NO: SC 18839	:	SUPREME COURT
ROBERT SIMMS	:	STATE OF CONNECTICUT
v.	:	AT HARTFORD, CONNECTICUT
PENNY SEAMAN, ET AL.	:	SEPTEMBER 19, 2012

B E F O R E :

THE HONORABLE CHASE T. ROGERS, CHIEF JUSTICE
THE HONORABLE FLEMMING L. NORCOTT, JUSTICE
THE HONORABLE RICHARD N. PALMER, JUSTICE
THE HONORABLE PETER T. ZARELLA, JUSTICE
THE HONORABLE DENNIS G. EVELEIGH, JUSTICE
THE HONORABLE CHRISTINE S. VERTEFEUILLE, SENIOR JUSTICE

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THE COURT: Good morning, everybody. The first matter this morning is *Simms* v. *Seaman*. Is the appellant ready?

ATTY. WILLIAMS: If it please the Court, my name is John Williams. I'm here on behalf of the plaintiff, Mr. Simms. I'd like to reserve five minutes.

There are, I think, three -- at least three issues that can be -- are to be considered in this case in descending level of ease of resolution, at least in my view. The first of these has to do with the significance and the impact of granting absolute immunity to attorneys for frauds perpetrated in the context of marital litigation, and I do think that's the easiest case for this case to resolve for the reasons that are so lucidly set forth in the brief of the amicus curiae.

The underlying proposition which provides, I guess, the policy support for the decision of the Appellate Court in this case is the importance of a truly adversarial system of litigation in civil cases and as the amicus points out, this Court in *Billington* and other cases has very explicitly moved Connecticut away from that kind of hard-edged adversarialness in marital litigation.

As *Billington* points out, the whole thrust of the policies set forth there is to reduce the contentiousness and the associated expense of litigation in marital cases precisely because those things, both the economic aspect and the interpersonal aspect, are contrary

to the public policy of this state.

The decision in this case, if permitted to stand in the context of marital litigation, clearly would undermine the holding of *Billington* and the public policy in *Billington* because what it would do is place entirely on the courts the burden of enforcing this obligation, which is paramount in marital litigation, a full and open and, indeed, voluntary disclosure of all relevant facts, particularly relevant financial facts.

And the impact of doing that, aside from reducing the likelihood that you would have -- that you would achieve the objective of full and open disclosure, would deny to the victims of such fraudulent behavior, the ability to recoup the often and, in this case, extremely high costs of litigation that are caused by the failure to disclose relevant information and this particular --

CHIEF JUSTICE ROGERS: Why is that? Why couldn't that have been taken care of in the underlying case through appropriate sanctions?

ATTY. WILLIAMS: Because what the underlying case is able to do was to remedy the excessive alimony that was paid as a result of the nondisclosure. That could be fixed, but what's going to reimburse Mr. Simms for the hundreds of thousands of attorney fees that he incurred?

CHIEF JUSTICE ROGERS: Why couldn't that have been sought as sanctions --

ATTY. WILLIAMS: I beg your pardon?

CHIEF JUSTICE ROGERS: Why could that have not been sought as sanctions in the underlying case?

ATTY. WILLIAMS: It could theoretically have been sought as a sanction in the underlying case, but it would be a more difficult proposition, I think, for the Court to impose it. I should think that the Court would be more reluctant to do that and, of course, the emotional cost could never be, and can never be, reimbursed to Mr. Simms.

CHIEF JUSTICE ROGERS: Right. So that's not going to be addressed as a result of this. All that's going to go on is ongoing litigation and bad feelings. So I don't understand why the Court would be more reluctant in the underlying case where they had true familiarity with what had happened. Why couldn't they have just said we need attorneys for all of these motions and all the hours we spent because of the nondisclosure?

ATTY. WILLIAMS: Well -- but it puts more burden on the Court to deal with that in the context in the marital case and although the Court might be able to do that, it encourages -- as the amicus points out, it encourages full disclosure, to have this independent remedy available, and indeed the argument made by the Appellate Court in support of its decision -- in many places in the decision is, well, there is no duty and of course they cite to negligence cases. But in the marital context, there is an affirmative duty of disclosure and that duty was breached, that duty that's owed to the third party, as

Billington points out -- and that duty was breached in this case so that they are -- again, denying any remedy to the victim other than through a contempt proceeding, seems to be contrary to the policy that's articulated in *Billington;* and, indeed, as the amicus points out, the high level of proof which is required to maintain a fraud case, is more than sufficient protection against the filing of false claim.

I want to say --

JUSTICE ZARELLA: Do you have any concern about spurious claims in marital cases?

ATTY. WILLIAMS: Spurious claims are always the danger but if the fear of spurious claims is to be used as a basis for abolishing causes of action, we aren't going to have much to do in our trial courts, are we?

JUSTICE ZARELLA: Well, the cause of action doesn't exist presently. You're asking us to allow a cause of action.

ATTY. WILLIAMS: I'm sorry. I'm having a hard time hearing. It's my fault. I'm sure.

JUSTICE ZARELLA: No. I'm sorry. I'm saying there isn't a cause of action presently. There's immunity presently. You're asking us to allow for an exception to the immunity to bring the cause of action.

ATTY. WILLIAMS: That's correct.

JUSTICE ZARELLA: All right.

ATTY. WILLIAMS: That's correct. And it's --

JUSTICE ZARELLA: So there isn't a cause of action presently.

ATTY. WILLIAMS: Well, I suppose that depends on which end of the scope you're looking at because I would contend that until the Appellate Court's decision in this case, there was such a cause of action.

JUSTICE ZARELLA: But there -- it seems to me that what's being encouraged by a separate cause of action is encouraging these spurious claims; whereas, if it were handled by way of sanctions in the underlying phase, it'd be less of a desire to bring a spurious claim.

ATTY. WILLIAMS: You could make that same argument in opposition to this Court's holding in the *Mozzochi* case and, of course, as we all know in *Mozzochi*, this Court expressly allowed -- and other cases have, as well -- expressly allowed vexatious litigation claims against lawyers, so one can say that that's encouraging spurious litigation, too.

JUSTICE ZARELLA: But in a vexatious litigation claim, and the underlying claim had already been resolved and determined in favor of, let's say, the defendant, I guess, the original suit, the vexatious --

ATTY. WILLIAMS: Well -- but if we're talking about -- yes. But a common law vexatious litigation case doesn't involve an explicit finding by the lower court that there -- that these other elements were present. This is something that the plaintiff has to prove and that, indeed,

was what we were talking about in the *Mozzochi* case. So the necessity of a favorable outcome in the underlying case, as a predicate to a vexatious litigation case, certainly can be analogized very easily to the requirement in a fraud case that there be actual knowledge and intent to defraud, as well as, of course, the higher burden of proof -- burden of proof or higher to be sure than that which is applicable to vexatious litigation.

So it's very difficult to me to see a distinction in public policy terms between what we allow for vexatious litigation under *Mozzochi* and what we're asking for in this case. It occurs to me, however, that --

JUSTICE EVELEIGH: So do you support the amicus suggestion that these cases should only be allowed if there was a finding by the lower court of fraud or wrongful retention of information?

ATTY. WILLIAMS: I can -- I think that there is some merit to that. That would be a way. If this Court has a concern about unleashing too many potential spurious claims, that would certainly be a way of resolving it, and I -- from the perspective of Mr. Simms, of course, that would allow this case to go forward, because there was such a finding by Judge Munro.

JUSTICE EVELEIGH: Well, there was such a finding as to one of the attorneys but not the rest of the attorneys. Correct? It was really as to Attorney Moch, was it not?

ATTY. WILLIAMS: Actually, that's -- Judge Munro's decision didn't refer explicitly to Attorney Moch. That's referenced in the amicus brief.

JUSTICE EVELEIGH: But it --

ATTY. WILLIAMS: What Judge Munro's decision did, however, was, at least implicitly without using a name, excluded Seaman.

JUSTICE EVELEIGH: It said the attorney -- the prior attorney. It was not -- and at the time the decision was written and Judge Munro specifically said in parenthesis, not the attorney here.

ATTY. WILLIAMS: Right. That excluded one but not any of the others. For example --

JUSTICE EVELEIGH: Well, there was no finding as to the appellate attorneys, was there?

ATTY. WILLIAMS: Well, actually, one of the appellate attorneys was sitting at counsel table with Attorney Moch on February 14, '06, when false representations were made, so it neither excludes nor includes.

JUSTICE NORCOTT: Mr. Williams, I don't know if you answered this in -- with respect to Justice Zarella's question, but is the concern for spurious litigation more prevalent in family law -- in the family law context?

ATTY. WILLIAMS: I don't see why it should be. I can't, frankly, perceive any public policy basis for that and I -- that brings me, actually, if I may, Your

Honor, to the -- what I think of as a second issue in this case, which is should this be allowed in non-marital cases, as well, and the example that comes immediately to mind, of course, is in the personal injury field where, unfortunately, as we all know, from time to time, lawyers have been even criminally prosecuted for encouraging fraudulent claims against insurance companies.

Now, what is an insurance carrier to do if the carrier discovers a year after losing a trial, too late to reopen the judgment, that, in fact, 90 percent of the medicals in that case were phony? Now, this happens. In fact, I'm aware of at least one case pending right now in which a group of insurance companies has brought a claim not only against the claimants, but against a group of attorneys.

Will it be a defense to that case for those attorneys to say, well, I'm sorry, we're immune? We have absolute immunity for presenting fraudulent claims to the court, even if we knew that those medicals -- that those doctors hadn't been seen, that they hadn't provided treatment and say, well, you know, they can always be prosecuted criminally.

It seems to me that as a matter of public policy, that would be a horrendous thing to do, and yet that is the impact of the Appellate Court's decision in this case.

So to take it out of the marital context and

move it into the broader context of civil litigation, is it really the public policy of our state that attorneys who encourage the bringing -- who actually participate in bringing false personal injury claims that result in potentially millions of dollars of losses to insurance carriers, that they cannot be sued civilly for what they have done? Is that the public policy of the state? That is the result, I submit, of the Appellate Court's decision here. I can't believe that that's what this Court would want. So that will --

JUSTICE EVELEIGH: But why isn't the answer to that question -- following up on Chief Justice Rogers' question that there is an availability for sanctions for attorneys' fees in the case which you just posed, the attorney could be disbarred, why isn't that a sufficient policy to deter this type of conduct?

ATTY. WILLIAMS: Well, in other words, that's saying that the only remedy is the grievance committee and that's --

JUSTICE EVELEIGH: And sanctions from a judge.

ATTY. WILLIAMS: Well, how can you get sanctions from a judge if the insurance carrier didn't discover -- and frequently this is the case -- when there's that type of fraud, it isn't found until after the judgment is filed. What are they going to do? Where -- how is there going to be jurisdiction to go back and seek an award of

counsel fees and how is the insurance company going to recoup the false claims that have already been paid out? They're not going to get them in an award of attorneys' fees. So --

CHIEF JUSTICE ROGERS: Why couldn't they bring a motion for a new trial based on evidence -- newly discovered evidence? I mean --

ATTY. WILLIAMS: There's a time limitation on filing a motion for a new trial, which is much shorter than the time limitation on bringing -- the three-year limitation on bringing an action for fraud.

JUSTICE EVELEIGH: But can't that be extended by a discussion of the trial court, that time limitation?

ATTY. WILLIAMS: I don't think it can be -- I could be wrong about this, but I don't think it can be extended after the limitation has expired post hoc, and that's what would have to be involved here, so I think the answer to that is no, Your Honor.

So that is the second issue and then, of course, the third issue, which I have to concede is a good deal more difficult one for me to maintain, has to do with the intentional infliction of emotional distress claim on which this Court has also has granted certification. And I concede that the built-in protections which obviously apply to fraud cases do not apply in the intentional infliction of emotional distress cases with one exception and that is the question of what is extreme and outrageous, which all of the

courts, including this Court, have held repeatedly is an extraordinarily high burden to meet, albeit only by the preponderance of the evidence standard.

So I would suggest that, there again, and as we know, intentional infliction of emotional distress cases typically go out prior to trial on motions and only the really, really strong cases survive at trial; and I would submit to the Court that that there also provides a sufficient protection against spurious claims and frivolous litigation. So --

JUSTICE EVELEIGH: How is the intentional infliction different from the intentional interference for the contract that we found was not valid in *Rioux*?

ATTY. WILLIAMS: Well, the tortious interference standard does not have an extreme and outrageous component to it, although I do -- if memory serves, I do think this Court did use extreme and -- the term extreme and outrageous at one point in its decision, but that's not one of the necessary elements for tortious interference, whereas, it is, of course, for intentional infliction.

JUSTICE EVELEIGH: Isn't it more akin, though, to, like, a defamation case that we haven't approved such actions? I mean, the burden of proof is the same. You've been arguing fraud here which has a different burden of proof, a higher standard, which is a more compelling argument, at least in my mind.

ATTY. WILLIAMS: I agree. It is a more compelling argument. I agree with you. I think it is a more compelling argument and I think that the IIED case is the weakest of my claims. I don't, however, concede it because it seems to me that what you have to prove in order to prove defamation, except, perhaps, in a public figure case, is a good deal less than what you'd have to prove to show intentional infliction of emotional distress, i.e. extreme and outrageous.

So that's my argument. If there are no further questions . . .

Thank you very much.

CHIEF JUSTICE ROGERS: Thank you.

ATTY. NOONAN: May it please the Court, my name is Patrick Noonan. I represent the only defendant in this case who has already been found to not have misled anyone, Penny Seaman, and I submit she should not have been sued. In the 12 minutes allotted to me, I'd like to address three points.

First, the real question that you will be deciding in this appeal is whether the litigation privilege will actually continue to have any practical application at all. The reason I say that is that if you allow claims for fraud and intentional infliction of emotional distress to be permitted, it will -- those exceptions will swallow up the rule. Second, I'd like to address the reasons why, even if this Court decides to abandon the litigation privilege, the

judgment should be affirmed in favor of my client, Attorney Seaman; and, third, I'd like to discuss briefly the reasons why it changed the law on litigation privileges is not only unnecessary but is contrary to public policy.

Starting with the first issue, I submit to you that a holding that a lawyer may be sued for fraud or IEED (sic) or both will effectively end the litigation privilege in this state. The exception really will swallow up the rule because if litigants are allowed to bring those causes of action, they -- lawyers will simply recast their other claims, for example, defamation, into claims for fraud and IEED.

JUSTICE EVELEIGH: If -- is you argument still the same if we were to find that such a suit were allowed in fraud if we put a gloss on it that you could only sue if a -- in the prior proceeding a court had found that there was fraud or intentional withholding?

ATTY. NOONAN: I would not favor that inroad into the litigation privilege, but I agree with Your Honor that it is -- that adding that qualification would make it better and, indeed, would compel a dismissal of my client from this litigation.

JUSTICE EVELEIGH: I mean, this seems to me, in my experience, and I don't know about yours, that Judge Munro's finding here is very unusual. I mean, you don't --

ATTY. NOONAN: I don't disagree with that, Your Honor. I will say this, and this isn't, frankly, on

behalf of my client but on behalf of the other defendants. I know that they were not present in those proceedings before Judge Munro. So to some extent, to say there is a finding by Judge Munro, it was a finding without the participation of the person or persons whom she felt acted inappropriately and therefore they didn't have an opportunity to be heard on whatever she thought was done inappropriately.

I wasn't at that proceeding. I can't tell you, you know, anything about the evidence that was heard, but it strikes me that I don't know whether the -- what really is dicta in Judge Munro's opinion here would really qualify as a finding of impropriety against Attorney Moch or the other attorneys, but what I do know on behalf of Attorney Seaman is that if you were to adopt the suggestion of the amicus brief and have that as a prerequisite, then certainly you have to affirm the judgment as to Attorney Seaman because it's quite clear that not only she disclosed the information in question, but there was a finding that she did not act inappropriate.

The --

JUSTICE ZARELLA: If there -- if we did go the route of a finding, would that finding be binding in the subsequent action for damages?

ATTY. NOONAN: And that's one of the problems I have. I mean -- and it really -- this has nothing to do with Attorney Seaman but, in general -- and I do care about

the law -- the problem I have, Your Honor, with the amicus' suggestion is exactly that, that now you have -- I don't know if that's really a finding, but you certainly have a situation where the person or people against whom that finding was made weren't even made aware of the fact that that would be considered. They weren't part of that process anymore.

I actually would find that to be very -- if you were to allow a claim for fraud and if you were to allow to have a gloss that there must be a finding, I think it ought to be a finding where the lawyer who is being charged actually was present and had an opportunity to defend himself or herself. I actually think due process would require that.

So my suggestion, frankly, would be that if you were to adopt the suggestion of the amicus brief, I would think that the judgment ought to be affirmed as to all defendants in this case because there has been no finding, as I understand that term. And, truly, if you adopt Mr. Williams' argument and allow these causes of action, what you really will be doing is reversing a lot of precedent, a lot of good, well thought-out cases in this case.

Certainly, *Petyan v. Ellis* is going to be overruled because that's the case that concluded that there is no case for IEED claims in this circumstance, even if the statements are false and malicious. You -- I think you'd have to overrule the *Rioux* case. I don't see any

distinction between an IEED case or even a fraud case and the intentional interference with contractual relations. Those are all intentional claims. You'd have to overrule *DeLaurentis*. I think you'd have to --

JUSTICE EVELEIGH: Would we have to? I mean, is it enough that the fraud standard is so high for a burden of proof that you could develop a difference between the ordinary negligence standard of preponderance against the fraud standard of clear and convincing?

ATTY. NOONAN: Well, Your Honor, my -- in my view, the intentional claims are intentional. I mean, they're not terribly different. And the problem with the added burden of proof as a curb on frivolous claims is this: You can plead fraud and that gets you to the courthouse. Then you have discovery and a trial. I don't think the fact that someone has to -- has a higher burden of proof at trial dissuades parties from bringing the action. If you allow people to bring a fraud action, they will bring fraud actions and they will do so in great numbers in the marital context.

There was a question before as to whether there is a greater risk of many spurious claims in the marital context. Indeed there is. I spend a lot of my time representing lawyers before the grievance committee and, at least in my practice, a huge percentage of those complaints is in the marital litigation context, and that's the place those disputes ought to be resolved.

JUSTICE PALMER: Do you think -- are you referring to claims raised by self-represented parties --

ATTY. NOONAN: No.

JUSTICE PALMER: -- or claims raised by lawyers?

ATTY. NOONAN: Yes.

JUSTICE PALMER: Do you think lawyers are going to bring substantial number of fraud claims based on litigation in a family case? They're going to allege fraud and find -- allege facts sufficient to survive a claim that the complaint is insufficient to allege fraud?

ATTY. NOONAN: It's not so much, Your Honor, that they're alleging fraud in the grievance committee. What I'm saying is that they are -- that marital litigants have a greater propensity to be angry with the lawyer for the other party and --

JUSTICE PALMER: Yes, but --

ATTY. NOONAN: -- if you allow --

JUSTICE PALMER: I mean, unless they bring the suit themselves --

ATTY. NOONAN: I'm sorry, Your Honor.

JUSTICE PALMER: Unless they bring the suits themselves -- a suit for fraud.

ATTY. NOONAN: It's been my experience, Your Honor, that people that want to sue will find a lawyer in this state to bring that suit.

JUSTICE PALMER: And, even though these are

not meritorious claims, there's no real evidence of fraud, the lawyer -- in your experience, there are many, many lawyers who will -- who are willing to put their name on a complaint that alleges fraudulent misconduct of another lawyer thereby at least getting it to the, you know, past the pleading stage.

ATTY. NOONAN: I don't know that there are many, many, Your Honor, but I will say this: The difficulty with a lawyer being presented -- having a client come in and say, here are the facts as I know them, that lawyer, I think, does have the right and, indeed, the obligation to then do his or her best to represent that client and, I think, can accept, at least at that moment, before he knows anything else from other parties, as true, those allegations; and people who in the marital battlefields end up -- the parties generally end up being disgruntled with each other, with their lawyer, and the lawyer for the other party and they're -- and some of them end up wanting to find other --

JUSTICE PALMER: It just seems to me, Mr. Noonan, that most lawyers know that. They know that, you know, this is an area that creates great dissatisfaction with the -- not just with the opposing lawyer, but with the judge and everybody else in the system, and that they're likely to be reasonably prudent in the way they go about alleging and deciding whether to allege a claim of fraud against the fellow attorney, not necessarily because they

have any particular regard for their fellow attorneys, but just that it's a pretty serious allegation that requires very substantial proof and, you know, I just don't know how many lawyers without that -- without a real basis to make the claim, other than a disgruntled client coming in and spouting off, is going to take the time, effort, to, you know, place his or her, you know, resources behind the claim like that.

That's -- I just -- because you say that if we were to go along -- if we were to agree with Mr. Williams that there will be -- in essence, you're suggesting that the floodgates will be open to these lawsuits.

ATTY. NOONAN: I don't know whether they will be pro se or represented, Your Honor. What I'm suggesting is that the litigants, sometimes the lawyers, but certainly the litigants, are very exercised and tend to want to pursue every avenue they can, as is illustrated in this case. I mean, this divorce is something like 30 years old now and it's still going on. So whether they get a lawyer or not is of no consequence to me.

JUSTICE PALMER: Mr. Noonan, just --

ATTY. NOONAN: These people will pursue a remedy if you give it to them.

JUSTICE PALMER: Just a related question, I suppose: What do you make of the amicus brief? I know that they take the position, generally -- they sort of reiterate the view that Mr. Williams is taking on behalf of his

client, but what -- does it -- what would you say to the observation that you have a group of lawyers, outstanding family lawyers, here who are taking the view that Mr. Williams takes? What credence or credit or weight are we to give that sort of -- that filing, given the nature of the people who are taking this position?

ATTY. NOONAN: I --

JUSTICE PALMER: This isn't an interested -- you know, a particularly interested -- you know, it's not a business group or --

ATTY. NOONAN: Yes.

JUSTICE PALMER: -- the normal sort of amicus. This is a group of lawyers who are distinguished in their field who apparently feel strongly enough about this to have submitted an amicus brief.

ATTY. NOONAN: I think what I would say to them, Your Honor, is that there are other remedies for this problem, to the extent they perceive it. There are perjury charges that can be brought. There are sanctions in the trial court, which I submit is the best way to deal with this. I disagree vehemently with Mr. Williams on this. It doesn't make sense to create a new cause of action. It would make sense to have these issues raised in the trial court so that judges like Judge Munro can deal with them in real time and those are the people that actually have the real facts.

I think it can be dealt with by the grievance

committee --

(The timer goes off.)

CHIEF JUSTICE ROGERS: You can finish.

ATTY. NOONAN: -- including disbarment. Thank you, Your Honor.

CHIEF JUSTICE ROGERS: Let me just -- are you done?

JUSTICE PALMER: Yes.

CHIEF JUSTICE ROGERS: What about, though, in a lot of these cases, they're not going to discover the information until after the judgment in the original case?

ATTY. NOONAN: And with respect to that, Your Honor, if our current Practice Book does not permit a long enough period of time to file an application for a new trial, then I would suggest that we address that through amending the Practice Book. We don't need to create a new cause of action to fix the Practice Book.

CHIEF JUSTICE ROGERS: I think the Practice Book may already provide for that, but --

ATTY. NOONAN: I think it does.

CHIEF JUSTICE ROGERS: Thank you.

JUSTICE EVELEIGH: May I just follow up? Thank you.

Just one further -- what's your response to Attorney Williams' example of the bringing of the action that is completely fraudulent and the insurance companies have to defend it? Is it your position that the remedies of

sanctions and conduct of the attorneys is enough? In other words, would the sanctions be able to recoup what the insurance companies have to go through to defend an entirely spurious action or is it necessary to have a third-party action to do that?

ATTY. NOONAN: In the third-party cause of action, Your Honor, we already have -- it's called the vexatious litigation claim and we have that. And this Court has permitted that and should permit it, that we are allowing abusive process and vexatious litigation. That is exactly the cause of action that shouldn't be allowed.

JUSTICE EVELEIGH: And after we allowed those causes of action, have you noticed the floodgates being opened and all kinds of suits being brought as a result of that?

ATTY. NOONAN: No, Your Honor. And I have to say that I've been practicing for 35 years and I haven't seen a rash of improper conduct on the part of lawyers, generally, conducting litigation. So I support what this Court has done and the tradition that we have had of a litigation privilege. I support it for lawyers. I support it for judges.

I mean, as Judge Blue pointed out in the *Stump v. Sparkman* case, there was some really outrageous conduct alleged on the part of a judge, but the courts held that that judge was absolutely immune from suit. I agree with that and I think the same rules should apply here.

JUSTICE EVELEIGH: Thank you.

ATTY. NOONAN: Thank you, Your Honor.

ATTY. PARE: May it please the Court, my name is Nadine Pare and I represent Attorneys Kenneth Bartschi, Karen Dowd, and Brendon Levesque, who acted solely as appellate counsel in the case at issue here. I certainly echo and agree with all the comments by Attorney Noonan and I am going to be addressing the alternate basis, but I just want to address briefly two issues that were just raised; one being, whether or not allowing vexatious litigation cases has created a floodgate of litigation. And the answer to that is likely no.

And I think the reason for that is because vexatious litigation not only requires that there be lack of probable cause, but it also has this gatekeeping function where the underlying suit had to have been, you know, decided in favor of that defendant, and that kind of gatekeeping function is not contained in these causes of action and simply saying that you have a higher standard of proof does not protect against the frivolous litigation that we've been talking about.

CHIEF JUSTICE ROGERS: What if we said that there had to be an underlying finding of fraud? Would that be adequate?

ATTY. PARE: I think it would be helpful. I'm not sure it'd be entirely adequate. I think maybe a finding similar to motions to open where there has to be

some kind of decision that it would have changed the outcome before pleading it -- pleading a second cause of action.

And I would also like to point out that in this case, when they're talking about whether findings were made against my clients, I think if you look at the decision, they were talking about the possibility of the inheritance should have been disclosed to the trial court by the attorney who was representing her at that time and that was not my client. Although they do say that the -- it should have been disclosed to the Supreme Court, as well, there is no finding against my client. So to the extent you were to include that, the case could still be affirmed because there has been no finding of fraud or wrongdoing against my clients.

JUSTICE EVELEIGH: What's your response to Attorney Williams' position that at least one of the appellate attorneys was present at the time the representation was made? Is that accurate?

ATTY. PARE: I'm not sure of, actually, what he's speaking about. I'm not sure if he's saying before the Supreme Court, Attorney Moch was sitting at the table? I was not quite following what he was saying, but he pleads, and it's my understanding, that appellate counsel were only counsel for the appeal. To the extent they may have been communicating with other counsel, that might be true, but they're handling the appeal; they're not handling the outside issues.

JUSTICE EVELEIGH: Because it seemed clear leading -- turning to Judge Munro's decision, that she was referring to conduct prior to the time that Attorney Seaman took over that -- in the prior court proceedings, not in any appellate proceedings.

ATTY. PARE: And my reading is that she's referring to the trial before the original trial on the motion to modify and my clients were not involved in that in any way. They did not -- they were not retained, and it's pled in the plaintiff's lawsuit, until post-judgment.

JUSTICE EVELEIGH: Thank you.

JUSTICE ZARELLA: If there is a finding that's made by the trial judge of some sort of fraud, why isn't that the time to deal with it, issuing sanctions, attorney's fees --

ATTY. PARE: I agree that is the time to deal with it. I think there are already remedies in place to make these parties whole to the extent that they have incurred unnecessary attorney's fees. To the extent that there is emotional distress, I believe Your Honor commented that that does not -- you know, filing another lawsuit, rehashing everything, also does not get rid of that emotional distress.

CHIEF JUSTICE ROGERS: It's just -- what's troubling is, in essence, what the argument is, is that you've got two policies, you know, contradicting each other here. One is strenuous advocacy and the other is truth and

candor to the Court and really what you're suggesting is that strenuous advocacy should win here. That's a little troubling because I don't see why the two can't fit together, so long as you're truthful about how you're advocating.

ATTY. PARE: I understand that concern and I don't think it should be a concern because what we're looking for here is not immunity to protect bad lawyers, bad guys, people who are lying. That's not the point of the immunity. There are ways to --

CHIEF JUSTICE ROGERS: Well, it has that effect.

ATTY. PARE: It -- as with any form of immunity, there are going to be people who abuse the immunity, just like in defamation cases, but the public policy behind it is to allow people to speak freely in the litigation process, including lawyers.

JUSTICE ZARELLA: But they're not immune from criminal charges. They're not immune from losing their ability to go to work as an attorney in the future if they're sanctioned that way and lose their license. A judge has some powers with respect to removing a license after a hearing without referring to the -- a reference to the bar committee; is that correct?

ATTY. PARE: I agree, Your Honor --

JUSTICE ZARELLA: So as far as the bad actor is concerned, there is plenty of sanctions that would be

sufficient to suppress that kind of conduct. It may not be rewarding to the plaintiff or the claimant, but it is -- it certainly would suppress that kind of activity by the attorney.

ATTY. PARE: I agree, Your Honor, and there is also the ability of the Superior Court to force the attorney to pay the attorney's fees, so, I mean, they have the inherent authority to actually have the lawyer be sanctioned in that way, to actually have to pay the attorney's fees for their bad faith litigation conduct in connection with the underlying litigation.

If I may just move to the alternate basis . . .

Even if the Court did not want to continue and apply immunity in this way, the underlying action could still be -- or the underlying judgment could still be affirmed on the basis that the cause of action, themselves, just are not legally sufficient.

As to the fraud count, the first issue is that it's clear that what the plaintiff is pleading is a fraud on the Court, that the defendants made misrepresentations to the Court that the Court relied on and this Court in *Suffield* seemed to make clear that such a cause of action is not even recognized in Connecticut. They refused to -- the Court refused to create such a cause of action, and I should point out that a lawyer was actually -- and his client were defendants in that case and the Court

refused to create a cause of action noting that the proper remedy is to move to open the judgment, and the Court found, also, that those types of claims don't meet the traditional common law elements of reliance because it's supposed to be statements made to the plaintiff or the plaintiff's reliance where these are statements made to the Court.

Therefore, to the extent the plaintiff is pleading fraud on the Court, which seems abundantly clear, it's just not a recognized cause of action, and even if the Court wanted to consider misrepresentations to the Court, the plaintiff still has not met the reliance part of that. The plaintiff has not pled any facts at all regarding how the Court, any court, relied on any of the defendants' alleged misrepresentations to the Court regarding financial information. There is some conclusory allegations that they relied on it -- the courts relied on this information.

There are some vague allegations that courts in matrimonial cases consider the totality of financial circumstances of the parties, but the plaintiff has not pointed to one decision or order by the Court at all, let alone one that was made in reliance on this particular information, the fact that there was no inheritance disclosed to the courts.

And as to defendants Bartschi, Dowd, and Levesque, who, again, only handled the appeal, the plaintiff specifically alleges that these misrepresentations were made to the Supreme Court, but in deciding appeals, including

based on motions to modify alimony awards, our appellate courts and the Court at that time was not taking evidence based on assets and issuing financial awards based on that. They're not hearing facts. You are not hearing facts. They're deciding whether the factors were properly applied based on the record below and that's what the appellate courts are confined to looking at when deciding these issues.

There was just no means by which the Court could have considered this information that was allegedly withheld from it; therefore, the Supreme Court could not have relied on any alleged misrepresentations that the appellate counsel made. And to the extent the plaintiff may be attempting to allege, although it's clearly not, a fraud on the plaintiff himself, the allegations are also insufficient. There is no allegations how the plaintiff actually relied on any information in connection with these defendants and especially as appellate counsel. There's no allegations about any action or inaction the plaintiff took in reliance on this information.

In turning to the intentional infliction of emotional distress claim, for this claim to be actionable, as we've already discussed, the conduct needs to be extreme and outrageous. It has to be so outrageous in character and so extreme in degree to go as -- to go beyond all bounds of decency and to be considered atrocious. Simply being distressing and, perhaps, unfair is not enough to state a

cause of action for this and it's -- as a matter of law, it's clearly an issue that is prerequisite, almost. It must be decided as a legal issue.

There are many, many cases which are cited in the defendants' briefs which talk about when and when not conduct has been considered extreme and outrageous and it is a very high standard. For example, an ex-husband's repeated angry threats to his wife about evicting her and then locking her out of the house and moving her stuff to the basement knowing that she's recovering from surgery and already depressed was not considered extreme and outrageous.

A town's refusal to protect a plaintiff from her supervisor's sexual harassment. Aggressive and hostile behavior is not extreme and outrageous.

Questioning the competency of a teacher in front of another -- you know, her colleagues, forcing her to undergo psychiatric evaluation, is not extreme and outrageous.

It's a very high standard that's been found in limited circumstances, such as exposing students to an atmosphere of chaos and physical and verbal violence for a period of two years. That's the kind of conduct that's considered extreme and outrageous and that is not what we have here. Although it may have not necessarily been proper, if --

(The timer goes off.)

-- the allegations are true and it may have

been distressing, it just does not rise to the level of something that's beyond all bounds of decency to be considered extreme and --

JUSTICE NORCOTT: Monetary concerns can never rise to extreme -- that extreme level?

ATTY. PARE: I have not found a case where monetary concerns themselves. It's more repeated conduct. There is a case, for example, where a known alcoholic was being taunted repeatedly in front of other employees by his supervisor about his alcoholism and it was on a repeated basis, you know, trying to goad him into drinking. That's the kind of conduct that's been considered extreme and outrageous.

JUSTICE PALMER: If an attorney engages in fraudulent misconduct in connection with a court proceeding, the kind of conduct that's alleged here -- I'm not prejudging whether it was, but would that -- that could not, in your view, constitute intentional infliction of emotional distress?

ATTY. PARE: I think it depends on what the conduct is, but if you look at what's being alleged here, it's -- especially as to my clients, it's -- the facts that they did not, post-judgment -- which, by the way, is my belief that they didn't even have a duty to disclose this under *Weinstein*, because it was post-judgment, and it was information that the Court couldn't do anything with and nobody could have really been relying on it at that point --

JUSTICE PALMER: My question is more generic. It's that -- is it your argument that a fraud committed by a lawyer in the course of a family matter -- simply involving money, simply could not rise to the level of the intentional infliction of emotional distress tort?

ATTY. PARE: I think it depends on the degree. It could.

JUSTICE PALMER: What? The amount of money involved?

ATTY. PARE: The amount -- the level of the lack of disclosure, I think.

JUSTICE PALMER: Well, if it's a -- okay. All right. I -- your time is up. I don't want to --

ATTY. PARE: I do --

JUSTICE PALMER: It's really a matter of degree, is your point.

ATTY. PARE: Thank you.

CHIEF JUSTICE ROGERS: Thank you.

ATTY. PLOUFFE: May it please the Court, I'm Raymond J. Plouffe. I represent Susan Moch. I know some of you have mentioned her name as perhaps being different from the others based upon Judge Munro's decision and I would respectfully disagree.

What we are here on is a decision in which Judge Munro already heard the evidence on the alleged fraud and she says so in her decision -- it's at page A-8 of the Moch appendix -- that she considered that evidence and

determined specifically, while the Court is not confronted with a question of fraud here, she found that there was -- something was wrong that occurred.

This trial court already determined, after a full hearing on the evidence without my client being there, without the appellant clients being there, that she was not dealing with fraud, although it was alleged. So this is exactly the type of case that the absolute privilege was designed to prevent, a disgruntled litigant who had his $1 a year alimony situation reversed and he has to pay now 800 a week and then 200 a week for a period of time; he lost on his allegation of fraud; and despite the Court finding there was no fraud, finds a lawyer who will bring a fraud claim.

Lawyers are not immune from the consequences of fraud. We should all be clear about that. In the context of a fraud that's determined by the courts, Judge Munro had an obligation herself to refer these lawyers to the grievance committee. The lawyer representing Mr. Simms at that time did not refer it to the grievance committee, although he had an -- a duty to do so. If confronted with that conduct, we have a duty to do that. You have a duty to do that as judges sitting in a case. So did Judge Munro and it was never done.

There was an ability to move for attorney's fees, sanctions, the cost of discovery. The lawyer could have been sanctioned for that cost out of their own pocket. Orders of the Court can be fashioned that way.

JUSTICE PALMER: Counselor, isn't it -- well, I'll ask you this, if you think there's any truth to the suggestion that when a judge is dealing with a lawyer who that judge sees or knows professionally and is confronted with an allegation of fraud, that at least at times it's easier to simply treat it as something else, treat it as wrong --

ATTY. PLOUFFE: I --

JUSTICE PALMER: -- but not intentional fraud -- let me just finish -- whereas --

ATTY. PLOUFFE: Well, I don't --

JUSTICE PALMER: Let me just finish --

ATTY. PLOUFFE: Oh, I'm sorry.

JUSTICE PALMER: -- whereas it may be easier for a jury in a civil case who -- which doesn't know the lawyer, is not a member of the legal profession and is simply, sort of objectively, from a distance, deciding whether -- deciding the merits of this claim of fraud.

ATTY. PLOUFFE: I disagree. We are a self-regulating bar. The disciplinary committee and panels have an obligation to determine if a lawyer does act fraudulently, and if a judge in the Superior Court or the trial court or anywhere else believes an attorney actually committed in fraud, intended to deceive the Court and/or others, I think that judge has an obligation to refer it at least for review by the panel.

JUSTICE PALMER: No. I'm suggesting a case

where there's a claim of fraud and the judge, given the option of concluding, as in this case, something wrong was done, as -- or it was actually fraudulent, may be inclined -- I'm not suggesting anything like this happened in this case. I don't know. I'm not -- but it just -- as a practical matter, it seems to me that it may, anyway, be easier for a judge to impose a sanction, take whatever steps are necessary to rectify the problem upon a conclusion that something that happened was really, you know, off base, wrong, inappropriate, as opposed to fraudulent, which is really closer to the standard that would warrant -- if not warrant, require a referral to the grievance committee.

We don't -- we just -- I -- in my experience, we don't have a lot of judges referring lawyers, civil lawyers or prosecutors, to the grievance committee, despite the fact that I suspect on a fairly -- well, perhaps on an all-too-regular basis, there's conduct that might arguably warrant that.

ATTY. PLOUFFE: The Court in this case did not find fraud, neither did --

JUSTICE PALMER: Well, I --

ATTY. PLOUFFE: -- anybody else. That's the record. The Court was not asked to articulate that and I think the problem is we're speculating on maybe there was fraudulent --

JUSTICE PALMER: No. I'm not talking about this case.

ATTY. PLOUFFE: The finding was no fraud.

JUSTICE PALMER: Counselor --

ATTY. PLOUFFE: Yeah?

JUSTICE PALMER: -- I'm not talking about this case.

ATTY. PLOUFFE: Okay.

JUSTICE PALMER: I just don't want to be misunderstood on that.

ATTY. PLOUFFE: Generally. Okay.

JUSTICE PALMER: I'm not suggesting that Judge Munro, you know, split the baby or anything like that. I'm -- what I'm saying is, is that just as a broader, practical matter, I just wonder if it's easier for juries to look at these matters with greater objectivity, sort of with the benefit of hindsight and that sort of thing --

ATTY. PLOUFFE: And --

JUSTICE PALMER: -- than it is for judges who are embroiled in these controversies and, you know, who deal with -- who are members of the bar and who deal with lawyers all the time.

ATTY. PLOUFFE: I think that would -- I understand what the Court is saying but I do not believe that a judge, when faced with fraud, and that judge determines in their mind that there was a fraud upon the Court, is going to look the other way.

One thing you should keep in mind, too, is that the remedies are there for any litigant -- for example,

the concern about an insurance company, that there was this prefabricated hatched claim of a false bodily injury and they're going to get socked, perhaps, with costs of the litigation or the loss because of this immunity. That's not the case. Our legislature has already lessened the standard for claims against attorneys under 52-568.

(The timer goes off.)

That's our vexatious litigation statute, but there's a lower standard: groundless litigation. It doesn't involve proof of malice, just lack of probable cause. It would open the door to double-damages.

So in the case of the insurance company, if they could show this was a bogus claim from the beginning, the attorney hatched it with the client and would have to hatch it prior to suit, which would be conduct outside of the judicial process, so we're not dealing with absolute immunity in that case, that's conduct that would be subject to legal proceedings, outright fraud claims, but you'd also have, under 52-568, groundless litigation based on that claim, which is available merely upon a showing of lack of probable cause. The remedies are there.

We do not condone -- I don't think anybody does -- that lawyers are immune from the consequences of fraud. What the common law privilege was looking to do was not to inundate lawyers with the thought of being financially subject to unmeritorious claims but based on disgruntled adversaries.

And in this case, that's what happened. There was no finding of fraud. Mr. Simms did not prevail. He brought these claims despite a finding of the Court that there was no finding of fraud, and lawyers, as we know, are subject to deductibles on insurance policies that are often very high: 5,000, 10,000, 20,000; and all you have to do is bring that claim and that lawyer is out of pocket just doing discovery to prove that the claim is bogus. We can't have that.

CHIEF JUSTICE ROGERS: Mr. Plouffe?

ATTY. PLOUFFE: You can't --

CHIEF JUSTICE ROGERS: Mr. Plouffe?

ATTY. PLOUFFE: Yes?

CHIEF JUSTICE ROGERS: Time is up.

ATTY. PLOUFFE: Okay. Thank you.

CHIEF JUSTICE ROGERS: Okay.

ATTY. WILLIAMS: Referring, first, to the idea that a claim for vexatious litigation solves the problem of insurance companies being defrauded, for there to be a claim of vexatious litigation, the accident must not have occurred, injury must not have been suffered, and that's not the typical situation and it's not the situation I was vesting.

In the typical insurance fraud case, there is an accident but the medicals are inflated and, unfortunately, all too -- hopefully, not too often, but often enough, and in the particular case I was thinking of

that was filed recently, accident occurs and then the person is -- the victim in the accident is farmed to a group of physicians or chiropractors who never even see the person but file -- and the attorney knowing that they haven't seen the person pursues in court claims that the damages, instead of being, say, $1,500, are $15,000 and recovers a verdict accordingly because of skillful advocacy.

Vexatious litigation isn't going to take care of that because the other -- there was a claim. There was a perfect right to file a PI claim. It just -- it's the claim for damages that was the fraud. And that's very much analogous to what is alleged to have happened in this case. It's not that Mrs. -- the former Mrs. Simms didn't have financial difficulties. It's not that Mr. Simms, though he had difficulties, maybe it was not as awfully situated. Who knows? But the financial facts were concealed and so, too, in the typical insurance fraud case.

Now, I'd like to address a couple of additional points. On February 14, 2006, Attorney Levesque, in fact, appeared before Judge Tierney in the Superior Court in Stamford with Attorney Moch who made the presentation and specifically stated on the record -- with me at counsel table is Attorney Brendon Levesque -- and, in fact, that law firm did file an appearance, not just in this Court, filed an appearance in the Superior Court. That's what the record will show, if we have to get to that.

With respect to the claim that there are

alternate grounds for affirmance, I would just say two points: Number one, that isn't before this Court, and, number two, as the dissenting opinion pointed out in the last paragraph of the dissenting decision, it would be profoundly unfair to reach that on appeal because, of course, if a motion to strike is granted for failure to state a claim, then the plaintiff has the opportunity to re-plead. That wouldn't happen, of course, if that happened on appeal.

So if there are legitimate grounds for pursuing a motion to strike other than the one that was granted by the Court, that can be taken up in the Superior Court when this case is remanded.

And I would just like to say, finally, that there was a suggestion that a prosecution for perjury might be a solution. I don't know if anybody has ever heard of a prosecution being brought for perjury in family court. I don't think there has ever been one and I think there is a reason for that and the reason is not that perjury doesn't get committed.

(The timer goes off.)

JUSTICE PALMER: Mr. Williams, I just have one quick question --

ATTY. WILLIAMS: Yes.

JUSTICE PALMER: -- if I may? If -- is there any measure of damages that you're seeking under the intentional infliction of emotional distress tort that you

would not be entitled to under the -- under a fraud tort, if we were to recognize the availability of a fraud tort?

ATTY. WILLIAMS: There is no question that Mr. Simms suffered an enormous amount of emotional distress occasioned by the needless litigation. I'm not sure that emotional distress damages can be recovered in an action for fraud.

JUSTICE PALMER: All right. Let me ask you this, if -- let's assume that they can't be or that at least it's easier to recover it in the intentional infliction tort --

ATTY. WILLIAMS: Right.

JUSTICE PALMER: -- is -- just so I understand your argument, is it -- or your position, is it your view that we ought to recognize or lift the cloak of immunity from the intentional infliction of emotional distress tort irrespective of whether there has been fraud or are you suggesting that where you can make a viable claim for fraud, you -- and that fraud provides the basis of the intentional infliction claim, that you ought to be able to bring both?

ATTY. WILLIAMS: That's what I'm suggesting, the latter.

JUSTICE PALMER: Okay.

ATTY. WILLIAMS: Thank you.

CHIEF JUSTICE ROGERS: Thank you.

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NO: SC 18839	:	SUPREME COURT
ROBERT SIMMS	:	STATE OF CONNECTICUT
v.	:	*AT HARTFORD, CONNECTICUT*
PENNY SEAMAN, ET AL.	:	SEPTEMBER 19, 2012

C E R T I F I C A T I O N

I hereby certify the foregoing excerpt is a true and correct transcription of the audio recording of the above-referenced case heard before the aforementioned Honorable Supreme Court Justices of Connecticut on the 19th day of September, 2012.

Dated this 6th day of November, 2012, in Hartford, Connecticut.

Kimberly G. Silverman
Court Recording Monitor