Front, Inc. v. *Khalil*: The New York Court of Appeals Rules that Statements Made by Attorneys Prior to the Commencement of Litigation are Protected by a Qualified Privilege

In a unanimous decision written by Judge Sheila Abdus-Salaam, the New York Court of Appeals held in *Front, Inc.* v. *Khalil* that statements by attorneys made in connection with prospective litigation are protected by a qualified privilege.[1]

I. Background and Procedural History

Plaintiff Front, Inc. ("Front") is an engineering firm that sued defendants Philip Khalil, a former Front employee, and Eckersley O'Callaghan ("EOC"), a competitor of Front and Khalil's subsequent employer, over claims stemming from Khalil's alleged misappropriation of Front's trade secrets and breach of his contract with Front. In March of 2011, Khalil informed Front that he would be resigning from his position of Director of Engineering at Front and taking a position with EOC. As alleged in the complaint, Front employees subsequently discovered that Khalil had downloaded proprietary and confidential company information to an external storage device, that Khalil had worked on approximately 40 side projects with Front's competitors, including EOC, and that he had surreptitiously diverted new business from Front to EOC. Front retained the law firm of Meister Seelig & Fein, LLP ("MSF"), and in April of 2011 MSF attorney Jeffrey Kimmel sent a letter to Khalil stating that Khalil had breached his contract with Front by engaging in a competitive side business and had violated various statutes, ethical codes and fiduciary duties by misappropriating proprietary information and purposefully diverting business opportunities to a competitor. The letter demanded that Khalil cease and desist from using Front's proprietary information and return the misappropriated property to Front. Kimmel sent a separate letter to EOC containing similar demands and enclosing his letter to Khalil.

After Khalil and EOC refused to comply with Front's demands, Front commenced an action in New York Supreme Court. Khalil, in turn, initiated a third party action against MSF and Kimmel claiming that Kimmel's letters to Khalil and EOC, by stating Front's allegations as facts, unqualified in any manner, amounted to libel per se and tortious interference with business relations. Kimmel and MSF moved to dismiss Khalil's third-party complaint for failure to state a claim under CPLR 3211. The Supreme Court dismissed the third-party complaint on the ground that the statements in both letters were absolutely privileged as statements made by attorneys in the course of a judicial proceeding. The court rejected Khalil's contention that the privilege does not attach to statements made prior to the commencement of litigation citing to First Department precedent.[2] The New York Supreme Court Appellate Division affirmed, holding that attorneys' statements made in the context of prospective litigation are absolutely privileged.[3]

II. The New York Court of Appeals Decision

The Court of Appeals affirmed the Appellate Division order, but held that attorney statements made in connection with prospective litigation are not absolutely privilege, but are instead subject to a qualified privilege.[4]

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[1] *Front, Inc.* v. *Khalil*, No. 01554, slip. op. at 1 (N.Y. Feb. 24, 2015) (the "Slip Opinion"). The background summary is derived from the Slip Opinion.

[2] *Id.*

[3] *Front, Inc*. v. *Khalil* 103 A.D.3d 481, 483-84 (citing *Sexter & Warmflash, P.C.* v. *Margrabe*, 38 A.D.3d 163, 174 (1st Dep't 2007); *Vodopia* v. *Ziff-Davis Publishing Co.*, 243 A.D.2d 368 (1st Dep't 1997)).

[4] Slip Opinion at 10.

While acknowledging that it is "well settled" that statements made in the course of judicial proceedings are absolutely privileged, the court observed a split between the First and Second Departments which have held that statements made in connection with prospective litigation are absolutely privileged, and the Third Department which has held that such statements are not absolutely privileged.[5]

As an alternative to an absolute privilege, the court noted the qualified privilege that attaches to statements made in the discharge of a private or public duty.[6] The qualified privilege extends beyond judicial proceedings, and protects statements made by individuals participating in certain public fora including executive, legislative and quasi-judicial proceedings.[7] In contrast to the immunity from liability in a defamation suit conferred by the absolute privilege, the qualified privilege is lost where it can be shown that the speaker acted out of malice, meaning a "knowing or reckless disregard of a statement's falsity."[8]

The Court of Appeals' decision turned on an analysis of the applicability of the policy rationale for the absolute privilege in the prospective litigation context. The absolute privilege for statements made in connection with a judicial proceeding promotes the public interest by enabling zealous advocacy and the pursuit of truth free from fear of reprisal.[9] The court reasoned that this rationale applies in the prospective litigation context because attorneys should be encouraged to engage in preliminary communications which may settle contested issues without the need for costly litigation.[10] Noting, however, that "'[a]s a matter of policy the courts confine absolute privileges to a very few situations'" the Court of Appeals concluded that applying the absolute privilege to statements made in connection with prospective litigation was ill-advised as it carried the risk of enabling unscrupulous attorneys to engage in intimidation tactics under the pretext of prospective litigation.[11] In order to give legitimate pre-litigation communications sufficient protection while minimizing the potential for abuse, the Court of Appeals held that statements made in connection with prospective litigation are protected by a qualified privilege so long as the statements are "pertinent to a good-faith anticipated litigation."[12] Factors that the Court of Appeals indicated may be relevant to this analysis include the presence of any remedial demands in the pre-litigation correspondence and the substantive similarity between the pre-litigation statements and the causes of action and requested relief in the litigation. [13]

The court found that the letters to Khalil and EOC met the "pertinent to a good faith anticipated litigation" test and were protected by the qualified privilege as the letters informed Khalil and EOC of Front's investigation, and attempted to avoid litigation by demanding cessation of the offensive business practices and the return of stolen property.[14]

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[5] *Id.* at 7 (*comparing Sexter*, 38 A.D.3d at 174, *and Sklover* v. *Sack*, 102 A.D.3d 855, 856 (2d Dep't 2013), *with Uni-Service Risk Management, Inc.* v. *New York State Ass'n of School Business Officials*, 62 A.D.2d 1093 (3d Dep't 1978)).

[6] *Id.* at 7-8 (citing *Rosenberg* v. *Metlife, Inc.*, 8 N.Y.3d 359, 365 (2007)).

[7] *Rosenberg*, 8 N.Y.3d at 365.

[8] *Id*.

[9] Slip Opinion at 5-6 (citing *Youmans* v. *Smith* 153 N.Y. 214 (1897); *Park Knoll Associates* v. *Schmidt*, 59 N.Y.2d 205 (1983)).

[10] *Id.* at 8.

[11] *Id*. at 8-9 (quoting *Park Knoll*, 59 N.Y.2d at 210).

[12] *Id.* at 9.

[13] *Id*. at 5, 10.

[14] *Id*. at 9-10.

III. Significance of the Decision

With the "pertinent to a good-faith anticipated litigation" standard, the Court of Appeals fashioned an analytical framework for the qualified privilege in the prospective litigation context distinct from the malice inquiry applicable to statements made in the discharge of a private or public duty. The approach set forth in *Front, Inc.* focuses the qualified privilege analysis on the connection between the pre-litigation correspondence and the eventual litigation rather than on the speaker's knowledge of statements' truth or falsity.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Charles A. Gilman at 212.701.3403 or cgilman@cahil.com; Jon Mark at 212.701.3100 or jmark@cahill.com; John Schuster at 212.701.3323 or jschuster@cahill.com; or Eric Weinstein at 212.701.3733 or eweinstein@cahill.com.