UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Case No. 12-2236

D & D ASSOCIATES, INC.

Appellees

v.

BOARD OF EDUCATION OF NORTH PLAINFIELD

Appellant

BRIEF OF *AMICUS CURIAE* NEW JERSEY STATE BAR ASSOCIATION

APPEAL FROM FINAL DECISION AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
CIVIL CASE ACTION NO.: 03-1026 (MLC)

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Corporate Disclosure Statement

The New Jersey State Bar Association is a private, nonprofit corporation organized under the laws of the State of New Jersey. It does not have a parent corporation, nor is there any publicly held corporation that owns 10% or more of its stock.

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JURISDICTION AND VENUE

The New Jersey State Bar Association (NJSBA) offers no statement on the issue of jurisdiction and venue except to respectfully note that the parties assert that this Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1367, and 42 U.S.C. § 1983 and that venue lies in the District of New Jersey pursuant to 28 U.S.C. § 1391 because the causes of action arose therein.

Amicus Curiae Statement

The NJSBA is a voluntary organization of attorneys founded in 1899, whose mission is, in part, to serve, protect, foster and promote the personal and professional interests of its members; to serve as the voice of New Jersey attorneys with regard to the law, legal profession and legal system. The NJSBA has a special interest in this case because its members rely every day on the litigation privilege at issue in this matter as they zealously represent their clients. Any limitations on that privilege would have a chilling effect on the ability of NJSBA members to advise their clients and advocate on their behalf. Because of this, upon recommendation of the Association's Amicus Committee, the NJSBA Board of Trustees authorized the filing of a Motion to Seek Leave to File a Brief *Amicus Curiae* and Participate in Oral Argument.

Rule 29(c)(5) Statement

The NJSBA represents that (1) no party's counsel authored this brief in whole or in part; (2) no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and (3) no person or organization, other than the NJSBA itself, contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF THE ISSUES PRESENTED

The NJSBA files this brief *amicus curiae* on the issue presented in the two claims remaining against the former defendant North Plainfield Board of Education's legal counsel, Robert C. Epstein, Esq., under the Amended Complaint as follows:

> Did the District Court err in failing to dismiss Count Eleven, grounded in Defamation, and Count Ten, grounded in Tortious Interference, against the opposing litigant's legal counsel who acted solely in his capacity as an attorney, as each such claim is barred by the litigation privilege?

STATEMENT OF FACTS

The NJSBA respectfully refers the court to the Statement of Facts as recited in the Brief of Appellee/Cross-Appellant Robert C. Epstein, Esq.

In brief, in 2003, D & D Associates, Inc. ("D&D") commenced a civil action against the Board of Education of North Plainfield, N.J. ("Board"), Vitetta Group, Inc. ("Vitetta"), Bovis Lend Lease, Inc. ("Bovis"), and Robert C. Epstein ("Mr. Epstein, Esq."). Subsequently amended, D&D's shotgun complaint alleged a wide-range of counts under multiple theories against the several defendants, including federal civil rights violations, violations of the New Jersey Trust Fund Law, N.J.S.A. 2A:44-148, breach of contract, "errors and omissions," tortious interference with prospective economic advantage, defamation, conversion, fraudulent inducement, civil conspiracy, and malicious abuse of process.

Following discovery and motion practice that saw summary adjudication of several of the plaintiff's claims, the trial court heard competing motions for summary judgment and, thereafter, returned a March 30, 2012, opinion dismissing several more of the plaintiff's remaining claims, including all claims against the Board. However, the court left intact certain claims leveled against other defendants, including two counts against Mr. Epstein, Esq., who was employed as the

Board's legal counsel and had acted in that capacity under specific directions and with the consent of his client.

As the court noted in its March 30, 2012 Memorandum Opinion, at 58-9, D&D has asserted that only seven (7) items form the basis for its defamation claims against the several defendants, of which only four (4) items involve Mr. Epstein; to wit, default/termination letters created by Mr. Epstein which were sent "on behalf of [his client,] the Board," as the District Court stated, and which are natural, necessary actions an attorney must take in following his or her client's instructions in terminating a contract, as was the case here.

Specifically, with respect to the analysis in the instant brief *amicus curiae*, the court kept alive two of the counts alleged against Mr. Epstein, Esq., as follows: Defamation (Count 11) and Tortious Interference (Count 10). The instant appeal ensued.

SUMMARY OF THE ARGUMENT

Litigants and their attorneys have long enjoyed broad protection under New Jersey's well-established litigation privilege, with such protections extending to words spoken and actions taken as parties ramp-up to litigation. The trial court erred in failing to dismiss the two remaining counts of the amended shotgun complaint (advanced under theories of Defamation and Tortious Interference) brought by Plaintiff D&D Associates, Inc.'s ("D&D") against, *inter alia*, Robert C. Epstein, Esq., the opposing legal counsel in a litigation matter.

Indeed, the complained-of actions of Mr. Epstein in the instant matter are actually appropriate and necessary actions that attorneys across the Third U.S. Circuit take each day on behalf of, and in defense of, their clients, and which deserve wide protection under the litigation privilege. Specifically, Mr. Epstein is sued for writing four (4) default/termination letters, which the District Court held in its March 30, 2012, Memorandum Opinion, at 58-9, were "sent by Epstein, on behalf of [his client,] the Board." A further review of those correspondence items leaves a reader with the incontrovertible understanding that there is nothing defamatory in any of them, let alone any untruthful statement that is made with actual malice as would be required here.

The default/termination letters at issue are essential condition precedents to termination of the construction contract at issue and for preparation for litigation with a contractor whom Mr. Epstein's client reasonably believed had breached that contract. See A1300-A1302; A1304-A1307; A2912-A2913; A3615-A3617 and SA34-SA35. Moreover, the record of this matter makes clear that the parties were fully aggravated with each other and, eventually, the contractor was heading to the courthouse with claims, reinforcing the hostile and litigious backdrop against which Mr. Epstein acted.

Mr. Epstein, like thousands of other attorneys in similar circumstance, found himself on the horns of a dilemma, faced with a choice of protecting his client or incurring the wrath of a likely future opposition litigant whom he felt was harming his client. The choice was resolved appropriately by Mr. Epstein who followed his client's direction and took the legally-permissible and, indeed, mandated action an attorney should take in protecting a client and its legal interests.

Mr. Epstein's choice is necessarily protected under settled New Jersey law that provides a wide berth of protection to lawyers and parties as they engage in litigation activities, including pre-litigation notices, actions, meetings and other efforts that lay the foundation for a civil action and defense. Indeed, the default/termination letters issued by Mr. Epstein in

his capacity as counsel for the Board are categorically precluded from the types of claims now leveled by D&D under the litigation privilege, discussed *infra*, and the vast public policy that allows parties in litigation to freely take actions and plead their cases without fear of retaliatory tort claims such as the two claims that remain against Mr. Epstein. Moreover, it should be noted that, had Mr. Epstein failed to act on behalf of his client as he did, the Board might have a cause of action against him for malpractice or could have discharged him for failing to provide effective assistance and counsel.

The net result of any holding from the court that limits or deviates from the clear and wide berth of protection afforded to attorneys for litigation-related actions and words under the litigation privilege would be devastating to the practice of law throughout the circuit. Such a holding would chill attorneys from providing effective legal representation and would impair both the diligence and creativity that are essential for good, sound lawyering for fear of claims of civil liability for engaging in the reasonable and customary activities that attorneys take for their clients in the ramp-up to litigation Moreover, such a holding would require attorneys engage in fact-finding and/or investigation into clients' proposed decisions and actions well beyond what should be expected or may even be ethically permissible.

For these reasons, the NJSBA submits that the trial court's failure to dismiss Counts Ten and Eleven of the Amended Complaint should be reversed with an appropriate order for summary disposition.

LEGAL ARGUMENT

PLAINTIFF'S DEFAMATION AND TORTIOUS INTERFERENCE CLAIMS AGAINST DEFENDANT'S LEGAL COUNSEL SHOULD BE DISMISSED AS ATTORNEYS' LITIGATION-RELATED ACTIONS TAKEN ON BEHALF OF CLIENTS FIT SQUARELY WITHIN THE BROAD PROTECTIONS OF NEW JERSEY'S WELL-ESTABLISHED LITIGATION PRIVILEGE

A. New Jersey's "Absolute" Litigation Privilege Immunizes Parties and Counsel from Defamation Liability and Extends to Pre-litigation Activities, Especially in Public Contracting

Statements made in the course of a judicial or quasi-judicial proceeding are "absolutely privileged and wholly immune from liability." Ruberton v. Gabage, 280 N.J. Super. 125, 132 (App. Div. 1995). New Jersey maintains such a broad public policy-based protection so that litigants and those undertaking actions related to litigation may, "be permitted to speak and write freely without the restraint of fear of an ensuing defamation action, this sense of freedom being indispensable to the due administration of justice." Hawkins v. Harris, 141 N.J. 207, 214 (1995).

The New Jersey Supreme Court, in Hawkins, held that privilege protects communications: "(1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." Id. at 216. There, a case in which

the New Jersey State Bar Association also appeared as *amicus curiae*, the Supreme Court found that "the absolute privilege accorded to statements made by participants in judicial proceedings extends to statements made by private investigators employed by the parties or their representatives company." Id. at 213.

Mr. Epstein correctly argues that the litigation privilege, "protects an attorney from civil liability arising from words he has uttered in the course of judicial proceedings," and offers a shield to "attorneys to safeguard them from defamation suits arising from comments made in the course of judicial proceeding." Loigman v. The Township Committee of Middletown, 185 N.J. 566, 579 and 583 (2006). Moreover, litigation, especially in the public contracting arena under the N.J. Local Public Contracts Law, N.J.S.A. 40A:11-1 et seq., the N.J. Public Schools Contracts Law, N.J.S.A. 18A:18A-1 et seq., and the Educational Facilities Construction and Financing Act, N.J.S.A. 18A:7G-1 et seq., often begins well before the complaint is filed and extends back to statutorily prescribed conditions precedent in addition to other appropriate pre-litigation notices, demands and the heated exchanges that occur in breach of contract matters that are on their way to full-blown litigation. Ideally, those efforts terminate in an off-ramp other than litigation through an amicable work-around or

settlement, but often they do not and attorneys remain palpably aware they must hope for the best and prepare for the worst in such a context.

B. Public Policy Underpinnings, Including Encouragement of "Free Exchange" and Settlement, Support Litigation Privilege Protections for Pre-litigation Activities

The analysis of the litigation privilege as sweeping up pre-litigation actions and words strikes at the heart of the standard articulated by the New Jersey Supreme Court in holding that, "the litigation privilege is not limited to statements made in a courtroom during a trial; 'it extends to all statements or communications in connection with the judicial proceeding.'" Hawkins, 141 N.J. 207, 216, citing Ruberton, supra, 280 N.J. Super. at 133.

In addition to the simple logic that subjecting attorneys to litigation for routine pre-litigation correspondence sent on behalf of their clients would unnecessarily open a floodgate of SLAPP and other suits by perturbed opposition litigants, the Hawkins decision articulates an additional public policy objective in broadly extending the litigation privilege to pretrial communications by parties and witnesses: "to promote the development and free exchange of information and to foster judicial and extra-judicial resolution of disputes." Hawkins, 141 N.J. at 218, citing General Elec. Co. v. Sargent & Lundy, 916 F.2d 1119, 1129 (6th Cir.1990).

In the instant litigation, the default/termination notices sent by Mr. Epstein, "on behalf of the Board," as the District Court held in its March 31, 2012, Memorandum Opinion, at 58-9, do nothing more than establish the Board's rights and carve out their defenses and, thus, are clearly protected under the litigation privilege. On their face, they are simply not defamatory, nor do they support any tort theory advanced by the Plaintiff.

Moreover, the record is replete with evidence and admissions that the parties to the school construction contract were fighting from nearly the moment of execution, placing Mr. Epstein's actions and words squarely in the context of pre-litigation as he was honoring his ethical duty to look out for his client's interests. In fact, no party in this action can be heard to say that Mr. Epstein's letters were not a product of pre-litigation activity as the parties now find themselves briefing this matter to the trial and appellate courts.

Not only do Mr. Epstein's demand and termination letters have a direct nexus to the issues being litigated and, thus, support continued extension of the litigation privilege protections to the words therein, but they also manifest the public policy benefits the New Jersey Supreme Court articulated in Hawkins by encouraging conversations, settlement discussions,

"free exchange" of information and an attempted extra-judicial resolution of the underlying disputes and differences.

Furthermore, it can be argued that if Mr. Epstein had failed to act on behalf of his client as he did, the Board might have a cause of action against him for malpractice or could have discharged him for failing to provide effective assistance and counsel. It is against such a back-drop that an attorney must always be provided the liberty to advocate zealously and even aggressively without fear of a vexatious opponent firing back with a shotgun suit and thereby removing the opponent's litigation counsel from the picture by making him or her a defendant. On that latter concern, D&D's lawsuit here had the net effect of denying the Board the benefit of a legal counsel with institutional knowledge and experience in the subject matter of the litigation and necessarily increased costs to the Board and the public thereby. A holding from the court that allows an opposition litigant to sue opposing counsel could give the imprimatur of the circuit court approving such suits as a regular course of action by disgruntled litigants.

If the litigation privilege does not extend to situations such as the instant matter – where attorneys, following their ethical obligation to zealously safeguard their clients within the bounds of the law are subjected to retaliatory lawsuits from the opposing litigant, it will pose grave consequences to

attorneys and their clients throughout the circuit. Accordingly, the NJSBA respectfully requests the Court find error in the District Court not holding that the litigation privilege extends to Mr. Epstein's actions in this case, and reverse with an appropriate order for summary disposition of the remaining claims against him.

CONCLUSION

For the reasons cited above, the NJSBA respectfully requests that this Court reverse the trial court's failure to dismiss Counts Ten and Eleven of the Amended Complaint and issue an appropriate order for summary disposition.

Respectfully submitted,

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Sharon A. Balsamo
General Counsel
New Jersey State Bar Association

Dated: August 1, 2013

CERTIFICATE OF IDENTICAL COMPLIANCE OF BRIEFS

I hereby certify that the text of the PDF file and Hard copies of this Brief are identical.

_____
Sharon A. Balsamo, General Counsel

CERTIFICATE OF VIRUS CHECK

I hereby certify that a virus check was performed on the PDF and Hard Copies of this Brief, using Symantec Anti-Virus software, and that no virus was indicated.

_____
Sharon A. Balsamo, General Counsel

CERTIFICATE OF ADMISSION

The attorneys signing below hereby certify that they are admitted to practice before the United States Court of Appeals for the Third Circuit.

_____
Sharon A. Balsamo, General Counsel

CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 32(a)(7)(B)(i)

I hereby certify that the Brief filed as *Amicus Curiae* contains **3,662** words as calculated by the word count feature on the word processing program used to prepare this brief, and therefore contains less than 14,000 words.

_____
Sharon A. Balsamo, General Counsel

CERTIFICATE OF SERVICE

I, Sharon A. Balsamo, General Counsel for the New Jersey State Bar Association, certify that on August 1, 2013, I have electronically filed and mailed via Lawyers Service, a true and correct copy of the New Jersey State Bar Association's Motion for Leave to Participate as Amicus Curiae and Brief to the following counsel:

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