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### Summary of Cucinotta v. Deloitte & Touche, LLP, 129 Nev. Adv. Op. No. 35

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## TORTS – BUSINESS LAW

### **Summary**

In an appeal from a district court order granting summary judgment in a defamation case, the Court considered whether information divulged by a registered accounting firm in accordance with the Securities Exchange Act of 1934 is subject to an absolute privilege.

### **Disposition/Outcome**

The Court affirmed the district court order, holding that those who are required by law to publish defamatory statements are absolutely privileged in making such statements so long as (1) the statements are communicated pursuant to a lawful process, and (2) the statements are communicated to a qualified person.

### **Factual and Procedural History**

Respondents Deloitte & Touche, LLP, a registered accounting firm, and Larry Krause, a certified public accountant in their employ, performed a financial audit for Global Cash Access Holdings, Inc. (GCA), a company providing services to the gaming industry. During the course of an audit for another gaming client, Krause obtained an intelligence bulletin authored by the FBI that contained information about alleged illegal acts committed by GCA and two of its board members, appellants Robert Cucinotta and Karim Maskatiya.

Due to the serious nature of the allegations, Deloitte contacted both the FBI and the DOJ to confirm their validity. Despite counsel from the DOJ advising against further dissemination of the bulletin, Deloitte felt compelled by federal securities law to disclose the allegations contained within the bulletin to GCA's Audit Committee. Deloitte subsequently communicated these allegations during a conference call with the Audit Committee and requested that the audit committee conduct an independent investigation.

GCA hired a national law firm to perform the investigation, and announced in a press release that its third quarter report would be delayed pending the results of an internal investigation. The investigation ultimately revealed no evidence of misconduct on the part of GCA, Cucinotta, or Maskatiya. However, as a result of the delayed third quarter report, GCA's stock price significantly declined. Shortly thereafter, Cucinotta and Maskatiya resigned from GCA's Board of Directors.

Cucinotta and Maskatiya then filed a complaint for defamation and tortious interference against respondents Deloitte and Krause, based on the respondent's communication of the contents of the FBI bulletin to GCA's Audit Committee. After limited discovery, Deloitte and Krause filed a motion for summary judgment, arguing that their communications with the Audit Committee were either absolutely or conditionally privileged.

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<sup>1</sup> By Sean Africk

The district court granted the motion for summary judgment on both claims, finding that the communications were at least conditionally privileged on the basis that Cucinotta and Maskatiya failed to provide sufficient evidence to permit a reasonable jury to conclude that Deloitte and Krause acted with actual malice. The district court also found that under federal securities law Deloitte and Krause had an affirmative duty to disclose the allegations contained in the bulletin, but found it unnecessary to determine whether the communications were absolutely privileged as a result of this duty.

## **Discussion**

Justice Cherry wrote for an en banc court in which Chief Justice Pickering voluntarily recused herself. The Court, in its discretion, addressed the issue of whether the communications between Deloitte and GCA's Audit Committee were absolutely privileged.

Defamation may occur when a person publishes a false statement of fact.<sup>2</sup> Nevertheless, certain defamatory communications are privileged because "the public interest in having people speak freely outweighs the risk that individuals will occasionally abuse the privilege by making false and malicious statements."<sup>3</sup> Accordingly, Nevada law provides an absolute privilege to defamatory statements made during the course of judicial or quasi-judicial proceedings.<sup>4</sup>

The Court held that this absolute privilege should also extend to communications published under law, and formally adopted the position of the Restatement (Second) of Torts which provides that "one who is required by law to do an act does not incur any liability for doing it."<sup>5</sup> However, the court cautioned that absolute privilege should only apply to a narrow set of circumstances because unfiltered speech to unintended persons could instigate malicious conduct that would go unpunished. Therefore, the Court held that communications made under the law only deserve absolute privilege when they are (1) made according to a lawful process and (2) communicated to a qualified person.

The Court determined that Deloitte's communications should be subject to absolute privilege. It reasoned that under federal law, when an accounting firm becomes aware of information that an illegal act has occurred or may occur, it must adequately inform the appropriate level of management,<sup>6</sup> in this case GCA's Audit Committee. The Court concluded that the absolute privilege granted to these communications precluded the appellant's claims of defamation and tortious interference, and therefore the district court's grant of summary judgment was appropriate.

## **Conclusion**

A party who is required by law to publish defamatory material is absolutely privileged to publish it, provided that the material is communicated to an appropriate party during a lawful process.

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<sup>2</sup> Pegasus v. Reno Newspapers, Inc., 118 Nev. 706, 714, 57 P.3d 82, 87 (2002).

<sup>3</sup> Circus Circus Hotels, Inc. v. Witherspoon, 99 Nev. 56, 61, 657 P.2d 101, 104 (1983).

<sup>4</sup> Fink v. Oshins, 118 Nev. 428, 433-34, 49 P.3d 640, 644 (2002).

<sup>5</sup> RESTATEMENT (SECOND) OF TORTS § 592A cmt. a (1977).

<sup>6</sup> See 15 U.S.C. § 78j-1(b)(1)(B) (2010).