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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
SECOND DISTRICT

AGM INVESTORS, LLC

Appellant,

DCA CASE NO. 2D14-4704
L.T. CASE NO. 12-3687CA

v.

BUSINESS LAW GROUP, P.A., BRUCE M. RODGERS, MICHAEL H. CASANOVER, BRANDON R. BURG

Appellees.
____________________________/

ANSWER BRIEF ON THE MERITS FOR APPELLEES, BUSINESS LAW GROUP, P.A., BRUCE M. RODGERS, MICHAEL H. CASANOVER, AND BRANDON R. BURG

ON REVIEW FROM THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT IN AND FOR PASCO COUNTY, FLORIDA

Jacob A. Brainard, Esq.
Scott C. Davis, Esq.
Business Law Group, P.A.
301 West Platt Street, #375
Tampa, Florida 33606
E-mail: JBrainard@blawgroup.com
Telephone: 813.379.3804 Ext. 657

Attorneys for the Appellees

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STANDARD OF REVIEW

The trial court's granting of summary judgment is reviewed under the *de novo* standard. *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000).

NOTE ON CITATIONS TO THE RECORD

Throughout this brief, the Appellant, AGM Investors, LLC will be referred to as "AGM." The Appellees, Business Law Group, P.A. ("BLG"), Bruce M. Rodgers ("Mr. Rodgers"), Michael H. Casanover ("Mr. Casanover"), and Brandon R. Burg ("Mr. Burg"), will collectively be referred to as the "BLG Appellees." Finally, Glendale Villas Condominium Association, Inc. will be referred to as the "Association." When citing to the record, the BLG Appellees will refer to R. Volume Number:Page Number (e.g. R. VI:1100). Where appropriate, the appendix to the initial brief will be cited as App. Item Number:Page Number (e.g. App. 10:7). Finally, for citations to the transcript of the March 31, 2014 hearing, the citation will include both the citation to the record and the page of the transcript – e.g. R. V:1007 (Tr. 1).

ISSUES

1. Whether the trial court correctly held that the BLG Appellees are protected by the litigation privilege
2. Whether the trial court correctly held no genuine issues of material fact existed between the parties and that the BLG Appellees were entitled to judgment as a matter of law.

SUMMARY OF ARGUMENT

This action involves a dispute over the application of the litigation privilege. The dispute arose over a disagreement regarding AGM's liability for past-due assessments to the Association. After the dispute over assessment liability ripened into a foreclosure action, AGM initiated collateral litigation against each of the BLG Appellees, claiming slander and abuse of process. The BLG Appellees moved for summary judgment, arguing that the litigation privilege protected the filing of all of the claims of lien. The trial court found in favor of the BLG Appellees, holding that the litigation privilege barred suit against them.

AGM argues that the fourth and fifth claims of lien were not protected by the litigation privilege. Notably, in its initial brief, AGM does not attack the filing of the first, second, or third claims of lien. Mr. Rodgers and Mr. Casanover only had a part in filing those claims of lien and no part in filing the fourth and fifth claims. For these two, AGM has failed to show any reversible error, and this Court should affirm on those grounds. *See Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150, 1152 (Fla. 1979). Alternatively, Mr. Rogers' and Mr. Casanover's conduct are protected by the litigation privilege, and this Court should likewise affirm.

The fourth and fifth claims of lien were part of a litigation proceeding and are thus protected by the litigation privilege. *Levin, Middlebrooks, Mable, Thomas,*

Mayes & Mitchell, P.A. v. U.S. Fire Ins. Co., 639 So. 2d 606, 608 (Fla. 1994) (holding that statements made during the course of a judicial or quasi-judicial proceeding are absolutely protected from collateral attack). AGM argues that because the Association could not prevail in a subsequent law suit, the litigation privilege does not apply. AGM asks this Court to change the litigation privilege to require that the actions be part of a valid and successful judicial proceeding, a position that has far-reaching consequences in encouraging collateral litigation of the very kind that the litigation privilege is intended to avoid.

AGM also argues that the BLG Appellees were not authorized to file the fourth and fifth claims of lien on behalf of the Association, in part, because BLG withdrew as litigation counsel. Claims regarding lack of authorization belong to the Association and not third-party AGM. In fact, whether the BLG Appellees were authorized to act for the Association in filing the fourth and fifth claims of lien is the subject of a still-pending malpractice action in the trial court.

Finally, AGM suggests that outstanding factual issues remain regarding whether or not the BLG Appellees acted with express malice. Based upon the pleadings and record evidence, the trial court found that the BLG Appellees met their burden for summary judgment. Once the movant meets its burden at summary judgment, the burden of showing a genuine issue of material fact shifts to the non-moving party. *Holl v. Talcott*, 191 So. 2d 40, 43-44 (Fla. 1966). AGM failed to

produce any evidence that created a factual question on whether the BLG Appellees acted with express malice. Since AGM failed to meet its burden at summary judgment, the trial court correctly entered final judgment in favor of the BLG Appellees, and this Court should affirm.

ARGUMENT

This action arises out of a dispute regarding the application of the litigation privilege. AGM contends that the trial court erred in applying the privilege to the BLG Appellees either as an absolute privilege or a qualified privilege. Additionally, AGM argues that factual issues remain surrounding whether the BLG Appellees acted with express malice. Initial Brief 31-34. For reasons stated *infra*, the trial court correctly entered summary judgment in favor of the BLG Appellees by applying the litigation privilege and finding that no genuine issues of material fact existed between the parties.

Underlying the entire dispute is a difference in opinion regarding the application of section 197.552, Florida Statutes, to condominium assessment debt under section 718.116, Florida Statutes. While AGM suggests that the law applying to the dispute is long-established, it was not until March 2014 that a district court, the Fourth District, directly addressed the apparent conflict between the two statutes in *A to Z Properties, Inc. v. Fairway Palms II Condominium Ass'n, Inc.*, 137 So. 3d 453 (Fla. 4th DCA 2014) (holding that assessments under section 718.116 do not survive a tax deed sale). This Court addressed a similar, yet not directly applicable, controversy six months earlier in *Cricket Properties, LLC v. Nassau Pointe at Heritage Isles Homeowners Ass'n, Inc.*, 124 So. 3d 302 (Fla. 2d DCA 2013) (holding that a tax deed extinguishes pre-tax deed assessments owed

and secured under chapter 720). While perhaps analogous, the jurisprudence surrounding chapter 720 does not control cases involving chapter 718.

The fourth and fifth claims of lien were each recorded well-before the *Cricket Properties* decision and the *A to Z Properties* decisions. The Association's successor counsel, Shawn Brown, took the issue of the statutory conflict between sections 197.552 and 718.116 up on appeal to this Court, R. I:125, before voluntarily dismissing the action in February 2014. Both the BLG Appellees and Mr. Brown took the same position in the litigation, though AGM chose only to proceed against the BLG Appellees.

The issues before this Court involve the application of the litigation privilege – absolute and qualified – to the BLG Appellees' actions. However, the underlying issue running through the suits against the BLG Appellees and this appeal is whether a difference in the interpretation of the law can form the basis for a suit against a lawyer and a law firm. An affirmance leaves intact the present state of the law, while a reversal opens the door to an influx of retaliatory actions against parties and attorneys for any interpretation of the law that the other side finds disagreeable.

I. No Reversible Error

The Appellant bears the burden of presenting all arguments and reversible errors in its initial brief; any arguments or errors not presented for review are

waived. *See Stanton v. Florida Dept. of Health*, 129 So. 3d 1083, 1085 (Fla. 1st DCA 2013) (internal citation omitted). In its initial brief, AGM raises several claims of reversible error directed at the fourth and fifth claims of lien. AGM raises no arguments or claims of reversible error concerning the first, second, or third claims of lien.

AGM brought third party complaints against Appellees Mr. Rodgers and Mr. Casanover for conduct surrounding the filing of the first, second, and third claims of lien, but not the fourth and fifth claims of lien that are the sole subject of AGM's appeal. Since AGM raises no arguments in its initial brief that show reversible error regarding the conduct of Mr. Rodgers or Mr. Casanover, this Court should affirm. *Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150, 1152 (Fla. 1979) (holding that where the arguments and record do not demonstrate reversible error, the judgment must be affirmed). Mr. Rodgers and Mr. Casanover are also protected by the litigation privilege as discussed below, but the Appellees believe that the Court need not consider whether the privilege applies to Mr. Rodgers and Mr. Casanover since AGM raises no issue with the final judgment's application to the first, second, or third claims of lien.

For reasons stated below, BLG and Mr. Burg should both prevail since the trial court properly applied the litigation privilege. However, Mr. Rodgers and Mr. Casanover filed neither the fourth nor the fifth claim of lien, the subjects of this

appeal. "The burden is on the appellant to demonstrate reversible error and present an adequate record for review." *JPMorgan Chase Bank v. Combee*, 883 So. 2d 330, 331 (Fla. 1st DCA 2004) (internal citations omitted). Because AGM failed to meet that burden regarding Mr. Rodgers' and Mr. Casanover's conduct, this Court should affirm.

II. The Litigation Privilege

The litigation privilege exists to protect parties and their counsel from tort actions based on statements or actions made in connection with a judicial proceeding. *Levin, Middlebrooks, Mable, Thomas, Mayes & Mitchell, P.A. v. U.S. Fire Ins. Co.*, 639 So. 2d 606, 608 (Fla. 1994). The privilege allows lawyers to use their best judgment in prosecuting or defending a suit, including strategic decisions and legal interpretation choices, without fear of retaliation from other parties or lawyers. *Id.* Applied here, the litigation privilege exists to protect the BLG Appellees from the kind of retaliation that AGM seeks in this action. For the privilege to have any weight, it must protect an attorney from a third-party damages claim based on an interpretation of unsettled law, even if that interpretation is ultimately erroneous. With an affirmance of the final judgment, this Court can further the important public purposes upon which the privilege rests and will discourage unnecessary and costly collateral litigation. As counsel for the BLG Appellees put it below, "[y]ou have the right to be wrong in the course of

judicial matters . . . ." R. V:1078 (Tr. 71). The BLG Appellees simply ask this Court to recognize that right to be wrong or even very wrong by affirming the final judgment.

A. Absolute Litigation Privilege

The absolute litigation privilege protects parties and attorneys from retaliation in a civil suit for statements made during the course of a judicial proceeding or preliminary to a judicial proceeding. *Delmonico v. Traynor*, 116 So. 3d 1205, 1214 (Fla. 2013) (internal citations omitted). The Florida Supreme Court recognized the common law absolute litigation privilege for two reasons: "(1) that the initial trial would needlessly devolve into another trial; and (2) that the potential exposure to a subsequent lawsuit would have a chilling effect on litigants seeking to redress their injuries." *Id.* Indeed, if the alleged malicious or defamatory statement or action has just *some* relation to the judicial proceeding, the absolute privilege applies. *See Levin,* 639 So. 2d at 608.

AGM relies heavily on the *Delmonico* Court's apparent "limiting" of the absolute litigation privilege. However, the *Delmonico* decision only presented a narrow case wherein the absolute privilege was not applicable and did not, as AGM suggests, alter the landscape of the absolute privilege. *See Delmonico*, 116 So. 3d at 1208. The conduct at issue in *Delmonico* involved certain *ex parte* defamatory statements made to a potential non-party witness during an

investigation for a pending action. *Id.* The Court held that the absolute litigation privilege is "not advanced by protecting a lawyer who is defaming a party to a witness outside of a proceeding at a time when both parties are not present and do not have an opportunity to be heard." *Id.* at 1209 (quoting *Delmonico v. Traynor*, 50 So. 3d 4, 12 (Fla. 4th DCA 2010) (Warner, J. dissenting)).

Here, the BLG Appellees published no defamatory statements about AGM to a potential non-party witness. In fact, the record is devoid of any meaningful evidence that the BLG Appellees made any defamatory statements, abused the legal process, or otherwise engaged in conduct that would be in line with the *Delmonico* Court's "narrow scenario" that departs from the absolute litigation privilege. *See Delmonico*, 116 So. 3d at 1208. The BLG Appellees did interpret the law in a reasonable way that simply differed from AGM's interpretation. The BLG Appellees did seek to comply with the pre-suit notices and procedures required in section 718.116(5), Florida Statutes, and to otherwise secure the debt owed to the Association by the filing of assessment liens. *See Ange v. State*, 98 Fla. 538, 540-41, 123 So. 916, 917 (Fla. 1929) (holding that required pre-suit communications are necessarily protected by the absolute litigation privilege). These actions are readily apparent from the record. Absent from the record is evidence of any defamatory statements or malicious conduct that would remotely justify departure

from the long-established rule that statements necessarily preliminary to instituting an action are part of the judicial process and absolutely privileged.

The fourth claim of lien was filed before the third claim was discharged. It could not cause any damage arising from a clouded title that was already clouded by the third claim of lien. AGM suggests that the filing of the fourth claim was prohibited under the Fourth District's decision in *U.S. Bank, N.A. v. Quadomain Condo. Ass'n, Inc.*, 103 So. 3d 977 (Fla. 4th DCA 2012). Initial Brief 29. *Quadomain*, however, is irrelevant to the issues at hand. In *Quadomain*, the Court considered whether the association's lien foreclosure case, filed after U.S. Bank recorded its own *lis pendens*, was jurisdictionally proper. *Id.* at 978. The Court held that once the *lis pendens* was recorded, only that court had jurisdiction to dispose of the liens associated with the property. *Id.* at 979-80. The case merely holds that any holder of an interest must intervene in the pending action after a *lis pendens* has been recorded. *Id.* In this case, the Association already had an action pending and could not be required to intervene in its own case.

Whether the fourth claim of lien was necessary to bring an action or not is immaterial. AGM asks this Court to adopt a position that because the Association would likely not prevail, its attorneys are liable for damages in collateral litigation. Put differently, AGM asks this Court to rule on the merits of a potential law suit that has yet to be filed and is not part of this appeal. AGM's only defense against

the application of the litigation privilege is that AGM would probably prevailed in a subsequent foreclosure suit. With no viable defense against application of the litigation privilege, this Court should affirm, holding that the fourth claim of lien was protected by the litigation privilege.

AGM essentially argues that the fifth claim of lien was barred by *res judicata* because the final judgment entered just before the fifth lien was recorded held that the Association could not recover any amounts owed prior to AGM's taking title from the tax deed sale. I:120-24. However, the time for appeal had not run when the fifth claim of lien was filed. As the record shows, the Association did appeal the initial final judgment. Had the appeal not been taken, AGM could have simply instituted a post-judgment proceeding to strike the fifth claim of lien. If the Association's interpretation of the relevant statutes, first through the BLG Appellees and then through the successor counsel Shawn Brown, was so outlandish and so devoid of merit, AGM could have filed a sanctions motion under section 57.105, Florida Statutes. *See LatAm Investments, LLC v. Holland & Knight, LLP*, 88 So. 3d 240 (Fla. 3d DCA 2011) (holding that alternative means for relief, other than bringing an abuse of process action against the lawyers, existed, including sanctions proceedings). AGM had ample opportunities to remedy the alleged wrongs through regular legal processes – through sanctions or through a

post-judgment enforcement motion – and did not need to resort to the type of collateral action that the litigation privilege prevents.

AGM cites several cases in arguing that the filing of the fourth and fifth claims of lien were not protected by the absolute litigation privilege. *See e.g. Fridovich v. Fridovich*, 598 So. 2d 65 (Fla. 1992). *Fridovich* and its progeny are distinguishable. In *Fridovich*, the Supreme Court considered whether the absolute litigation privilege applied to defamatory statements against an individual made to police in an as-yet unfiled criminal proceeding. *Id.* at 66. Notably, *Fridovich* did not address statutorily-required pre-suit statements such as those in section 718.116. The Association, through the BLG Appellees, filed liens to secure the admittedly disputed debt owed for past-due assessments. The BLG Appellees did not, as in *Fridovich*, make purposeful, perjurous, and malicious statements against an individual in the context of a police investigation or trial. *Id.* The *Fridovich* Court did not recede from *Ange* as applied to necessary pre-suit statements since the dispute had nothing to do with mandatory conditions precedent. *Id.* at 69 ("We therefore recede from *Ange* . . . to the extent [it is] inconsistent with our ruling today."). Since the filing of a lien is a mandatory condition precedent for foreclosing the lien, the fourth and fifth claims of lien are protected by the absolute litigation privilege under *Levin* and *Ange*.

The foundation of AGM's suit against the BLG Appellees is based on a different interpretation of the relevant law at the time. Differing interpretations of how the law applies to a fact pattern should not give rise to collateral litigation against an opponent's lawyer. *See e.g. Air Turbine Technology, Inc. v. Quarles & Brady, LLP*, No. 4D14-0110, slip op. (holding that a lawyer's reasonable, good faith interpretation of unsettled or fairly debatable law is entitled to judgmental immunity). Lawyers and parties must be able to interpret the law and pursue legal remedies free from harassment and fear of retaliation. *Levin*, 639 So. 2d at 608; *see Echeveria, McCalla, Raymer, Barrett & Frappier v. Cole*, 950 So. 2d 380 (Fla. 2007). For these reasons, this Court should affirm.

B. Qualified Litigation Privilege

The BLG Appellees maintain that the absolute litigation privilege bars the claims by AGM. AGM, however, argues that not only are the BLG Appellees' actions not protected by the absolute litigation privilege, but they are also not protected by the qualified litigation privilege. AGM relies heavily on *Delmonico* and *Fridovich* in arguing that the BLG Appellees' actions fell outside the "protective cloak of [the] qualified [litigation] privilege . . . ." *Delmonico*, 116 So. 3d at 1219. AGM, however, misapprehends the Supreme Court's holdings in *Delmonico* and *Fridovich* and interprets the qualified privilege too narrowly.

In *Delmonico*, the Florida Supreme Court held that *ex parte* statements to a non-party witness during a preliminary investigation were not entitled to the absolute litigation privilege, but only to a qualified privilege. *Id.* at 1218. Even those alleged defamatory statements during a completely informal pre-suit investigation were protected. The Court further affirmed the principle that "much latitude must be given to the judgment and discretion of those who maintain a cause in court when determining what is pertinent." *Id.* at 1219 (quoting *Myers v. Hodges*, 53 Fla. 197, 211, 44 So. 357, 362 (Fla. 1907)) (internal quotation marks omitted). Going further, the Court quoted *Levin* in solidifying the strength and breadth of the qualified privilege holding that "the defamatory statement or other tortious behavior is privileged '*so long as the act has some relation to the proceeding.*'" *Id.* (quoting *Levin*, 639 So. 2d at 608)).

Like *Delmonico*, *Fridovich* concerned unsworn statements in an informal, pre-litigation investigation. *Fridovich*, 598 So. 2d at 68-69. The Court held that the statements made to police were subject to the qualified litigation privilege. *Id.* at 69. The qualified privilege provides a difficult but available path for plaintiff's to overcome the litigation privilege by proof of express malice. *Id.* (internal citation omitted). As discussed more fully in Part III of this brief *infra*, the record evidence does not establish any express malice nor create a factual issue of whether such malice existed. Even if the qualified privilege applies in lieu of the absolute

privilege, the BLG Appellees should still prevail based on the record and the relevant law.

Perhaps the biggest difference between the statements in *Delmonico* and *Fridovich* and the "statements" at issue here is the sworn to and formal nature of the claims of lien. Both *Delmonico* and *Fridovich* concerned unsworn statements in an informal, preliminary investigation. The alleged defamatory statements made in this action were both sworn to and part of a formal litigation proceeding. *See Robertson v. Industrial Ins. Co.*, 75 So. 2d 198 (Fla. 1954) (holding that alleged defamatory statements made in a letter to the Insurance Commissioner requesting formal revocation of license proceedings were protected by the litigation privilege as a necessary communication prior to a judicial proceeding); *see McCollough v. Kubiak*, 158 So. 3d 739 (Fla. 4th DCA 2015) (distinguishing *Delmonico* in holding that alleged defamatory statements made by second law firm against first law firm in a deposition of a non-party witness were protected by the absolute privilege). Indeed, *Fridovich* itself makes the same distinction in noting that statements made under oath during a deposition pursuant to a subpoena are absolutely privileged. *Fridovich*, 598 So. 2d at 69 n.7.

AGM cannot prevail in this appeal unless it shows (1) that the absolute litigation privilege is completely inappropriate, (2) that the BLG Appellees are, at best, entitled only to the qualified litigation privilege, and (3) factual issues remain

regarding whether the BLG Appellees had the requisite express malice when filing the fourth and fifth claims of lien. Even assuming, *arguendo*, that the qualified privilege applies to this case, AGM has not pointed to any evidence in the record that establishes a factual issue regarding express malice. This Court should affirm either because the absolute litigation privilege applies, as the BLG Appellees argue, or because the record is devoid of any evidence that the BLG Appellees acted with express malice toward AGM when the last two claims of lien were filed.

C. Merits Not Considered

In analyzing the litigation privilege, be it qualified or absolute, the merits of the statements or actions at issue is not relevant to the application of the privilege. None of the cases that AGM cites for its proposed narrowing of the litigation privilege ever speak to the propriety of maintaining a particular suit. Unlike the analysis performed when considering a sanctions motion, Florida courts do not consider whether a suit was or was not frivolous or baseless in applying the litigation privilege.

AGM accuses the BLG Appellees of filing two claims of lien (the fourth and fifth claims) that had nothing to do with litigation because the debt in question had allegedly been discharged by the final judgment against the Association. *See generally* Initial Brief. That argument hinges on this Court's including the merits of the then-pending or future litigation as a factor in applying the litigation

privilege. Such a factor, however, would not be in line with the very case law that AGM cites. The *Fridovich* Court, for instance, recognized the availability of other avenues for relief and protections for defamed parties that did not include suits for defamation or slander. *Fridovich*, 598 So. 2d at 69 n.5. Likewise in this action, other remedies or avenues of relief were available.

AGM argued below and now argues on appeal that the fourth and fifth claims of lien cannot qualify for the litigation privilege because they could not be part of a valid suit. R. VI:1100; Initial Brief 28. The meaning of the term "valid" in this context is unclear. AGM's likely intent is to say that no meritorious suit could come from either the fourth or fifth claims of lien. The litigation privilege, as applied to the fourth and fifth claims of lien, does not take into account a "valid" successful judicial action, simply a judicial action.

Could a suit be maintained to enforce the fifth claim of lien? Yes. AGM may well have available the affirmative defense of *res judicata* or could otherwise argue the lien is unenforceable. However, the merits of a foreclosure action based on the fourth or fifth claim of lien is not a factor for the Court to consider in applying the litigation privilege.

III. No Standing to Object to Authority

AGM argues that the BLG Appellees' actions were malicious and inappropriate because BLG had withdrawn from representation in the case. AGM

further argues that the Association's affidavit on rehearing claiming that BLG was not representing the Association in any way after withdrawal from the case provides dispositive proof that the fourth and fifth claims of lien were an abuse of process and otherwise not protected by either the absolute or qualified litigation privilege. Initial Brief 28. Whether the BLG Appellees were properly authorized to file the fourth and fifth claims of lien or not, however, is an issue between the Association and BLG and is the subject of a pending malpractice dispute still pending in the trial court below.

AGM presents this challenge to the BLG Appellees' authority alleging that the recording of the fourth and fifth claims of lien were outside the scope of representation of the Association or otherwise *ultra vires*. Standing to challenge contractual validity or authority rests with the parties to the contract and certain third-party beneficiaries. *See Centerstate Bank Cent. Florida v. Krause*, 87 So. 3d 25, 29 (Fla. 5th DCA 2012) (holding that only the mortgagor and third party creditors can challenge the validity of the mortgage contract). AGM is not in privity of contract with BLG. In fact, BLG is completely adverse to AGM. AGM is a member of the Association and can, under section 617.0304(2), Florida Statutes, challenge the Association's actions as *ultra vires*; however, that authority does not extend to challenging, as an adverse party, BLG's actions against AGM. The consequences of permitting such a challenge could have far-reaching and

unintended consequences for lawyers and law firms across Florida, potentially creating a spate of new litigation by third parties against opposing law firms.

Whether BLG still represented the Association is not pertinent to the claims AMG makes. AGM attempts to use the Association's affidavit attached to the Association's motion for rehearing, R. VI:1122-26, App. 13:1-5, to bolster its claims of BLG's maliciousness in filing the fourth and fifth claims of lien. The liens in question, however, were not filed in BLG's name but rather on behalf of the Association in securing past-due assessments and related amounts. AGM's claims on clouded title and damages are against the Association, the owner of the debt, and not the agents, the BLG Appellees. As the BLG Appellees pointed out below, withdrawing as litigation counsel in a particular case regarding a particular lien does not establish that the attorney or law firm does not continue to represent its client on other matters. R. V:1072-73 (Tr. 65-66). Since the Association did not appeal the judgment below and the issues of the scope of BLG's representation are already the subject of a malpractice action pending before the trial court, AGM has no standing to challenge whether BLG and its attorneys were authorized to file the fourth and fifth claims of lien.

IV. No Factual Issues Existed

At summary judgment, the movant must prove that no genuine issues of material fact exist between the parties and that the movant is entitled to judgment

as a matter of law. Fl. R. Civ. P. 1.510(c). The burden is on the movant to show the non-existence of factual issues. *Holl v. Talcott*, 191 So. 2d 40, 43-44 (Fla. 1966). Once the movant establishes the prima facie case, the burden shifts to the non-moving party to show the existence of factual issues. *Id.* Once the burden shifts to the non-moving party, that party must produce competent, admissible evidence that affirmatively shows a factual issue; mere disagreement is insufficient to show that a factual issue exists between the parties. *Landers v. Milton*, 370 So. 2d 368, 370 (Fla. 1979) (internal citations omitted).

In its initial brief, AGM argues that the trial court erred in finding that no factual issues existed between the parties. Initial Brief 31-34. AGM argues that the BLG Appellees failed to prove that they did not act with express malice and that whether express malice existed is a factual issue left undetermined. *Id.* However, application of the litigation privilege is apparent from the pleadings, given that the BLG Appellees' actions were all part of a judicial proceeding. *See LatAm Investments*, 88 So. 3d at 245 (holding that applying the litigation privilege is appropriate where the privilege's application is apparent on the face of the pleadings). After the BLG Appellees met their burden of showing that no factual issues existed, AGM failed to produce competent, admissible evidence to prove the existence of the factual issue of express malice. *See Landers*, 370 So. 2d at 370; *see Axelrod v. Califano*, 357 So. 2d 1048 (Fla. 1st DCA 1978) (holding that

express malice cannot be "imputed. Rather, in order to prevail, the plaintiff must prove express malice . . . .").

Presumably, AGM would rely on the affidavit of AGM's operations manager Anthony Marsella for its express malice evidence. Mr. Marsella specifically testifies in paragraph 27 that the BLG Appellees acted with express malice. R. IV:719, App. 10:7. That testimony clearly constitutes a legal conclusion. Mr. Marsella does not testify that he is a licensed Florida attorney or is otherwise an expert in matters involving express malice. Even if Mr. Marsella were such an expert, however, "'it is not the function of . . . [a] witness to draw legal conclusions[;] that determination is reserved to the trial court.'" *Crown Custom Homes, Inc. v. Sabatino*, 18 So. 3d 738, 741 (Fla. 2d DCA 2009) (quoting *Palm Beach County v. Town of Palm Beach*, 426 So. 2d 1063, 1070 (Fla. 4th DCA 1983)). The legal conclusions drawn by non-expert Mr. Marsella are not supported by the facts and are only bare statements of law that do not raise genuine issues of material fact.

Express malice occurs where the defendant's primary motive is to injure the plaintiff. *Fridovich*, 598 So. 2d at 69; Initial Brief 32. AGM produced no competent, admissible evidence indicating that the BLG Appellees acted with express malice. Mr. Marsella's affidavit testimony on the subject was neither competent nor admissible. The record contains no evidence or testimony that even

plausibly suggests that the BLG Appellees exhibited or had personal animus toward AGM or any of its agents nor any evidence that the primary motive in filing the fourth and fifth claims of lien was to injure AGM's reputation. The trial court correctly found that no factual issues existed and correctly entered summary judgment in favor of the BLG Appellees.

CONCLUSION

The trial court correctly held that the litigation privilege shielded the BLG Appellees from AGM's third party litigation. The conduct complained of is protected by the absolute litigation privilege afforded all statements that are necessary to a judicial proceeding and have some relation to that proceeding. *Levin*, 639 So. 2d at 608. Alternatively, the conduct is protected by the qualified litigation privilege as the statements were made preliminary to a judicial proceeding, and the record contains no evidence that anyone acted with express malice. Finally, as to Mr. Rodgers and Mr. Casanover, AGM has failed to demonstrate reversible error as to the conduct of these two appellees. For all of these reasons, this Court should affirm.

CERTIFICATE OF SERVICE

I hereby certify that a copy of this brief has been sent via electronic mail to Adam J. Knight, Esq. (aknight@hicksknight.com) and Shawn G. Brown, Esq. (shawn@langandbrown.com), on this 4th day of June, 2015.

/s Jacob A. Brainard

Jacob A. Brainard, Esq.
Fla. Bar No. 0092278
Scott C. Davis, Esq.
Fla. Bar No. 0022799
BUSINESS LAW GROUP, P.A.
301 W. Platt Street, #375
Tampa, FL 33606
Phone: 813-379-3804
Fax: 813- 221-7909
Email: JBrainard@blawgroup.com
Email(2): Service@blawgroup.com
Attorneys for Appellee

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all style requirements of Rule 9.210, Florida Rules of Appellate Procedure, specifically that it is written in Times New Roman 14-point font.

/s

Jacob A. Brainard, Esq.