SJC-13175

MICHAEL J. BASSICHIS & others[1] vs. MICHAEL I. FLORES.

Barnstable. January 5, 2022. - July 1, 2022.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.

Privileged Communication. Attorney at Law. Fraud. Practice, Civil, Motion to dismiss, Conduct of counsel.

Civil action commenced in the Superior Court Department on July 10, 2020.

A motion to dismiss was heard by Mark C. Gildea, J.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Peter S. Farber for the plaintiffs.
J. William Chamberlain, Jr., for the defendant.
The following submitted briefs for amici curiae:
Steven E. Kramer, pro se.
Richard M. Novitch & Kimberley J. Joyce, pro se.

[1] Lower Cape Plastering LLC, Max Makowsky, and Sylvia E. Freed.

GEORGES, J. This case concerns the scope of the litigation privilege, which precludes civil liability based on communications made by a party, witness, or attorney in connection with judicial proceedings or contemplated litigation. In particular, we are asked to determine whether the protection afforded by the litigation privilege applies where the statements at issue are fraudulent misrepresentations, and also whether the litigation privilege extends to actions taken during the course of litigation, or whether it is limited to written and oral statements.

The plaintiffs seek to hold the defendant attorney liable for his conduct while representing a client in divorce proceedings, and for purported fraudulent misrepresentations he made to the court during the divorce trial that formed the basis for the trial judge's disposition of the marital estate to the defendant's client, the wife, thereby preventing the husband's creditors from attaching any of the marital assets. We conclude that the litigation privilege applies in these circumstances, and therefore affirm the allowance of the defendant attorney's motion to dismiss the plaintiffs' complaint.

1. Background. We recite the facts as set forth in the plaintiffs' complaint. See Galiastro v. Mortgage Elec. Registration Sys., Inc., 467 Mass. 160, 164 (2014).

The plaintiffs are creditors of William von Thaden,[2] who was married to Kimberly von Thaden until their divorce in 2017. The defendant, Michael I. Flores, represented Kimberly in the divorce proceedings. Prior to the filing of the complaint in the present action, the plaintiffs each had filed separate complaints against William and Kimberly, asserting a number of claims arising from contract disputes involving William's construction business. After William filed a petition for bankruptcy and was granted a discharge under 11 U.S.C. § 727, the plaintiffs jointly commenced this action against Flores, Kimberly's former attorney.

a. Prior proceedings involving debts owed by William and Von Thaden Builders. During much of the marriage between William and Kimberly, William owned and operated a successful construction business, Von Thaden Builders, Inc. (Von Thaden Builders), that was the primary source of income for his family. By 2014, however, the business was no longer profitable. The complaint alleges that despite these financial difficulties, William "continued to withdraw large sums from his business account to maintain his family at the standard of living they had been accustomed to." He used the money he received from new

[2] Because they share a last name, we refer to former husband and wife William von Thaden and Kimberly von Thaden by their first names.

customers to pay debts from previous jobs. By June of 2016, William was unable to continue conducting the business in this manner. He closed Von Thaden Builders and liquidated its few remaining assets, leaving multiple debts unpaid.

One such debt was owed to plaintiff Max Makowsky, who had lent William $50,000 in October of 2015, and had been repaid only $5,000 by the time that Von Thaden Builders closed. William had received a short-term loan of $50,000 from Makowsky once previously, and had repaid that loan in less than two months. In this instance, however, when Makowsky asked that the loan be repaid in May of 2016, William paid only $5,000 toward the outstanding balance. By June of 2016, the $45,000 balance still had not been paid; at that point, Makowsky demanded payment, and William told him that Von Thaden Builders was struggling. William closed the business shortly thereafter. In August of 2017, Makowsky commenced an action against William and Kimberly in the Superior Court.

William also owed money to plaintiff Lower Cape Plastering LLC (Lower Cape Plastering), which had completed work for Von Thaden Builders in June and July of 2016 but had not been paid the full amount invoiced. In August of 2016, Lower Cape Plastering commenced an action against William in the District Court, seeking repayment of $20,500 for work that had been performed. After a jury trial in June of 2017, judgment was

entered in favor of Lower Cape Plastering in the amount of $31,281.26. In October of 2017, Lower Cape Plastering filed a complaint in the Superior Court to enforce the District Court judgment. See note 4, infra.

Plaintiffs Michael J. Bassichis and Sylvia E. Freed had hired Von Thaden Builders in February of 2016 to demolish the existing residence and to build a new single-family home on their property in Wellfleet. After Von Thaden Builders closed, work on the project ceased, and Bassichis was forced to act as the general contractor to complete the job. Bassichis and Freed commenced an action in the Superior Court in April of 2017 against William and Von Thaden Builders, seeking $55,386.35 in damages, which was the amount that Bassichis had been required to expend, above the agreed contract price, in order to finish the project.

b. Divorce proceedings. Kimberly did not become aware of her husband's financial difficulties until the business closed in June of 2016. At that time, Kimberly obtained a promise from her husband to cooperate in what the complaint labels a "collusive divorce," through which she would receive all of the marital property. She then hired the defendant, Flores, to represent her in the divorce. According to the plaintiffs, the agreement among William, Kimberly, and Flores was that all of the marital assets, which included three parcels in Orleans (two

buildable lots and one single-family home), three condominium units in Orleans, several motor vehicles, and an eighteen-foot Boston Whaler, "would be transferred to [Kimberly] by way of a judgment of divorce, and once the divorce decree became final, [William] would declare bankruptcy." In this way, the assets that were transferred to Kimberly would be shielded from William's creditors.

In October of 2016, Flores filed a complaint for divorce, on behalf of Kimberly, in the Probate and Family Court. In accordance with William's and Kimberly's plan, Flores requested a trial on the complaint be scheduled for June of 2017. Prior to trial, Flores submitted proposed findings of fact, supporting documentation, and a proposed judgment that awarded all marital assets to Kimberly. At trial, Flores represented Kimberly, while William appeared pro se. Flores informed the judge in his opening statement that William was in agreement with all of the proposed findings of fact and the proposed judgment. Flores explained that he had submitted the case as an "adversarial matter" because it was William's intent to file for bankruptcy after the divorce became final. The complaint quoted Flores's opening statement explaining that the couple had decided not to settle the case by agreement, because, due to the planned bankruptcy filing,

> "settling this case by agreement would be perilous for both parties . . . because the trustee has the ability to claw back, as it were, and void [S]tate court agreements, judgments that are based on agreements, so we are seeking a ruling from you, a judgment from you, that allocates to my client under . . . [G. L. c. 208, § 34], her share of marital assets, as well as an award of alimony, to essentially insure that any future bankruptcy proceeding -- the bankruptcy court gives due deference to the fact that a [S]tate court has divided the assets and awarded alimony, which is a little different than a negotiated agreement."

Flores later argued that William had "dissipated" approximately $896,000 of marital property by withdrawing that sum from retirement and college savings accounts, such that Kimberly was entitled to all of the remaining assets. According to the plaintiffs, Flores "purposefully withheld" information from the judge that could have been used to challenge the claim of dissipation, including records showing that the vast majority of the money that William withdrew from the marital accounts was used to pay legitimate business expenses, mortgages on the properties owned by the couple, real estate taxes, car loans, and other family expenses. William introduced no evidence at trial and told the judge that he was in agreement with all of Flores's representations. Presented with only the evidence submitted by Flores, in July of 2017, the judge entered a judgment transferring all marital assets to Kimberly.

Following the entry of judgment, William and Kimberly sold the three Orleans properties and paid the net proceeds of $638,552.48 directly to Flores. William then conveyed his fifty

per cent interest in the Orleans condominium units to Kimberly for one dollar. After the judgment nisi became final, William filed a petition for bankruptcy in the United States Bankruptcy Court for the District of Massachusetts, naming the plaintiffs as creditors in that proceeding. The bankruptcy case was closed in May of 2019, without any distribution to William's creditors.

The plaintiff creditors' separate actions against William and Kimberly in the Superior Court have been consolidated for trial.[3] The amended complaint in the consolidated cases alleges, among other claims, that both William and Kimberly are liable under the Uniform Fraudulent Transfer Act, G. L. c. 109A, for carrying out a scheme to defraud the plaintiff creditors by transferring all marital assets to Kimberly through collusive divorce proceedings. Flores is not a party to those actions.

c. Prior proceedings against Flores. In July of 2020, the plaintiff creditors commenced a parallel action in the Superior Court against Flores based on his representation of Kimberly in her divorce; the plaintiffs' complaint alleged active participation in a fraudulent transfer, civil conspiracy, and violations of G. L. c. 93A.

[3] See Makowsky vs. von Thaden; Lower Cape Plastering LLC vs. von Thaden; and Bassichis vs. von Thaden (Superior Court Docket Nos. 1772CV00148, 1772CV00402, & 1772CV00490).

Flores moved to dismiss the complaint on the ground that the plaintiffs' claims were barred by the litigation privilege. In their opposition to Flores's motion, the plaintiffs maintained that the litigation privilege protects only communications made in the course of litigation and does not protect conduct. According to the plaintiffs, their claims were based on Flores's "conduct in effectuating the unlawful transfer of [William's] assets to his wife." Consequently, they argued, the litigation privilege does not apply.

After a hearing in September of 2020, a Superior Court judge allowed Flores's motion to dismiss. In rejecting the plaintiffs' contention that their claims sought to hold Flores liable for his conduct, rather than for his communications, the judge reasoned that "it is the defendant's statements made in court, his misrepresentations, that constitute the basis of [the plaintiffs'] claims. Characterizing the defendant's statements as 'orchestrating' fraud does not allow the plaintiffs to redefine the 'statements' as 'conduct' to avoid the privilege." The plaintiffs filed an appeal in the Appeals Court, and we transferred the case to this court on our own motion.

2. Discussion. We review the allowance of a motion to dismiss de novo. See Curtis v. Herb Chambers I-95, Inc., 458 Mass. 674, 676 (2011). In conducting our review, we accept as true all of the facts alleged in the complaint and draw all

reasonable inferences in the plaintiffs' favor. See Flagg v. AliMed, Inc., 466 Mass. 23, 26 (2013), citing Marram v. Kobrick Offshore Fund, Ltd., 442 Mass. 43, 45 (2004).

The crux of the complaint is that Flores "orchestrated the scheme," resulting in all of the marital assets being transferred to Kimberly through a judgment of divorce that William's creditors could not challenge. The plaintiffs emphasize that William cooperated with the scheme by appearing pro se during the trial, introducing no evidence with respect to his substantial financial contributions to the marriage, and acknowledging his agreement with the award of the entirety of the marital estate to Kimberly. The plaintiffs also argue that Flores fraudulently misrepresented to the judge that William had dissipated a significant amount of the marital assets, which provided the basis for the judge's order awarding all remaining assets to Kimberly.

The motion judge's ruling focused on the allegation regarding fraudulent misrepresentations. As the motion judge noted, this allegation is not based on conduct, but on statements that Flores made in court, to which the litigation privilege squarely applies. Nonetheless, the plaintiffs maintain, without citation to apparent authority, that the privilege does not attach where the contested statements were made "for a purpose perverse to the search for truth," and that,

where the proceeding is a "collusive suffering of judgment by a debtor to effect a transfer of assets to his spouse" or otherwise related to "insider" fraud, it "is not the type of legal proceeding[] that would satisfy the requirement of being 'sufficiently judicial in nature' to allow the parties or their counsel to assert the litigation privilege." The motion judge did not address the plaintiffs' other claims, which involve alleged actions that were taken by Flores to obtain a favorable outcome for his client. See Blank v. Chelmsford Ob/Gyn, P.C., 420 Mass. 404, 407 (1995). The plaintiffs argue that where an "attorney is personally engaged in tortious conduct with his clients," as they contend Flores was here, "the privilege does not protect the attorney from liability for such conduct."

Because we conclude that the litigation privilege is applicable both to Flores's alleged misrepresentations during the course of the divorce proceedings and to his purported "actions," such as scheduling a trial in the von Thaden divorce despite the fact that the case was in no sense adversarial, the order allowing Flores's motion to dismiss must be affirmed.

a. Litigation privilege. The roots of the litigation privilege can be found in English common law, with the first reported decision dismissing an action against an attorney on the ground of the privilege issued in 1606. See Brook v. Montague, 79 Eng. Rep. 77, 77 (K.B. 1606); Anenson, Absolute

Immunity From Civil Liability: Lessons for Litigation Lawyers, 31 Pepp. L. Rev. 915, 918 (2004) (Anenson). In that case, an English court held that an attorney accused of slandering his client's adversary during a previous trial -- by asserting that the adversary was a convicted felon -- was immune from suit. See Anenson, supra at 919. The court decided that "[a] counsellor in law retained hath a privilege to enforce any thing which is informed him by his client, and to give it in evidence, it being pertinent to the matter in question, and not to examine whether it be true or false." See id., quoting Brook, supra.

Courts in the United States adopted this doctrine in the Nineteenth Century and frequently cited the early English cases in doing so. See, e.g., Marsh v. Elsworth, 36 How. Pr. 532, 535 (N.Y. Super. Ct. 1869), citing Brook, 79 Eng. Rep. at 77; Mower v. Watson, 11 Vt. 536, 540-541 (1839), citing Buckley v. Wood, 76 Eng. Rep. 888 (K.B. 1591). Over time, the scope of the doctrine has broadened. See Hayden, Reconsidering the Litigator's Absolute Privilege to Defame, 54 Ohio St. L.J. 985, 991 (1993). Nearly every State, including Massachusetts, has adopted the formulation of the privilege set forth in the Restatement (Second) of Torts, which provides:

> "An attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of, a

> judicial proceeding in which he participates as counsel, if it has some relation to the proceeding."

Restatement (Second) of Torts § 586 (1977). "The privilege applies regardless of malice, bad faith, or any nefarious motives on the part of the lawyer so long as the conduct complained of has some relation to the litigation." Anenson, supra at 918. See Sriberg v. Raymond, 370 Mass. 105, 109 (1976) (adopting formulation of litigation privilege described in Restatement).

In Massachusetts, as in all States that have adopted this formulation, application of the privilege extends beyond statements that are made in the court room itself to "communications preliminary to a proposed judicial proceeding." See Sriberg, 370 Mass. at 108. In Sriberg, supra at 105, 109, for instance, this court held that an attorney was immune from liability for allegedly defamatory statements contained in a letter that the attorney mailed to the plaintiff, in which the attorney threatened to pursue litigation. Although formal proceedings had yet to begin, we observed that "[i]t appears desirable to install the privilege where such statements are made by an attorney engaged in his [or her] function as an attorney[,] whether in the institution or conduct of litigation or in conferences and other communications preliminary to litigation" (emphasis added). Id. at 109.

Moreover, under the formulation set forth in the Restatement, the litigation privilege protects defamatory statements made in the course of judicial proceedings "even if uttered maliciously or in bad faith." See Mezullo v. Maletz, 331 Mass. 233, 236 (1954). This court has reasoned that if the privilege were conditioned on the speaker's honest intentions, "he or she [might] still have to go to court to prove the absence of malice or recklessness." See Correllas v. Viveiros, 410 Mass. 314, 320 (1991). "[T]he privilege would afford small comfort . . . if there was a possibility that [the speaker] would be subjected in every instance to an inquiry as to his [or her] motives." Mezzulo, supra at 237.

Although the privilege developed to protect lawyers from defamation suits, its scope has expanded in many States to bar additional claims, because "[a] privilege which protected an individual from liability for defamation would be of little value if the individual were subject to liability under a different theory of tort." Correllas, 410 Mass. at 324. See Lark Hill, The Litigation Privilege: Its Place in Contemporary Jurisprudence, 44 Hofstra L. Rev 401, 404 (2016). In Massachusetts, for example, it is well established that "[t]he privilege applies not only to defamation claims brought against [an] attorney, but to civil liability generally." See Bartle v. Berry, 80 Mass. App. Ct. 372, 378 (2008). Thus, the privilege

has been applied in Massachusetts to bar claims for intentional infliction of emotional distress, see Correllas, supra; abuse of process and negligence, see Robert L. Sullivan, D.D.S., P.C. v. Birmingham, 11 Mass. App. Ct. 359, 360, 367-368 (1981) (Sullivan); invasion of privacy, violations of G. L. c. 93A, and violations of the Civil Rights Act, G. L. c. 12, §§ 11H-11J, see Doe v. Nutter, McClennen & Fish, 41 Mass. App. Ct. 137, 140-141 (1996).

The litigation privilege promotes zealous advocacy by allowing attorneys "complete freedom of expression and candor in communications in their efforts to secure justice for their clients." Sriberg, 370 Mass. at 108. As Chief Justice Lemuel Shaw observed,

> "[I]t is, on the whole, for the public interest, and best calculated to subserve the purposes of justice, to allow counsel full freedom of speech, in conducting the causes, and advocating and sustaining the rights, of their constituents; and this freedom of discussion ought not to be impaired by numerous and refined distinctions."

Hoar v. Wood, 3 Met. 193, 197-198 (1841). "An essential ingredient of zealous representation is the freedom to err in favor of the client." Mallen & Roberts, The Liability of a Litigation Attorney to a Party Opponent, 14 Willamette L.J. 387, 390 (1978). "Implicit in [the] duty of zealous representation is a recognition that there may be occasions when, in the heat of advocacy, statements may be made that are injudicious."

State v. Boyd, 166 W. Va. 690, 697 (1981). Without the immunity afforded by the litigation privilege, an attorney's representation of his or her client would be compromised by the "fear of having to defend [him- or herself] in a subsequent civil action for misconduct." Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. United States Fire Ins. Co., 639 So. 2d 606, 608 (Fla. 1994) (Levin). See Haynes & Boone, LLP v. NFTD, LLC, 631 S.W.3d 65, 79 (Tex. 2021) ("Attorney immunity exists to promote such loyal, faithful, and aggressive representation by alleviating in the mind of the attorney any fear that he or she may be sued by or held liable to a non-client for providing such zealous representation" [quotation and citation omitted]).

Similarly, the litigation privilege allows witnesses to testify without fear of civil liability, thereby encouraging full disclosure. As this court noted almost 150 years ago, "in order to promote the most thorough investigation in courts of justice, public policy requires that witnesses shall not be restrained by the fear of being vexed by actions at the instance of those who are dissatisfied with their testimony." Rice v. Coolidge, 121 Mass. 393, 395-396 (1876). On balance, we have decided that "it is more important that witnesses be free from the fear of civil liability for what they say than that a person

who has been [harmed] by their testimony have a remedy." Aborn v. Lipson, 357 Mass. 71, 72 (1970).

In addition to fostering freedom of expression, the litigation privilege furthers the efficient administration of justice by preempting frivolous actions brought by disgruntled individuals in the wake of unfavorable judgments. "[I]t is not a desire to prevent actions from being brought in cases where they ought to be maintained, but the fear that if the rule were otherwise, numerous actions would be brought against persons who were acting honestly in the discharge of a duty" (citation omitted). See Sullivan, 11 Mass. App. Ct. at 367. On the whole, it is preferable to bar all actions based on statements made in the course of litigation, rather than to open the floodgates to groundless lawsuits that would clog the courts with pointless litigation and force attorneys to expend time and resources that otherwise could be spent on representing clients, in their own defense. See Jacob B. v. County of Shasta, 40 Cal. 4th 948, 955 (2007) (litigation privilege "give[s] finality to judgments" and "avoid[s] unending litigation" [citation omitted]); Surace v. Wuliger, 25 Ohio St. 3d 229, 235 (1986) (litigation privilege avoids "clog[ging] court dockets with a multitude of lawsuits based upon alleged defamatory statements made in other judicial proceedings"). In this way, the litigation privilege has been understood to be "the backbone to

an effective and smoothly operating judicial system." See Silberg v. Anderson, 50 Cal. 3d 205, 215 (1990), quoting McClatchy Newspapers, Inc. v. Superior Court, 189 Cal. App. 3d 961, 970 (1987).

At the same time, the privilege does not shield attorneys from their own wrongdoing. "[T]here are remedies other than a cause of action for damages that can be imposed" to discourage and sanction attorney misconduct. See Simms v. Seaman, 308 Conn. 523, 536 (2013). A trial judge has the inherent authority to sanction an attorney for his or her misconduct in the court room, see Wong v. Luu, 472 Mass. 208, 219 (2015), or to hold the attorney in contempt of court, see Sussman v. Commonwealth, 374 Mass. 692, 695 (1978). Separately, the Board of Bar Overseers may institute disciplinary proceedings against an attorney for a violation of the rules of professional responsibility. See S.J.C. Rule 4:01. Thus, "[a]lthough the result may be harsh in some instances and a party to a lawsuit may possibly be harmed without legal recourse, . . . [s]ufficient protection from gross abuse of the privilege is provided" by a judge's inherent powers and the specter of disciplinary proceedings. See Surace v. Wuliger, 25 Ohio St. 3d 229, 234 (1986), quoting Justice v. Mowery, 69 Ohio App. 2d 75, 77 (1980). See also Levin, 639 So. 2d at 608-609 (trial court's inherent contempt powers may be used to punish "tortious conduct occurring during litigation");

Clark v. Druckman, 218 W. Va. 427, 434 (2005) (rules of civil procedure, rules of professional conduct, and court's inherent authority "provide adequate safeguards to protect against abusive and frivolous litigation tactics").

With these considerations in mind, we turn to the question whether the plaintiffs' claims here are barred by the litigation privilege. As the motion judge's ruling focused only on the purported fraudulent misrepresentations by Flores during the divorce proceedings, we first consider whether Flores is protected from liability based on these statements. Because we accept every allegation in the complaint as true at this stage of the litigation, we then address the question whether the litigation privilege is applicable not just to statements made, but also to actions assertedly taken by Flores during the course of the divorce proceedings.

b. Litigation privilege and fraudulent misrepresentation. A court determines whether the litigation privilege is applicable "on a case-by-case basis, after a fact-specific analysis, with a proper consideration of the balance between a plaintiff's right to seek legal redress for injuries suffered and the public policy supporting the application of such a strong protection from the burdens of litigation." See Fisher v. Lint, 69 Mass. App. Ct. 360, 365-366 (2007).

Although, as discussed, it is well settled that statements made during the course of litigation are protected by the litigation privilege, the plaintiffs contend that the privilege is inapplicable where an attorney's statements are designed to hinder, rather than to enhance, the "truth-seeking function of the adversary system." They maintain that "the policy considerations underlying the litigation privilege all focus on the truth-seeking function of the adversary system of justice," and that the privilege therefore only applies where it supports this function.

We have long recognized, in the context of defamation claims, that the litigation privilege applies regardless of bad faith or malicious intent. See Mezullo, 331 Mass. at 236; Laing v. Mitten, 185 Mass. 233, 235 (1904). As we noted in Aborn, 357 Mass. at 73, "[t]o hold that a false statement, knowingly made" is not subject to the litigation privilege "would render the privilege illusory and of little value." "The privilege would depend on the knowledge or lack of it possessed by the person making the defamatory statement," id., which would become known only through litigation challenging the statements.

The same rationale applies where an attorney is accused of making fraudulent misrepresentations in the course of representing a client. If the protection of the litigation privilege was not in effect where an attorney knowingly

misrepresented material facts, at the client's behest, during the course of litigation, the fear of civil liability could limit the attorney's ability to function as a zealous advocate for his or her client. The Connecticut Supreme Court, for instance, determined that two attorneys were protected by the litigation privilege against claims that they intentionally concealed their client's true financial circumstances during an appeal from a court order that modified the amount of required alimony payments. See Simms, 308 Conn. at 568-569. The court explained that "[t]he privilege is not intended to give offending attorneys immunity for making fraudulent statements but to protect the overwhelming number of innocent attorneys from unjust claims of fraudulent conduct." Id. at 563 n.25. The litigation privilege thus serves "to encourage robust representation of clients and to protect the vast majority of attorneys who are innocent of wrongdoing from harassment in the form of retaliatory litigation by litigants dissatisfied with the outcome of a prior proceeding." Id. at 562-564.

This reasoning, which has deep roots in English and American common law, is persuasive. See, e.g., Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950) ("[it is] better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation"); Munster v. Lamb, 11

Q.D.B. 588, 604 (1883) ("it is better to make the rule of law so large that an innocent counsel shall never be troubled, although by making it so large counsel are included who have been guilty of malice and misconduct"). In deciding that the litigation privilege is applicable to claims of fraud, the Connecticut Supreme Court examined the well-established pattern of expansion of the litigation privilege to similar claims in other States:

> "Thus, courts have applied the privilege to bar causes of action for, among others, intentional infliction of emotional distress; interference with contractual relationship; fraud; invasion of privacy; abuse of process; and negligent misrepresentation.' . . . [An] objective [of this expansion] simply has been to recognize that the privilege should apply to other acts associated with an attorney's 'function as an advocate.' Dory v. Ryan, [25 F.3d 81, 83 (1994). See also [Abanto vs. Hayt, Hayt & Landau, P.L., U.S. Dist. Ct., No. 11-24543-CIV (S.D. Fla. Oct. 18, 2012) (litigation privilege applied to statutory cause of action under Florida Consumer Collection Practices Act); Hahn vs. United States Dep't of Commerce, U.S. Dist. Ct., No. 11-6369(ES) (D.N.J. Sept. 10, 2012); Rickenbach v. Wells Fargo Bank, N.A., 635 F. Supp. 2d 389, 401-402 (D.N.J. 2009)] (litigation privilege applies to claims against attorney for negligence and breach of duty of good faith and fair dealing because privilege is 'broadly applicable' and implied abrogation of privilege is not favored); Linder v. Brown & Herrick, 189 Ariz. 398, 405-406 . . . (App. 1997) (litigation privilege applies to claims of fraud); Echevarria, McCalla, Raymer, Barrett & Frappier v. Cole, [950 So. 2d 380], 384 (Fla. 2007) ('the litigation privilege applies in all causes of action, whether for common-law torts or statutory violations,' including alleged violations of Florida Consumer Collection Practices Act and Florida Unfair and Deceptive Trade Practices Act); [Levin, 639 So. 2d at 608] (litigation privilege applies to claim of tortious interference with business relationship because 'absolute immunity must be afforded to any act occurring during the course of a judicial proceeding, regardless of whether the act involves a defamatory statement or other tortious behavior . . .

> [as] long as the act has some relation to the proceeding'); Bennett v. Jones, Waldo, Holbrook & McDonough, [2003 UT 9, ¶ 77] (litigation privilege applies to claim of deceit when complaint alleges that attorneys made statements with intent to deceive courts)."

Simms, 308 Conn. at 567-568. Consistent with the other jurisdictions, we conclude that the litigation privilege protects Flores from liability based on the allegedly fraudulent misrepresentations he made to the judge during the divorce trial.

The plaintiff creditors' argument that the litigation privilege is applicable only where it fosters truth-seeking misconstrues the policies that the litigation privilege is designed to advance. The underlying purpose of the litigation privilege is to allow participants in judicial proceedings the freedom to speak without fear of subsequent litigation based on their words. See Gillette Co. v. Provost, 91 Mass. App. Ct. 133, 141 (2017). Although this freedom is thought to facilitate truthful disclosure of testifying witnesses, see Matsuura v. E.I. du Pont de Nemours & Co., 102 Haw. 149, 155 (2003), its application to attorneys rests on an additional ground: to ensure that an attorney fulfilling his or her ethical duty to advocate for a client is not "hobbled by the fear of reprisal," Russell v. Clark, 620 S.W.2d 865, 868 (Tex. Civ. App. 1981). To be sure, eliminating such concerns "encourages candor on the part of honest attorneys, who greatly outnumber those few

attorneys who choose not to abide by the rules." See Simms, 308 Conn. at 563-564. It does, however, come at the cost of potentially protecting an individual attorney who misrepresents material facts to further the attorney's clients' interests. We accept this broad protection as necessary to encourage zealous advocacy.

c. Application of litigation privilege to conduct. In assessing whether Flores was immune from liability for his representation of Kimberly in her divorce, we also must determine whether the litigation privilege extends beyond communications made during the course of judicial proceedings to actions taken by the attorney. As stated, the plaintiffs seek to hold Flores liable not only for his alleged misrepresentations during the course of the divorce proceeding, but also for his conduct in "orchestrating" the purported scheme to defraud them, which they contend went beyond communications and had the effect of taking actions. This purported conduct apparently included scheduling a trial in the divorce case and submitting proposed findings of fact to the court.

Although this issue may be a question of first impression in Massachusetts, as noted supra, multiple State supreme courts have held that the litigation privilege shields an attorney from liability for actions taken during the course of litigation. See, e.g., Levin, 639 So. 2d at 608; Kahala Royal Corp. v.

Goodsill Anderson Quinn & Stifel, LLP, 113 Haw. 251, 271 (2007); Taylor v. McNichols, 149 Idaho 826, 839 (2010); Cantey Hanger, LLP v. Byrd, 467 S.W.3d 477, 482 (Tex. 2015); Moss v. Parr Waddoups Brown Gee & Loveless, 2012 UT 42, ¶¶ 34-36; Clark, 218 W. Va. at 433. These courts have determined that the policies justifying application of the litigation privilege to an attorney's statements made in the course of litigation apply with equal force to the attorney's conduct. For instance, the Florida Supreme Court has observed that

> "absolute immunity must be afforded to any act occurring during the course of a judicial proceeding, regardless of whether the act involves a defamatory statement or other tortious behavior . . . so long as the act has some relation to the proceeding. The rationale behind immunity afforded to defamatory statements is equally applicable to other misconduct occurring during the course of a judicial proceeding. Just as participants in litigation must be free to engage in unhindered communication, so too must those participants be free to use their best judgment in prosecuting or defending a lawsuit without fear of having to defend their actions in a subsequent civil action for misconduct."

Levin, supra.

These arguments are compelling. As discussed, the litigation privilege "is based upon a public policy of securing to attorneys as officers of the court the utmost freedom in their efforts to secure justice for their clients." Restatement (Second) of Torts § 586 comment a. In light of this policy, "we see no reason to distinguish between communications made during the litigation process and conduct occurring during the

litigation process." Clark, 218 W. Va. at 433. The acts of preparing and advancing a litigation strategy are as integral to the duties of a lawyer as is advocating in the court room. The strategic decisions a lawyer makes in an effort to serve his or her client warrant protection from civil liability, regardless of whether those decisions require the lawyer to speak or to act on the client's behalf. See Loigman v. Township Committee of Middletown, 185 N.J. 566, 587-588 (2006) ("Lawyers necessarily exercise a wide degree of discretion in performing their duties in the course of judicial proceedings, and must be free to pursue the best course charted for their clients without the distraction of a vindictive lawsuit looming on the horizon"). "The litigation privilege must have sufficient breadth to advance the best interests of the administration of justice." Id. at 588.

Accordingly, we conclude that the litigation privilege applies to an attorney's actions during the course of a judicial proceeding, just as it does to the attorney's communications. "To find otherwise would invite attorneys to divide their interest between advocating for their client and protecting themselves from a retributive suit." Taylor, 149 Idaho at 841. See Alpert v. Crain, Caton & James, P.C., 178 S.W.3d 398, 405 (Tex. App. 2005) ("If an attorney could be held liable to an opposing party for statements made or actions taken in the

course of representing his client, [the attorney] would be forced constantly to balance his [or her] own potential exposure against [the] client's best interest").

Thus, the plaintiff creditors' argument that the litigation privilege does not apply here because Flores was "personally engaged in tortious conduct with his clients" is unavailing. The plaintiffs rely on the Appeals Court's decision in Kurker v. Hill, 44 Mass. App. Ct 184, 192 (1998), in which the court held that the litigation privilege did not shield the defendant attorneys from liability on a claim for interference with advantageous business relations because the privilege did not "encompass the defendant attorneys' conduct in counseling and assisting their clients in business matters generally." This reliance is inapposite. The attorneys in Kurker provided legal advice and services in connection with the purchase and sale of corporate assets; their assistance was not confined to litigation and, indeed, primarily was related to "counselling and assisting their clients in business matters generally," rather than the preparation or conduct of litigation. Id. Here, all of Flores's actions occurred in the context of the von Thaden divorce. The litigation privilege thus applies to Flores's advice and to the services he rendered.

That tort liability is not available, however, does not preclude those who have been harmed by an attorney's fraudulent

statements or actions from being able to obtain relief,[4] nor does it deprive the public of a mechanism for discouraging attorney misconduct. Trial judges possess the inherent authority to "sanction an attorney for making knowingly false misrepresentations to the court, intentionally misleading the court, or knowingly concealing information that an attorney has a duty to provide to the court."[5] Wong, 472 Mass. 219. Trial judges also have inherent "power to sanction an attorney for engaging in conduct in the court room that interferes with a judge's ability to manage the court room fairly, efficiently, and respectfully," or for engaging in other types of misconduct

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[4] Third parties who allege that they were harmed by the actions of an attorney's client also are not precluded by the litigation privilege from obtaining financial relief. For instance, here, shortly after he filed his complaint in the Superior Court against William and Kimberly, plaintiff Makowsky also obtained a real estate attachment in the amount of $53,000 on all real estate William and Kimberly owned in Barnstable County. When they filed their complaint in the Superior Court, Bassichis and Freed also obtained a real estate attachment in the amount of $50,000 on all real estate in Barnstable County owned by William. Similarly, on the day that it filed its complaint in the District Court, Lower Cape Plastering obtained a real estate attachment in the amount of $22,000 on all real estate in Barnstable County held in William's name. Following a jury trial, judgment entered for Lower Cape Plastering in the amount of $31,281.26. Lower Cape Plastering received $22,000 of that amount, which was being held by the deputy sheriff as a result of the prejudgment attachment; it then commenced an action in the Superior Court to enforce the remainder of the District Court's judgment.

[5] We do not intend to imply that an attorney in Flores's position would have a duty to apprise a court of the attorney's view of the client's financial position.

that "threatens a judge's ability to ensure the fair administration of justice." Id. Such sanctions may be in the form of fines designed to compensate the aggrieved person for losses incurred by the misconduct of the offending party. See Avelino-Wright v. Wright, 51 Mass. App. Ct. 1, 5 (2001), citing Clark v. Clark, 47 Mass. App. Ct. 737, 744-745 (1999).

Furthermore, an attorney may be subject to disciplinary proceedings for his or her misrepresentations to a court or other misconduct. Rule 3.3 of the Massachusetts Rules of Professional Conduct, as appearing in 471 Mass. 1416 (2015), for example, prohibits the making of a "false statement of fact or law to a tribunal," while Mass. R. Prof. C. 8.4, as appearing in 471 Mass. 1483 (2015), deems it to be professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." In bar discipline proceedings involving an attorney's material misrepresentations to a court, the presumptive sanction is a suspension from the practice of law in the Commonwealth for a period of one year. See, e.g., Matter of Neitlich, 413 Mass. 416, 420, 425 (1992) (one-year suspension where respondent's misrepresentations to Probate and Family Court judge and opposing counsel constituted "knowing concealment" and were "deliberate, planned attempts . . . to conceal from the Court and his opponent the full terms of [a] proposed sale"). Where an attorney lies under oath, the

presumptive sanction is a two-year suspension from the practice of law. See Matter of Balliro, 453 Mass. 75, 86-87 (2009), quoting Matter of O'Donnell, 23 Mass. Att'y Discipline Rep. 508, 514 n.3 (2007).

Thus, a determination that an attorney is immune from civil liability for making fraudulent misrepresentations about material aspects of a client's case, or for engaging in misconduct, would not shield the attorney from any applicable sanction for conduct contrary to the rules of professional responsibility, nor would it suggest to other attorneys that such behavior is acceptable.

Judgment affirmed.