirmed, but the Florida Supreme Court reversed and remanded.

The issue before the Court was whether Florida's absolute privilege, which shields judges, counsel, parties and witnesses from liability for alleged defamatory statements made in the course of a judicial proceeding, extends to statements made by an attorney during *ex parte*, out-of-court questioning of a potential, nonparty witness while investigating matters connected to a pending lawsuit. In *DelMonico v. Traynor*, 50 So. 3d 4 (Fla. 2010), the appellate court relied on the Florida Supreme Court's decision in *Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. United States Fire Insurance Co.*, 639 So. 2d 606 (1994), to hold that regardless of the circumstances under which an attorney interviews a potential witness in preparation for pending litigation, statements made during that

interview are absolutely privileged if the statements bear some relation to or connection with the pending matter.

The Florida Supreme Court reversed and remanded, holding that Florida's absolute privilege was never intended to sweep so broadly to provide absolute immunity from liability to an attorney for alleged defamatory statements the lawyer makes during *ex parte*, out-of-court questioning of a potential, nonparty witness in the course of investigating a pending lawsuit. The Court concluded that a qualified privilege instead should apply to *ex parte*, out-of-court statements, so long as the alleged defamatory statements bear some relation to or connection with the subject of inquiry in the underlying lawsuit. A qualified privilege requires the plaintiff to establish express malice. However, where the statements bear no relation to or connection with the subject of inquiry in the underlying lawsuit, the defendant is not entitled to the benefit of any privilege — either absolute or qualified.

Here, in the underlying defamation action, the Company President sued his own competitors, alleging that they had defamed him by telling a number of his clients that, in a successful attempt to lure customers away from the competitors, he had supplied prostitutes to the owner of a company doing business with the competitor.

The attorney was retained to defend the underlying defamation case. The Company President alleged that the attorney made numerous false statements about him to various individuals the attorney had contacted as potential witnesses in the underlying case. For example, the Company President alleged the attorney contacted the Company President's ex-wives and told them that the Company President had wrongfully taken a customer by enticing the customer's purchasing agent with prostitutes, and that the Company President was "being prosecuted for using prostitutes to get some business."

After carefully reviewing the absolute privilege and its evolution, the Florida Supreme Court noted that:

This absolute immunity resulted from the balancing of two competing interests: the right of an individual to enjoy a reputation unimpaired by defamatory attacks versus the right of the public interest to a free and full disclosure of facts in the conduct of judicial proceedings. In determining that the public interest of disclosure outweighs an individual's right to an unimpaired reputation, courts have noted 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. Although the immunity afforded to defamatory statements may indeed bar recovery for bona fide injuries, the chilling effect on free testimony

would seriously hamper the adversary system if absolute immunity were not provided.

Here, however, the Florida Supreme Court agreed with the dissenting opinion of Justice Martha Warner from the appellate court that alleged defamatory statements should be subject only to a qualified privilege when made during the course of legal representation, but outside the safeguards of a legal proceeding (such as a trial or deposition), where both parties are not present and there is no opportunity to be heard.

Significance of Opinion

This decision is important because it significantly limits the use of absolute privilege as a defense to defamation claims against attorneys and others involved in judicial proceedings, where the alleged statements are *ex parte* and occur out of court (or a deposition).

For further information, please contact [Terrence P. McAvoy](#).

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