

SUPREME COURT OF FLORIDA

DelMonico v. Traynor

116 So. 3d 1205 (Fla. 2013) · Decided February 14, 2013

SUMMARY

The Florida Supreme Court held that an attorney’s allegedly defamatory statements made during ex parte, out-of-court interviews of potential nonparty witnesses in connection with pending litigation are not protected by an absolute privilege. Instead, a qualified privilege applies when the statements relate to the subject of inquiry, requiring the plaintiff to prove express malice; statements unrelated to the inquiry receive no privilege. The Court quashed the Fourth District Court of Appeal’s contrary decision.

CASE DETAILS

COURT	Supreme Court of Florida
WRITING FOR THE COURT	Pariente, J.; Quince, J.; Labarga, J.; Perry, J.; Lewis, J.; Canady, J.; Polston, C.J.
JURISDICTION	Florida
DECIDED	February 14, 2013
DISPOSITION	quashed
PROCEDURAL POSTURE	The Supreme Court of Florida reviewed a conflict decision of the Fourth District Court of Appeal affirming summary final judgment for an attorney and his law firm in defamation and tortious-interference claims. The Court exercised conflict jurisdiction based on the district court's misapplication of Florida Supreme Court precedent.
STANDARD OF REVIEW	De novo review of the pure legal question concerning the scope of Florida's absolute privilege.
PRECEDENTIAL VALUE	Binding precedent from the Supreme Court of Florida
PARTIES	DelMonico, MYD Marine Distributor, Inc. v. Traynor, Traynor's law firm

TOPICS

- defamation
- civil procedure
- summary judgment
- torts

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether Florida's absolute judicial privilege protects alleged defamatory statements made by an attorney during ex parte, out-of-court interviews of potential nonparty witnesses while investigating a pending lawsuit.
2. Whether a qualified privilege applies to such statements when they are related or connected to the subject of inquiry in the underlying litigation.
3. Whether the defendants were entitled to summary judgment based on absolute privilege.

HOLDINGS

1. Florida's absolute privilege does not extend to alleged defamatory statements made by an attorney during ex parte, out-of-court questioning of a potential nonparty witness in the course of investigating a pending lawsuit.
2. A qualified privilege applies to alleged defamatory statements made by an attorney during ex parte, out-of-court questioning of a potential nonparty witness during investigation of a pending lawsuit, so long as the statements bear some relation to or connection with the subject of inquiry in the underlying lawsuit.
3. The alleged statements concerning DelMonico's use of prostitution were related to the subject of inquiry in the underlying defamation action, so Traynor and his law firm could assert a qualified privilege; DelMonico and MYD were required on remand to prove express malice.

KEY QUOTATIONS

"We hold that Florida's absolute privilege, as this Court has developed the common law doctrine, was never intended to sweep so broadly as to provide absolute immunity from liability to an attorney for alleged defamatory statements the attorney makes during ex-parte, out-of-court questioning of a potential, nonparty witness in the course of investigating a pending lawsuit." (at 1209)

"Once the trial court is satisfied as a matter of law that the alleged defamatory statements, assuming they were made, are connected with or related to the subject of inquiry in the underlying lawsuit, the defendant to a defamation action is entitled to assert a qualified privilege, placing the burden upon the plaintiff to then prove the additional element of express malice." (at 1219)

"Based on the foregoing, we hold that Florida's absolute privilege does not extend to statements made by an attorney during ex-parte, out-of-court questioning of a potential, nonparty witness in the course of investigating a pending lawsuit." (at 1220)

FACTUAL BACKGROUND

Attorney Arthur Rodgers Traynor, Jr. represented defendants in an underlying defamation action alleging that DelMonico had used prostitutes to lure business away from a competitor. While investigating that case, Traynor allegedly made statements to DelMonico's former spouses, former employees, and business associates that DelMonico was being prosecuted for prostitution or had used prostitution to obtain business. DelMonico and

MYD alleged that the statements were false and caused the loss of MYD's exclusive distributorship and substantial business losses.

PROCEDURAL HISTORY

DelMonico and MYD sued Traynor and his law firm over allegedly defamatory statements made during Traynor's informal interviews of potential witnesses in a pending defamation action. The trial court entered summary final judgment for the defendants, concluding that the statements were absolutely privileged under Florida law. The Fourth District affirmed, holding that statements made while interviewing a witness in preparation for and connected to pending litigation were absolutely privileged. The Supreme Court of Florida quashed the Fourth District's decision and remanded for further proceedings under a qualified-privilege framework.

DISPOSITION

quashed

REMAND INSTRUCTIONS

The case was remanded for further proceedings. The defendants may assert a qualified privilege because the alleged statements were related to the subject of inquiry, and DelMonico and MYD must develop and prove the factual elements necessary to overcome that privilege, including falsity and express malice.

CASES CITED

- DelMonico v. Traynor, 50 So. 3d 4 (Fla. 4th DCA 2010)
- Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. United States Fire Insurance Co., 639 So. 2d 606 (Fla. 1994)
- Wallace v. Dean, 3 So. 3d 1035 (Fla. 2009)
- Bosem v. Musa Holdings, Inc., 46 So. 3d 42 (Fla. 2010)
- Myers v. Hodges, 53 Fla. 197, 44 So. 357 (1907)
- Fridovich v. Fridovich, 598 So. 2d 65 (Fla. 1992)
- Echevarria, McCalla, Raymer, Barrett & Frappier v. Cole, 950 So. 2d 380 (Fla. 2007)
- Robertson v. Industrial Insurance Co., 75 So. 2d 198 (Fla. 1954)
- Ange v. State, 98 Fla. 538, 123 So. 916 (1929)
- State ex rel. Giblin v. Sullivan, 157 Fla. 496, 26 So. 2d 509 (1946)
- Budd v. J.Y. Gooch Co., 157 Fla. 716, 27 So. 2d 72 (1946)
- Taylor v. Alropa Corp., 138 Fla. 137, 189 So. 230 (1939)
- Fisher v. Payne, 93 Fla. 1085, 113 So. 378 (1927)
- Stewart v. Codrington, 55 Fla. 327, 45 So. 809 (1908)
- Anderson v. Shands, 570 So. 2d 1121 (Fla. 1st DCA 1990)
- Nodar v. Galbreath, 462 So. 2d 803 (Fla. 1984)

- Hope v. National Alliance of Postal & Federal Employees, Jacksonville Local No. 320, 649 So. 2d 897 (Fla. 1st DCA 1995)

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