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

APPEAL NO. 2D14-4704
LOWER TRIBUNAL NO. 12-3687 CA

AGM INVESTORS, LLC,

Appellant,

v.

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

Appellees.

ON APPEAL FROM THE SIXTH CIRCUIT COURT,
IN AND FOR PASCO COUNTY, FLORIDA

APPELLANT'S INITIAL BRIEF

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PRELIMINARY STATEMENT REGARDING CITATIONS TO THE RECORD ON APPEAL

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STATEMENT OF THE CASE

This case began as Appellee condominium association's action against Appellant, AGM Investors, LLC ("AGM"), a condominium owner, to enforce an unenforceable claim of lien for assessments incurred against the unit before AGM took title through a tax deed. (R. Vol. I, p. 1-20). The complaint of the Plaintiff/Appellee, Glendale Villas Condominium Association, Inc. (the "Association"), was summarily adjudicated in favor of AGM through a partial final summary judgment issued April 16, 2013. (R. Vol. 1st Add., p. 1283; Apx. 5), which granted AGM's Motion for Partial Summary Judgment, a motion supported by the Affidavit of Anthony Marsella, AGM's operations manager. (R. Vol. 1st Add., p. 1220; Apx. 3) (R. Vol. 1st Add., p. 1256; Apx. 4). The partial final summary judgment was subsequently amended to correct an erroneous statutory citation. (R. Vol. 1st Add., p. 1292; Apx. 7). The amended order did not alter the substance of the court's initial ruling. (*Compare* R. Vol. 1st Add., p. 1283-87 (Apx. 5) *with* 1292-96 (Apx. 7); (*See also* R. Vol. 1st Add., p. 1288 (Apx. 6)).

The trial court concluded that Section 718.116(1)(a), Florida Statutes, assigning joint and several liability to one who receives a condominium unit through transfer of title, was inapplicable to AGM as a purchaser of a tax deed, and the Association's claim for assessments accruing before the tax deed issued was extinguished pursuant to Section 197.573(2), Florida Statutes. (*See* R. Vol. 1st

Add., p. 1292, at p. 1295; Apx. 7). The Association filed a notice of appeal of the partial final summary judgment (R. Vol. I, p. 125), which appeal was voluntarily dismissed before briefing. (*See* 2D13-2542).

AGM brought a counterclaim against the Association and a third-party complaint against third parties: LM Funding, LLC ("LMF"), with whom the Association contracts to collect delinquent condominium assessments; Business Law Group, P.A. ("BLG"), the law firm hired by LMF to pursue delinquent condominium assessments; and Bruce M. Rodgers ("Rodgers"), Michael H. Casanover ("Casanover") and Brandon Burg ("Burg"), attorneys with BLG. (R. Vol. I, p. 38). (BLG, Rodgers, Casanover, and Burg together will be called the "BLG Defendants"). After BLG was sued, it filed a motion to withdraw from representation of the Association. (R. Vol. I, p. 104; Apx. 1). The trial court granted the motion on March 28, 2012, in an order docketed April 12, 2012. (R. Vol. I, p. 116; Apx. 2).

On November 14, 2013, following a hearing at which the trial court orally announced its decision to grant in part and deny in part AGM's motion for leave to amend its counterclaim and third-party complaint, AGM filed its Verified Amended Counterclaims and Third-Party Complaint. (R. Vol. II, p. 385 through Vol. III, p. 469; Apx. 8). The written order permitting that amended pleading was entered November 22, 2013. (R. Vol. III, p. 470).

The Verified Amended Counterclaims and Third-Party Complaint (Apx. 8) alleged the following causes of action:

COUNT	CLAIM	DEFENDANTS
I	Quiet Title	Association & LMF
II	Injunctive Relief	Association & LMF
III	Injunctive Relief	Association, LMF & BLG Defendants
IV	Slander or Disparagement of Title	Association, LMF & BLG Defendants
V	Abuse of Process	Association, LMF & BLG Defendants
VI	Malicious Prosecution	Association, LMF & BLG Defendants
VII	Injurious Falsehood	Association, LMF & BLG Defendants
VIII	Breach of Contract	Association & LMF

It is the wholesale summary adjudication of Counts IV, V, VI, and VII of the Amended Third-Party Complaint in favor of the BLG Defendants based on litigation privilege that is presented to this Court for review. (R. Vol. 1st Add., p. 1311; Apx. 23).

Summary judgment was first granted to BLG and Rodgers (R. Vol. 1st Add., p. 1297; Apx. 11) based on their Amended Motion for Summary Judgment. (R. Vol. III, p. 587; Apx. 9). Motions for rehearing (reconsideration) were filed by both AGM and the Association. (R. Vol. VI, p. 1091; Apx. 12), (R. Vol. VI, p. 1106; Apx. 13). A Response was filed by BLG and Rodgers (R. Vol. 1st Add., p. 1305; Apx. 15). AGM and the Association directed their motions for reconsideration to only two of the five claims of lien filed by the BLG Defendants against AGM. Specifically, the movants contested the court's conclusion that the fourth and fifth claims of lien were properly protected by the litigation privilege

when both were recorded after BLG no longer represented the Association with respect to pending litigation on the same debt and one was recorded with knowledge of the summary adjudication against the Association's claim. (R. Vol. II, p. 385, at Vol. III, p. 461; Apx. 8) (R. Vol. IV, p. 713, at p. 763; Apx. 10) (R. Vol. II, page 385, at Vol. III, p. 462; Apx. 8) (R. Vol. IV, p. 764; Apx. 10). The Association attached to its motion for reconsideration the affidavit of the Association's vice-president stating that the BLG Defendants did not have authority from the Association to file claims of lien against AGM following BLG's withdrawal from representation of the Association and that the Association was unaware of such actions by BLG. (R. Vol. 1st Add., p. 1106, at p. 1122; Apx. 13). Both motions were denied after a hearing. (R. Vol. 1st Add., p. 1310; Apx. 16).

Because the same issues were presented in the separate motion for summary judgment filed by third party defendants Casanover and Burg (R. Vol. VI, p. 1136; Apx. 14), in the interest of judicial economy, the parties stipulated to waive hearing while the trial court granted summary judgment as to Casanover and Burg based on litigation privilege while preserving AGM's rights of appeal. (See R. Vol. VI, p. 1152; Apx. 17) (R. Vol. VI, p. 1163; Apx. 18). The order granting summary judgment to Casanover and Burg was entered September 23, 2014. (R. Vol. VI, p. 1170; Apx. 19). On that same date, AGM voluntarily dismissed Count III of the Amended Third-Party Complaint (R. Vol. VI, p. 1184), leaving no further

claim against any of the BLG Defendants. Notice of appeal was prematurely filed on September 24, 2014. (R. Vol. VI, p. 1176). This Court issued an order to show cause that permitted Appellant 30 days to obtain a final, appealable judgment and remanded the case to the trial court for that purpose. Thus, the parties stipulated to entry of final judgment as to the BLG Defendants while preserving AGM's right to appeal. (R. Vol. VI, p. 1186; Apx. 22). The trial court entered a final judgment in favor of the BLG Defendants on October 21, 2014. (R. Vol. 1st Add., p. 1311; Apx. 23). AGM submitted an Amended Notice of Appeal on October 28, 2014, which attached the Final Judgment. (R. Vol. VII, p. 1203; Apx. 24). AGM's appeal is timely.

STATEMENT OF THE FACTS

The relationship of the BLG Defendants to the Association

The Association contracted with third-party defendant LMF[1] to collect delinquent assessments for condominium units located in the Glendale Villas condominium community. (R. Vol. II, p. 385, at Vol. III, p. 412-22; Apx. 8) (R. Vol. IV, p. 713, at p. 730-740; Apx. 10). The LMF-Association Contract purported to provide authority to LMF to "engage Business Law Group, P.A. and other legal counsel to act upon behalf of Association as attorney in fact for Association…" while acting at the direction of LMF. (R. Vol. II, p. 385, at Vol. III, p. 414; Apx. 8) (R. Vol. IV, p. 713, at p. 732; Apx. 10).

History of the Claims of Lien

Before the condominium unit was sold for delinquent taxes, on June 10, 2009, BLG recorded a claim of lien for delinquent assessments against the property and the prior owner. (R. Vol. IV, p. 713, at p. 741; Apx. 10). On April 22, 2010, a tax deed was issued to AGM for the condominium unit in the Glendale Villas condominium community following a tax deed sale at which AGM was the high bidder. (R. Vol. II, p. 385, at Vol. III, p. 423-24; Apx. 8) (R. Vol. IV, p. 713, at p. 722-23; Apx. 10). Within the week, Rodgers sent AGM a written threat of litigation demanding payment of assessments that had accrued while the unit was

[1] The claims against LMF remain pending below.

owned by the prior owner. (R. Vol. II, p. 385, at Vol. III, p. 431; Apx. 8) (R. Vol. IV, p. 713, at p. 742; Apx. 10). Rodgers demanded a written dispute or payment within 30 days in the amount of $7,179.12, which included interest assessed at 18% per annum, late fees, legal fees, and collection costs. The letter also served as notice of intent to lien. AGM responded through its counsel, the late Henry W. Hicks, informing Rodgers that through operation of Section 197.573(2), Florida Statutes, "[t]he liens for assessments in connection with tax deed sales do not survive these sales….Accordingly, my client will be making payment of all assessments accruing since the date of his purchase on April 22, 2010. Please provide relevant contact information for payment of future assessments." (R. Vol. II, p. 385, at Vol. III, p. 435; Apx. 8) (R. Vol. IV, p. 713, at p. 746; Apx. 10).

Twelve days later, on June 9, 2010, BLG through Casanover recorded its **second** claim of lien against the property, claiming that $5,355.34 was due in unpaid regular assessments and owed by AGM.[2] (R. Vol. II, p. 385, at Vol. III, p. 438; Apx. 8) (R. Vol. IV, p. 713, at 749; Apx. 10). AGM timely recorded a Notice of Contest of Lien pursuant to Section 718.116(5)(a), Florida Statutes, on July 27, 2010, informing BLG, Rodgers and Casanover that they had 90 days within which

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[2] AGM has paid or attempted to pay all assessments that have come due since it took title. *See* Affidavit of Anthony Marsella (R. Vol. IV, p. 713, at p. 718 (¶22); Apx. 10). Furthermore, the BLG Defendants are not permitted to seek assessments that accrued *after* the claim of lien was filed. *Losner v. Australian of Palm Beach Condominium Association, Inc.,* 139 So. 3d 986 (Fla. 4th DCA 2014). The issues in this appeal are limited to the claim against AGM for pre-tax deed assessments.

to file suit to enforce the claim of lien. (R. Vol. II, p. 385, at Vol. III, p. 439; Apx. 8) (R. Vol. IV, p. 713, at p. 750; Apx. 10). The BLG Defendants did not file any action to enforce the claim of lien within 90 days, a deadline established by the statute following the Notice of Contest.

On or about August 11, 2010, AGM filed a lawsuit for a judicial determination that the **first** claim of lien did not create a cloud on AGM's title, Case No. 2010-CA-006336-ES (Pasco) (R. Vol. II, p. 385, at Vol. III, p. 440-48; Apx. 8) (R. Vol. IV, p. 713, at p. 717, 751-59; Apx. 10). AGM obtained a Final Judgment of Quiet Title April 20, 2011 determining that the first claim of lien had been extinguished by the tax deed and adjudicating that it presented no cloud on the title. (R. Vol. II, p. 385, at Vol. III, p. 457; Apx. 8) (R. Vol. IV, p. 713, at p. 760-61; Apx. 10). BLG through Casanover consented to entry of this judgment quieting title. (R. Vol. II, p. 385, at Vol. III, p. 449; Apx. 8).

Undeterred by the legal processes that precluded the Association's claim, six weeks later, on May 31, 2011, BLG through Casanover recorded a **third** claim of lien claiming AGM owed $7,827.34 in unpaid regular assessments. (R. Vol. II, p. 385, at Vol. III, p. 455; Apx. 8) (R. Vol. IV, p. 713, at p. 762; Apx. 10). The third claim of lien was followed on July 19, 2011 by the Association's Complaint in this action seeking both to foreclose against the condominium unit and to obtain a judgment against AGM for monetary damages. (R. Vol. I, p. 1). BLG represented

the Association in the lien foreclosure action and, in conjunction with the foreclosure action, BLG recorded a Notice of *Lis Pendens* as to the property. (R. Vol. I, p. 21).

AGM first sued third party defendants BLG and Rodgers on January 12, 2012, by filing its Answer, Affirmative Defenses, Counterclaim and Third-Party Complaint. (R. Vol. I, p. 38). BLG moved to withdraw as counsel for the Association March 16, 2012. (R. Vol. I, p. 104; Apx. 1). The Motion to Withdraw was granted in an order dated March 28, 2012, docketed by the Clerk April 12, 2012. (R. Vol. I, p. 116; Apx. 2). The next month, BLG recorded a **fourth** claim of lien in the name of the Association, this time asserting AGM owed $10,419.34 in unpaid regular assessments. (R. Vol. II, p. 385, at Vol. III, p. 461; Apx. 8) (R. Vol. IV, p. 713, at p. 763; Apx. 10).

The summary adjudication against the Association's Complaint to enforce the third claim of lien was announced at the hearing February 20, 2013, and the written order entered April 16, 2013. (R. Vol. 1st Add., p. 1283; Apx. 5) (and corrected May 13, 2013. (R. Vol. 1st Add., p. 1292; Apx. 7)).[3] By that Judgment, the *Lis Pendens* was discharged, clearing AGM's title to the property for the first time since AGM acquired it April 22, 2010, three years earlier.

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[3] The trial court inadvertently entered another order granting AGM's motion for summary judgment on May 29, 2013. (R. Vol. I, p. 120). That order later was stricken by the Order Striking Order Entered in Error. (R. Vol. II, p. 380).

On May 7, 2013, BLG recorded a **fifth** claim of lien (R. Vol. II, p. 385, at Vol. III, p. 462; Apx. 8) (R. Vol. IV, p. 713, at p. 764; Apx. 10), this time claiming AGM owed $13,251.34 in unpaid regular assessments from May 2009 through April 2013. BLG by Rodgers continued demanding payment in the name of the Association by periodic letters to AGM including those dated April 26, 2013 and November 15, 2013, the latter of which required payment exceeding $24,000.00. (R. Vol. IV, p. 713, at p. 765-67; Apx. 10). A timeline is provided as Exhibit P to the Affidavit of Anthony Marsella (R. Vol. IV, p. 713, at p. 768; Apx. 10). It was utilized after notice was given of AGM's intent to use a summary. (R. Vol. IV, p. 604).

AGM moved for leave to amend to bring in allegations concerning the fourth and fifth claims of lien and a breach of contract count and to allege punitive damages. (R. Vol. II, p. 290). AGM was permitted to amend to bring in the new facts and contract count, but not to allege punitive damages until after an adequate showing was made on the record. (R. Vol. II, p. 385, at Vol. III, p. 470; Apx. 8). Thus, on November 14, 2013, AGM filed its Verified Amended Counterclaims and Third-Party Complaint. (R. Vol. II, p. 385 through Vol. III, p. 469; Apx. 8), which first brought in Casanover and Burg as third-party defendants.

The third-party defendants filed two separate motions for summary judgment of the Amended Third-Party Complaint's tort claims based on the

protection afforded by litigation privilege. (R. Vol. III, p. 587; Apx. 9) (R. Vol. VI, p. 1136; Apx. 14).

On March 31, 2014, the trial court heard argument on Rodgers' and BLG's Amended Motion for Summary Judgment. (R. Vol. VI, p. 1007 (Transcript of hearing; Vol. III, p. 587; Apx. 9) The court took the matter under advisement and on May 14, 2014, issued its Order Granting BLG & Rodgers' Motion for Summary Judgment as to Counts 4, 5, 6, and 7. (R. Vol. 1st Add., p. 1297; Apx. 11). It made no distinction among the distinct claims of lien and did not analyze whether any applicable privilege may be only qualified.

The proceedings from that point on are fully described in the Statement of the Case, *supra.*

SUMMARY OF THE ARGUMENT

BLG's rabid pursuit of AGM was a strategic choice to use statutory claims of lien to coerce AGM to pay monies it did not owe.[4] There are no fewer than five legal reasons that AGM was not responsible for the debt of an earlier owner. First, a tax deed represents a new title[5], and by virtue of long-established principles of Florida law and express statutory language, any liens and debts against the property were extinguished by the issuance of the tax deed under Sections 197.552 and 197.573(2), Florida Statutes. Second, the Association and BLG consented to a judgment quieting title against the association's lien. Third, the Association's Condominium Declaration provides joint and several liability for accrued obligations to a grantee of a conveyance of title but not to a grantee who receives title through any other means such as a tax deed. (R. Vol. II, p. 385 at Vol. III, p. 427; Apx. 8). Fourth, enforcement of the claim was precluded when BLG failed to file suit within 90 days of AGM's Notice of Contest of the second claim of lien. Fifth, the trial court made a judicial determination that any claim for pre-tax deed assessments was precluded by a circuit court's quiet title judgment in Case No.

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[4] The BLG Defendants acted at the direction of LMF, not the Association, and were pursuing funds that would be paid primarily to LMF pursuant to the terms of the LMF-Association Contract. (*See* R. Vol. II, p. 385, at Vol. III, p. 414; Apx. 8).

[5] *E.g., Stuart v. Stephanus*, 94 Fla. 1087, 114 So. 767 (1927); *Hecht v. Wilson*, 107 Fla. 421, 144 So. 886 (1932), *modified*, 145 So. 250 (1933); *Blume v. Giles*, 197 So. 344 (Fla. 1940); *Daniel v. Sherrill*, 48 So. 2d 736 (Fla. 1950).

2010-CA-006336-ES (Pasco). Nevertheless, BLG recorded three claims of lien subsequent to the final judgment in AGM's favor.

When summarily adjudicating AGM's claims and apply litigation privilege in favor of the BLG Defendants, the trial court failed to acknowledge the unique circumstances of the final two claims of lien, the fourth and the fifth, which the BLG Defendants recorded in the Association's name even after BLG withdrew from representation of the Association.

The trial court concluded litigation privilege barred each of the four tort counts based on its erroneous finding "that the filing of a claim of lien is necessarily preliminary to the legal enforcement of the Association's lien and are therefore subject to the litigation privilege." (R. Vol. 1st Add., p. 1297, at p. 1300; Apx. 11). The court relied on *Ange v. State,* 98 Fla. 538, 123 So. 916 (1929), and *Pledger v. Barnup & Sims, Inc.*, 432 So. 2d 1323 (Fla. 4th DCA 1983), to support its conclusion that the BLG Defendants' recording of all four claims of lien against AGM (the second through the fifth) were necessarily preliminary to the legal enforcement of the Association's alleged lien and, therefore, subject to litigation privilege.

The summary judgment failed to consider that litigation privilege could not apply to the fourth and fifth claims of lien because they were recorded *after* BLG no longer represented the Association concerning the Association's claim against

AGM, *after* the quiet title court determined that a lien for pre-tax deed assessments was extinguished by the tax deed, and the fifth was recorded *after* the trial court entered a judgment against the Association's claim.

AGM submits that the fourth and fifth claims of lien recorded by the BLG Defendants were tortious and unlawful and were not "necessarily preliminary to litigation" and cannot be connected with or related to the subject of inquiry in any underlying suit. The litigation privilege is not so overwhelmingly broad that it protects a law firm and attorneys from liability for injurious acts undertaken while not representing the party whose right is asserted and without the authorization or knowledge of that party, for acts taken in knowing, conscious, and malicious disregard of a court order, or for acts that, if done today, would potentially subject the BLG Defendants to criminal penalties.[6]

Based on the trial court's reliance on *Pledger* and *Ange*, and its failure to address the issue of express malice, AGM must presume the court found the BLG Defendants' recording of the claims of lien, including the fourth and fifth claims, was conduct protected by an absolute litigation privilege.

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[6] Section 817.535, Florida Statutes, became effective October 1, 2013. *See* s. 1, ch. 2013-228, Laws of Florida. It is now a third degree felony to file in the public records any instrument containing a materially false, fictitious, or fraudulent statement or representation that purports to affect an owner's interest in property with the intent to defraud or harass another.

The BLG Defendants' actions do not fall within the scope of absolute privilege because the actions were not part of a judicial or quasi-judicial proceeding and because the actions were not part of any formal discovery process, nor were they material to any judicial proceeding. The BLG Defendants' actions are not protected by a qualified privilege because the actions were not preliminary to any judicial proceeding. The BLG Defendants were no longer representing the Association and knew that the lien had been judicially determined to be invalid and extinguished.

Litigation privilege does not insulate the BLG Defendants' intentional and malicious recording of the fourth and fifth claims of lien because neither absolute nor qualified litigation privilege applies to the BLG Defendants' conduct.

ARGUMENT AND CITATIONS TO AUTHORITIES

I. Standard of Review

The standard of review of a summary judgment based on litigation privilege is *de novo*. *DelMonico v. Traynor*, 116 So. 3d 1205, 1211 (Fla. 2013) (the issue whether the litigation privilege applies "is a pure question of law, subject to de novo review"); *Major League Baseball v. Morsani*, 790 So. 2d 1071, 1074 (Fla. 2001) ("The standard of review governing a trial court's ruling on a motion for summary judgment posing a pure question of law is de novo"); *See also Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000) (a grant of summary judgment is reviewable de novo).

II. Timeline

To better illustrate the timing of the BLG Defendants' actions, AGM submits the following timeline of relevant events:

- April 22, 2010: Tax Deed issued to AGM Investors, LLC
- June 9, 2010: Second Claim of Lien recorded by BLG
- July 27, 2010: Notice of Contest of Lien recorded by AGM pursuant to Section 718.116, Fla. Stat.
- April 20, 2011: Final Judgment of Quiet Title in Case No. 10-CA-6336 (Pasco), determining the Association had no claim against AGM for pre-tax deed assessments
- Mary 31, 2011: Third Claim of Lien recorded by BLG

- July 19, 2011: Foreclosure/damages action filed against AGM below, along with a Notice of *Lis Pendens*

- March 16, 2012: BLG filed Motion to Withdraw from representation of the Association

- March 28, 2012: The trial court grants BLG's request to withdraw as counsel for the Association

- April 20, 2012: Notice of appearance of new counsel for the Association is filed

- May 21, 2012: BLG records the fourth claim of lien in the name of the Association

- February 20, 2013: The trial court holds a hearing to determine AGM's motion for partial summary judgment of the Association's complaint to collect assessments that were incurred prior to AGM's tax deed. The court announces its ruling that the Association's lien against AGM's property was extinguished by AGM's tax deed

- April 16, 2013: The trial court enters its written order granting AGM's motion for partial summary judgment, which finally adjudicated the Association's claim of lien against the Association. The court's summary judgment expressly holds that the Association's lien was invalid based on the issuance of AGM's tax deed

- May 7, 2013: BLG records the fifth claim of lien in the name of the Association

III. The litigation privilege

The litigation privilege is a common law creation with a 400-year history in England that was first recognized in Florida in the 1907 decision of *Myers v. Hodges*, 53 Fla. 197, 44 So. 357 (1907). The Supreme Court of Florida traced the

history and evolution of litigation privilege in the 2013 case of *DelMonico v. Traynor*:

> [T]his Court's recognition of the privilege derived from a balancing of two competing interests – the public interest in allowing litigants and counsel to freely and zealously advocate for their causes in court versus protecting the rights of individuals, including the right of an individual to maintain his or her reputation and not be subjected to slander or malicious conduct. Where this balance fell was often dependent upon the safeguards in place that served to provide real and immediate checks to abusive and overzealous practices – that is, how far removed those practices were from protection of the formalized judicial process that would serve to counteract the occurrence and consequences of the defamatory statements or abuse.

DelMonico, 116 So. 3d at 1217.

In the bellwether decision in *Myers,* the Supreme Court of Florida analyzed the limits on the privilege as follows:

> We think the ends of justice will be effectually accomplished by not extending the privilege so far as to make it an absolute exemption from liability for defamatory words wholly and entirely outside of, and having no connection with, the matter of inquiry. For why should a person be absolutely privileged to defame another in the course of a judicial proceeding by making slanderous statements wholly outside of the inquiry before the court? We think it unnecessary to carry the doctrine so far. The ends of justice can be effectually accomplished by placing a limit upon the party or counsel who avails himself of his situation to gratify private malice by uttering slanderous expressions and making libelous statements, which have no relation to, or connection with, the cause in hand or the subject-matter of inquiry. The person whose good name suffers has, or ought to have, the right to vindicate his reputation by an appeal to the courts,….

Myers, 44 So. at 361-62.

Thus, the Supreme Court in *Myers* determined that the absolute privilege would not extend to statements sharing "no relation to, or connection with, the cause in hand or the subject-matter of inquiry." Where the defamatory statements were not pertinent to the cause at hand, but were still published in the course of a judicial proceeding, the court held that a qualified privilege would apply. *Id.* at 363. The qualified privilege could be overcome by the plaintiff showing that the defendant acted with express malice. *Id.*

In *DelMonico,* the Supreme Court of Florida reviewed its decisions following *Myers* and the evolution of the privilege in the intervening century of jurisprudence. Of particular interest to this case is *Fridovich v. Fridovich,* 598 So. 2d 65 (Fla. 1992), in which the court "narrowed the scope of the absolute privilege, recognizing that not all statements made outside of the formal judicial process should be subject to an absolute privilege." 116 So. 3d at 1214. In *Fridovich*, the court receded from the broad holdings in *Ange v. State,* 98 Fla. 538, 123 So. 916 (1929), and *Robertson v. Industrial Ins. Co.,* 75 So. 2d 198 (Fla. 1954), which had held that any defamatory statement made *preliminary* to a judicial proceeding that is related to the proceeding is absolutely privileged. *Fridovich,* 598 So. 2d at 69. After extensive review of the law of Florida and other jurisdictions, the court in *Fridovich* concluded that the scope of the absolute privilege should be narrowed in the case of statements and actions preliminary to judicial proceedings. The court

concluded in that case – where siblings of Martin Fridovich orchestrated criminal charges against him – that a qualified privilege for the siblings' statements to police officers was sufficient to serve the policy interests in "free and unhindered communication to assist the authorities in detecting and prosecuting perpetrators of criminal activity." *Fridovich*, 598 So.2d at 68. The court said:

> Indeed, an absolute privilege would frustrate the principle that the courts should be open to redress every wrong. Moreover, we believe that a plaintiff's burden of proof for establishing a case under a qualified privilege would likely deter most frivolous suits. In overcoming a qualified privilege, a plaintiff would have to establish by a preponderance of the evidence that the defamatory statements were false and uttered with common law express malice – i.e., that the defendant's primary motive in making the statements was the intent to injure the reputation of the plaintiff. *See Nodar v. Galbreath,* 462 So. 2d 803, 806 (Fla. 1984).

Id. at 68-69.

Thus, the Supreme Court of Florida has expressly receded from the breadth of the privilege articulated in *Ange v. State,* one of two cases cited by the trial court in its decision to apply an absolute privilege to the BLG Defendants' claims of lien.

In *DelMonico,* the Supreme Court of Florida reiterated that an absolute privilege applies to conduct occurring during the course of the proceedings "so long as the act has some relation to the proceeding." *DelMonico, supra, citing Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. U.S. Fire Ins.*

Co., 639 So. 2d 606, 608 (Fla. 1994). However, not all statements made outside of the formal judicial process are protected by the litigation privilege.

Examples in which the litigation privilege was deemed inapplicable include the case of *Olson v. Johnson,* 961 So. 2d 356, 360 (Fla. 2d DCA 2007), in which this Court found that the litigation privilege did not protect three women who filed a police report allegedly falsely accusing Olson of stalking. Following Olson's acquittal on stalking charges, he sued the three women for malicious prosecution and this Court concluded that the litigation privilege did not apply "to a complaining witness such as Johnson who is named as a defendant in a malicious prosecution action." *Id.* at 360-61. In *Am. Nat'l Title & Escrow of Fla. v. Guarantee Title & Trust Co*., 748 So. 2d 1054, 1055 (Fla. 4th DCA 2000), the Fourth District affirmed a trial court's order holding that, at most, the defendants enjoyed a qualified privilege for allegedly providing law enforcement with false information with the intent to injure the plaintiffs. In *LatAm Investments, LLC v. Holland & Knight, LLP,* 88 So. 3d 240 (Fla. 3d DCA 2011), the Third District clarified that a cause of action for abuse of process remains a viable one "when the claim is based on actions taken outside of a judicial proceeding or on actions that are taken during a judicial proceeding but which are unrelated to the judicial proceeding." *Id.* at 243.

DelMonico examined the policies for litigation privilege that are to be considered in each case. The Supreme Court of Florida set forth the standards and circumstances for determination of whether a claim of litigation privilege is absolute, qualified, or non-existent. Application of *DelMonico* to the facts here leads necessarily to a different conclusion than that reached by the trial court.

IV. THE BLG DEFENDANTS ARE NOT ENTITLED TO ABSOLUTE LITIGATION PRIVILEGE.

As clarified by the Supreme Court of Florida in *DelMonico,* absolute privilege applies only in instances where the statements or actions are part of and occur within a judicial setting, to wit:

> In cases where this Court has applied the absolute privilege to issues involving defamation, the defamatory statements at issue were made either in front of a judicial officer or in pleadings or documents filed with the court or quasi-judicial body. In these more formalized judicial settings, the presence of safeguards facilitates and promotes an unimpeded speaking environment while protecting an individual from false or malicious statements for several reasons. First, the alleged defamatory statements giving rise to the action are memorialized before a judicial officer, minimizing concerns of factual dispute. Second, the potential harm that may result can be 'mitigated by...formal requirements such as notice and hearing, the comprehensive control exercised by the trial judge whose action is reviewable on appeal, and the availability of retarding influences such as false swearing and perjury prosecutions.' Third, the trial court 'can and will protect the party aggrieved by expunging [or striking] irrelevant defamatory matter from the pleadings, and by punishing for contempt of court the guilty party.' And finally, the 'trial judge has the inherent power to do those things necessary to enforce its orders, to conduct its business in a proper manner, and to protect the court from acts obstructing the administration of justice.'

DelMonico, 116 So. 3d at 1217 (internal citations omitted). The court refused to apply an absolute litigation privilege to an attorney's ex-parte, out-of-court statements made to a non-party potential witness even though the attorney was speaking with the witness as part of his informal investigation of pending litigation in which he represented the defendant. The Supreme Court held that "where an attorney steps outside of both the courtroom and the formal discovery process to investigate a claim, this Court's precedent does not support an extension of the absolute privilege." *DelMonico*, 116 So. 3d at 1218. In reaching this conclusion, the Court stated:

> [W]e conclude that Florida's absolute privilege was never intended to sweep so broadly as to immunize an attorney from liability 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.

Id.

Thus, the court concluded that a qualified privilege applies to statements made by attorneys as they undertake informal investigation during pending litigation and engage in ex-parte, out-of-court questioning of nonparty witnesses, "'so long as the statements are relevant to the subject of inquiry' in the underlying suit." The court said:

> The competing public policies of safeguarding a plaintiff's reputation and ensuring full disclosure in a judicial proceeding are better served in this circumstance by a qualified privilege. As Judge Warner cogently explained:

> Just as in *Fridovich* [*v. Fridovich,* 598 So. 2d 65 (Fla. 1992)], that standard would deter frivolous lawsuits as it would require the plaintiff to prove both that the statements were false and that they were made with express malice, i.e., 'that the defendant's primary motive in making the statements was the intent to injure the reputation of the plaintiff.' 598 So. 2d at 69. But it would also deter participants in the investigatory process outside judicial proceedings from intentionally harming their adversary with impunity. *DelMonico v. Traynor,* 50 So. 3d 4, at 12 (Fla. 4th DCA 2010) (Warner, J., dissenting).

116 So. 3d at 1218.

In *Myers,* the Court concluded that the absolute privilege would not extend to statements sharing "no relation to, or connection with, the cause in hand or the subject-matter of inquiry." 44 So. at 362. "The ends of justice can be effectually accomplished by placing a limit upon the party or counsel who avails himself of his situation to gratify private malice by uttering slanderous expressions and making libelous statements, which have no relation to, or connection with, the cause in hand or the subject-matter of inquiry. The person whose good name suffers has, or ought to have, the right to vindicate his reputation by an appeal to the courts…." *Id.*

The trial court relied primarily upon the *Pledger* case to hold litigation privilege bars AGM's claims against the BLG Defendants. However, *Pledger* supports AGM's position that the court erred when granting the summary judgment to the BLG Defendants. In *Pledger*, there were two separate defamation

claims: One based on publication of a draft complaint and a second based upon the filing of a complaint in court. *Pledger*, 432 So. 2d at 1325-26. As to the complaint filed in a court proceeding, the *Pledger* court applied absolute privilege to bar claims based on publication of the complaint in a court proceeding. *Id.* at 1331. However, the *Pledger* court held that only a qualified privilege could apply to the draft complaint that had been presented for settlement purposes and never published in court. *Id.* at 1327. Further, and just like the Supreme Court of Florida in *Fridovich*, *supra*, the Fourth District in *Pledger* found issues of fact remained concerning whether the defendants published the draft complaint with express malice. *Id.* at 1328.

Based on the Supreme Court's decision in *DelMonico*, the BLG Defendants' fourth and fifth claims of lien cannot be protected by absolute litigation privilege because their recording was not in the courtroom, was not part of any judicial or quasi-judicial proceeding, and was not part of any formal discovery process.

The trial court looked to the provisions in the Association's Condominium Declarations to conclude otherwise. Again, the court failed to consider that the BLG Defendants were not persons entitled to the protection because they were not counsel to the Association in connection with the assertion of its rights against AGM.[7] Moreover, the fact that the Association was obligated to record a claim of

[7] BLG may attempt to claim authority to do so as attorney in fact pursuant to the LMF-Association Contract. However, there is no colorable claim that the LMF-

lien before actions to collect delinquent assessments does not open the gate for the filing of liens for debts that already have been determined judicially and otherwise to be not due.

V. THE BLG DEFENDANTS ARE NOT ENTITLED TO ANY QUALIFIED LITIGATION PRIVILEGE.

Although a qualified immunity may apply to statements of an attorney made outside of formal litigation, those statements are only protected "'so long as the statements are relevant to the subject of inquiry' in the underlying suit." *DelMonico*, 116 So. 3d at 1218 (quoting *Levin*, 639 So. 2d at 607).

In this case, the trial court's summary judgment against AGM was based upon its conclusion that the BLG Defendants' recording of the claims of lien, including the fourth and fifth claims of lien, were actions preliminary and necessary to some unknown, future litigation. The Supreme Court of Florida addressed the applicability of qualified privilege to pre-suit, out-of-court statements in *Fridovich*. The Supreme Court of Florida adopted a qualified privilege analysis to address defamatory statements made to police prior to a formal court proceeding. *Fridovich*, 598 So.2d at 68-69. In addressing the facts of that case, the Supreme Court held that a qualified privilege could be overcome by showing express malice. *Id.* at 69.

Association Contract constitutes a legitimate power of attorney to BLG.

In this case, the fourth and fifth claims of lien recorded by the BLG Defendants were superfluous and unrelated to the pending litigation and were not necessary or preliminary to any litigation that could be initiated to enforce the already adjudicated claim of lien.

In *DelMonico*, the Supreme Court clarified the application of a qualified litigation privilege and further required that the statements or actions of the person claiming a qualified privilege must be related to an underlying proceeding. *DelMonico*, 116 So. 3d at 1218. "Where...[the alleged actions]…, assuming they were made, are *not* connected with or related to the subject of inquiry, then the defendant…[is]…afforded no privilege at all." *Id.* at 1219 (emphasis in original).

A. The Fourth Claim of Lien is Not Protected by a Qualified Litigation Privilege.

The BLG Defendants recorded the fourth claim of lien on May 21, 2012. At the time they recorded this fourth claim of lien, BLG had requested and been permitted to withdraw as counsel for the Association. In short, there was no viable basis for the BLG Defendants to record a claim of lien on behalf of a party or entity they did not represent with respect to the alleged debt and, thus, they are not persons entitled to protection under the litigation privilege for that act.

The existence of the pending litigation and notice of *lis pendens* precluded the filing of the fourth claim of lien. Here, BLG had recorded a notice of *lis pendens* in connection with the Association's action on the third claim of lien. A

recorded notice of *lis pendens* "constitutes a bar to the enforcement against the property described in the notice of all interests and liens, including, but not limited to, federal tax liens and levies, unrecorded at the time of recording the notice unless the holder of any such unrecorded interest or lien intervenes in such proceedings within 30 days after the recording of the notice." § 48.23, Fla. Stat. *See also U.S. Bank Nat. Ass'n v. Quadomain Condominium Ass'n, Inc.*, 103 So. 3d 977 (Fla. 4th DCA 2012) (a *lis pendens* recorded as part of a mortgage foreclosure action barred a subsequent *lis pendens* and deprived a county court of subject matter jurisdiction to enforce an association lien and *lis pendens* recorded after the mortgage foreclosure *lis pendens*). As such, the fourth claim of lien was invalid as a matter of law and could not be enforced by the Association or the BLG Defendants.

Because the fourth claim of lien was filed without the authority of the Association, and with no prospect of ever being enforced, the trial court incorrectly determined that the recording of the fourth claim of lien by the BLG Defendants was an action preliminary and necessary to litigation. Further, the court failed to consider the fact that the BLG Defendants were no longer counsel for the Association and had no right, authority or entitlement to take any action to record the fourth claim of lien on behalf of the Association. Thus, the BLG Defendants are not parties entitled to any claim of litigation privilege for the fourth claim of

lien. The trial court failed to consider that the alleged debt had been quieted against the Association in litigation in which BLG represented the Association.

B. The Fifth Claim of Lien is Not Protected by a Qualified Litigation Privilege.

BLG recorded the fifth claim of lien on May 7, 2013, more than one year after the order discharging BLG from representation of the Association. The BLG Defendants knew AGM already had counterclaims related to claims of lien filed by the BLG Defendants; they knew the quiet title action had quieted the claim to pre-tax deed assessments; and, most importantly, the BLG Defendants knew the trial court had entered a judgment on April 16, 2013 extinguishing any lien against AGM's property by the Association and discharging the *lis pendens* filed at the commencement of the litigation.[8]

There is no legitimate claim that the fifth claim of lien was connected to the pending proceeding as the enforceability of liens for pre-tax deed assessments had been determined by the trial court weeks earlier and by the circuit court in the Quiet Title action years earlier.

A qualified privilege could only apply to the BLG Defendants if the fifth claim of lien was authorized by the Association and was preliminary to some

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[8] As indicated by the certificate of service of the Partial Final Summary Judgment in Favor of the Defendant/Counter-Plaintiff AGM Investors, LLC, BLG received a copy of the final judgment finding AGM's tax deed extinguished any lien by the Association against the property for pre-tax deed assessments.

future proceeding. However, the fifth claim of lien absolutely could not be connected to a future proceeding for the very reason that the trial court and the quiet title court previously held that any lien by the Association against AGM's property was EXTINGUISHED based upon AGM's tax deed. With this determination in place, the BLG Defendants knew they could never initiate any legitimate litigation based on the fifth claim of lien.

The BLG Defendants no longer represented the Association and had no authority or legal right to record the lien or enforce the lien as part of any future proceeding on behalf of the Association. Therefore, they are not among the classes of persons entitled to litigation privilege protection for those acts.

Therefore, the trial court's finding that the liens were necessary and preliminary to enforcement cannot apply to the fifth claim of lien.

VI. EVEN ASSUMING A QUALIFIED LITIGATION PRIVILEGE APPLIED, ISSUES OF FACT REMAIN CONCERNING WHETHER THE BLG DEFENDANTS ACTED WITH EXPRESS MALICE.

AGM contends that the fourth and fifth claims of lien were not authorized and were not related, preliminary, or necessary to any possible enforcement of a lien by the Association. Where the statements are made outside of a judicial process, "so long as the statements are relevant to the subject of inquiry," a qualified privilege would apply. *DelMonico,* 116 So. 3d at 1218. If the Court determines that the liens were necessarily preliminary to some enforcement action,

summary judgment still is error. The privilege may be overcome by AGM's proof that the BLG Defendants acted with express malice. In this case, issues of fact remain concerning whether the BLG Defendants acted with express malice when recording the fourth and fifth claims of lien.

Express malice exists where a defendant's primary motive in taking an action is to cause injury to the plaintiff. *Fridovich*, 598 So. 2d at 69. "If the record reflects the existence of any genuine issue of material fact, or the possibility of any issue, or if the record raises even the slightest doubt that an issue might exist, summary judgment is improper." *Gomes v. Stevens*, 548 So. 2d 1163, 1164 (Fla. 2d DCA 1989) (citing *Snyder v. Cheezam Dev. Corp.*, 373 So. 2d 719 (Fla. 2d DCA 1979)). "The burden, furthermore, is on the movant to demonstrate conclusively that the nonmoving party cannot prevail." *Id.* (citing *Snyder*, *supra*, and *Holl v. Talcott*, 191 So. 2d 40 (Fla. 1966)).

As argued by AGM above, the fourth and fifth claims of lien were not necessary or preliminary to any valid action that could be pursued. Issues of fact remain regarding the BLG Defendants' express malice even if the court somehow concludes the fourth and fifth claims of lien could possibly be necessary or preliminary to some future proceeding.

A. Issues of Fact Remain Concerning the Fourth Claim of Lien.

At the time of recording the fourth claim of lien on May 21, 2012, the BLG Defendants knew, at the very least, the following facts:

- The BLG Defendants no longer represented the Association based on their own request and the trial court's order permitting BLG to withdraw as counsel
- The Association was represented by new counsel
- AGM was contesting the validity of the recording of the claims of lien against AGM's property
- The action below was pending and BLG had recorded a *lis pendens* contemporaneously with initiating the action
- The recorded *lis pendens* barred enforcement of subsequent liens as the trial court had exclusive jurisdiction to determine whether any claim of lien by the Association was valid
- A circuit court already had quieted the Association's claim

In consideration of the foregoing facts, the BLG Defendants' motions for summary judgment do not conclusively establish that AGM cannot prevail on its claims because the motions do not and could not conclusively prove the BLG Defendants acted without express malice.

At a minimum, issues of fact remain concerning whether the BLG Defendants acted with express malice and, therefore, the trial court erred when entering the summary judgment in favor of the BLG Defendants as to the fourth claim of lien.

B. Issues of Fact Remain Concerning the Fifth Claim of Lien.

At the time of recording the fifth claim of lien on May 7, 2013, the BLG Defendants knew, at least, the following facts:

- The *lis pendens* had been discharged and for the first time since its purchase in 2010, AGM held clear title
- The BLG Defendants no longer represented the Association based on their own request and the trial court's order permitting BLG to withdraw as counsel
- The Association was represented by new counsel
- AGM was contesting the validity of the recording of the liens against AGM's property
- The trial court held a hearing on February 20, 2013 to determine AGM's motion for partial summary judgment
- The trial court entered final summary judgment in favor of AGM on the third claim of lien
- The final summary judgment found that AGM's tax deed extinguished any lien for pre-tax deed assessments
- A circuit court already had quieted the Association's claim

Nevertheless, the BLG Defendants intentionally and maliciously recorded the fifth claim of lien to further cloud AGM's title to its property.

At a minimum, the facts known by the BLG Defendants at the time of recording the fifth claim of lien create issues of fact for determination by the court at an evidentiary hearing or trial. Because substantial issues of material fact remained for determination, the trial court erred by entering summary judgment in favor of the BLG Defendants on litigation privilege grounds.

CONCLUSION

The trial court failed to consider important facts and circumstances when determining that the BLG Defendants were entitled to absolute litigation privilege

protection for the fourth and fifth claims of lien. First, the BLG Defendants cannot assert an absolute litigation privilege because, as stated best in *DelMonico*, absolute litigation privilege only applies to actions taken in a judicial proceeding, in a quasi-judicial proceeding, or in formal discovery so long as they are related to the proceeding. Where an attorney or litigant steps out of the courtroom and causes harm, absolute litigation privilege will not act to shield that attorney's or person's conduct.

Second, qualified litigation privilege also applies only where the actions or statements have some connection to an underlying proceeding. The fourth and fifth claims of lien are not connected to any pending or future litigation. The fourth claim of lien could never be enforced in a future action because the *lis pendens* in effect at the time of recording the fourth claim of lien would absolutely bar enforcement of the lien for the same alleged debt. The BLG Defendants no longer represented the Association when recording the fourth lien and had no authority to file the claim of lien. The fifth claim of lien could also never be related to a valid future enforcement proceeding. The BLG Defendants had no authority to represent or act on behalf of the Association when the filed the fifth claim of lien. The BLG Defendants knew the trial court extinguished any lien by the Association for pre-tax deed assessments in the order granting AGM's motion for

partial summary judgment. As such, the BLG Defendants knew the fifth claim of lien could never be enforced.

No appellate court of Florida has ever applied the litigation privilege to lawyers who take injurious actions against others on behalf of a party whom they do not represent in connection with the matter. Instead of zealous advocacy, the summary judgment based on litigation privilege permits a callous trampling of AGM's property rights with no countervailing benefit to the truth-seeking process.

The summary judgment should be reversed and the case remanded for further proceedings against the BLG Defendants on the fourth and fifth claims of lien.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a correct copy of the foregoing was served by electronic mail to:

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Initial Brief complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure. It is set in 14 point Times New Roman.

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