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COURT OF APPEALS

STATE OF NEW YORK

FRONT, INC.,

Respondent,

-against-

No. 19

PHILIP KHALIL,

Appellant.

20 Eagle Street
Albany, New York 12207
January 14, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Sara Winkeljohn
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 19, Front v.
2 Khalil.

3 MR. MARANTZ: Good afternoon.

4 CHIEF JUDGE LIPPMAN: Take your time.

5 MR. MARANTZ: Thank you.

6 CHIEF JUDGE LIPPMAN: Go ahead, counsel.
7 You want any rebuttal time, counsel?

8 MR. MARANTZ: Sure, the same. Two minutes
9 seems to be good.

10 CHIEF JUDGE LIPPMAN: Two minutes. You
11 have it. Go ahead.

12 MR. MARANTZ: Thank you. It is an honor to
13 be here. Thank you. And my name is Neil G. Marantz.
14 I represent the appellant Philip Khalil in this
15 matter. And it appears that I have been chosen
16 somehow to be the guardian of precedent with respect
17 to the law of defamation and the applicability of
18 absolute privilege.

19 CHIEF JUDGE LIPPMAN: Well, tell us - - -
20 tell us why or why - - - why not there is absolute
21 privilege here.

22 MR. MARANTZ: Well, there should not be
23 absolute - - -

24 CHIEF JUDGE LIPPMAN: Why not?

25 MR. MARANTZ: - - - privilege here for many

1 reasons.

2 CHIEF JUDGE LIPPMAN: Let's take it first
3 from a policy argument.

4 MR. MARANTZ: Well - - -

5 CHIEF JUDGE LIPPMAN: What's the - - - the
6 purpose of having absolute privilege and why - - -
7 why shouldn't we have it in this case?

8 MR. MARANTZ: Okay. Well - - -

9 CHIEF JUDGE LIPPMAN: What's fair?

10 MR. MARANTZ: I'm sorry?

11 CHIEF JUDGE LIPPMAN: What's fair?

12 MR. MARANTZ: Well - - - well, that's - - -
13 I think - - - and fundamentally we have, literally,
14 over a century of precedent - - -

15 CHIEF JUDGE LIPPMAN: Uh, uh, uh; I asked
16 you on policy grounds.

17 MR. MARANTZ: Well, I'm - - -

18 CHIEF JUDGE LIPPMAN: What's - - -

19 MR. MARANTZ: Which expresses the policy.

20 CHIEF JUDGE LIPPMAN: Okay.

21 MR. MARANTZ: And in - - -

22 CHIEF JUDGE LIPPMAN: Tell us what the - -
23 -

24 MR. MARANTZ: - - - response - - - in
25 response there's been a change where there's - - - no

1 rationale has been offered whatsoever.

2 CHIEF JUDGE LIPPMAN: Okay. Tell us what
3 the - - -

4 MR. MARANTZ: Which is admittedly
5 difficult.

6 CHIEF JUDGE LIPPMAN: Tell us what the
7 policy is.

8 MR. MARANTZ: Okay. The policy is at least
9 two-fold. First, there is a strong policy that this
10 court has enunciated on several occasions that
11 absolute privilege is to be stringently applied.

12 CHIEF JUDGE LIPPMAN: Where - - - where do
13 you have it? Where's the policy? Where do you have
14 it - - -

15 MR. MARANTZ: Well - - -

16 CHIEF JUDGE LIPPMAN: - - - from a policy
17 perspective? Why should you have - - - in what
18 circumstance should you have absolute privilege?

19 MR. MARANTZ: Well, this court said in Park
20 Knoll that the purpose of absolute privilege is, "for
21 the benefit of the public, to promote the
22 administration of justice, and only incidentally for
23 the benefit of the participants."

24 CHIEF JUDGE LIPPMAN: Why isn't - - -

25 MR. MARANTZ: Clearly - - -

1 CHIEF JUDGE LIPPMAN: - - - this the
2 adminis - - -

3 MR. MARANTZ: Clearly - - -

4 CHIEF JUDGE LIPPMAN: Why isn't this the
5 administration of justice?

6 MR. MARANTZ: Because there's a tremendous
7 different between an attorney acting within the
8 context of a proceeding where there was other counsel
9 - - -

10 CHIEF JUDGE LIPPMAN: He's getting ready to
11 - - - to - - - for a proceeding, pre-litigation but
12 not there yet.

13 MR. MARANTZ: Well, we don't know that, do
14 we, because nothing's happened yet. So we don't know
15 if he's really getting ready for a proceeding.

16 JUDGE PIGOTT: Well, we know it here.

17 MR. MARANTZ: But more to the point - - -

18 JUDGE READ: We know it - - -

19 JUDGE PIGOTT: We know it here.

20 MR. MARANTZ: Excuse me?

21 JUDGE PIGOTT: We know it here in this
22 case.

23 MR. MARANTZ: Well, we have the benefit of
24 hindsight that six months later - - -

25 JUDGE PIGOTT: Well, let me ask you in the

1 benefit of hindsight, why did you get a letter in
2 April and not stop - - - and not respond immediately?
3 If you - - - if you thought this was libelous per se
4 and if it was defamation and if it was interfering
5 with your right to contract, et cetera - - - you make
6 a big deal out of the fact that six months went by.
7 Well, six months - - - months went by without either
8 of these defendants issuing a peep.

9 MR. MARANTZ: That's not true, actually. A
10 letter was - - -

11 JUDGE PIGOTT: Well, it's not in the
12 record. And then - - - and then when they did
13 exactly what they told you they were going to do, six
14 months later, it could be read to see they gave you
15 an opportunity to cease and desist and to explain and
16 to repay, et cetera. And now you're saying well,
17 it's all libelous per se, and I'm sorry I didn't
18 mention that in - - - in April when they made these
19 outrageous statements. But here we are.

20 MR. MARANTZ: Well, it's interesting and I
21 - - - if it's not in the record, then shame on me
22 because - - - but there was a letter written
23 immediately saying that you've gone way beyond the
24 bounds of zealous representation of a client and it's
25 - - - and what you've written is outrageous.

1 JUDGE PIGOTT: It's not in there. Not that
2 I saw. Maybe you could point it out.

3 MR. MARANTZ: Right. But may I just say
4 they went way beyond the bounds of zealous
5 representation and it was - - - was outrageous.

6 JUDGE PIGOTT: Why? They - - - they said
7 we represent a client and here are the allegations.
8 Now, obviously this law firm wasn't sitting there
9 when the claims that - - - that your client was
10 stealing all of this stuff and downloading all of
11 this stuff and working behind the back of his
12 employer against their best interests. What they
13 said is, this is what our client is saying and this
14 is why we want you to stop it.

15 Now, you could write back and say we have
16 stopped it. Of course you're not working there
17 anymore. But we did not take this stuff. We had the
18 authority to do this. And - - - but none of that - -
19 - none of that was done. And - - - and to now say
20 gee, it's outrageous that they made these claims and
21 then - - - and then came and sued us on them; we get
22 to sue them now.

23 MR. MARANTZ: Well, as I said, it - - - it
24 actually was done. But more to the point, I think
25 Your Honor should not assume that letter to be true.

1 What Your Honor should assume to be true is the
2 pleading at issue, which is a third-party complaint.
3 That's what - - -

4 JUDGE PIGOTT: No. Let's take a - - -
5 let's take a look at the first-party complaint
6 because I didn't understand why when you got that,
7 these wouldn't be affirmative defenses or
8 counterclaims within that suit. The only thing this
9 does is raise a specter that these lawyers can't
10 properly represent their client because you've now
11 said they may be witnesses.

12 But if you would have asserted the same
13 things in the - - - in the - - - in the claim that
14 you're making against them as an affirmative defense
15 and/or a counterclaim against the - - - against
16 Front, you'd all be in one lawsuit and things could
17 have been halfway over by now.

18 MR. MARANTZ: Well, that - - - those
19 actually have been asserted in subsequent pleadings,
20 so there are - - -

21 JUDGE PIGOTT: But we don't have the record
22 that you're arguing about.

23 MR. MARANTZ: No, unfortunately. Because
24 it was a motion - - - this was a pre-answer motion to
25 dismiss.

1 JUDGE PIGOTT: Is it moot?

2 MR. MARANTZ: So that's what - - - I'm
3 sorry?

4 JUDGE PIGOTT: Is it moot?

5 MR. MARANTZ: No, it's not moot. Because I
6 think it's - - - there's an essential problem in an
7 attorney being hired as a henchman to knowingly
8 interfere with a prospective business arrangement
9 that's acknowledged in the letter itself. It wasn't
10 a secret here. The let - - - the letter says I - - -

11 JUDGE ABDUS-SALAAM: But it - - - doesn't
12 that point out, counsel, that the reason that the
13 lawyer sent your client first, Mr. Khalil, the letter
14 was there was an allegation. More than an
15 allegation, there was a witness who saw him
16 downloading information that was proprietary to Front
17 and they wanted that back, if he had it, or any other
18 information. So wasn't this in an effort to resolve
19 the problem before suing anybody?

20 MR. MARANTZ: Actually not, Your Honor.
21 There was no - - - the letter says on its face, we
22 prevented you from downloading and we confiscated the
23 hard drive. So there was nothing to cease and desist
24 in - - -

25 JUDGE PIGOTT: Oh, no, no. That's not

1 true.

2 MR. MARANTZ: It's absolutely true.

3 JUDGE PIGOTT: Oh, no. I mean, look at the
4 - - - look at the e-mails. I mean, we don't know
5 what he shipped over to - - - to England. We don't
6 know, you know, what - - - what he shared of his
7 knowledge that belonged to Front that now is - - - is
8 in all of these architectural works across the world.

9 MR. MARANTZ: Well, again, unfortunately,
10 as - - - assumptions are being made that, frankly,
11 are just not true. The letter did not - - - the - -
12 - the letter states we prevented you from doing it,
13 and they did. And - - - and - - -

14 JUDGE ABDUS-SALAAM: They prevented him
15 from downloading - - -

16 MR. MARANTZ: - - - and there's been
17 subsequent motion practice whereby we - - - there's a
18 conversion cause of action to return - - -

19 JUDGE ABDUS-SALAAM: Well, counsel, they
20 caught him - - -

21 MR. MARANTZ: - - - the hard drive that was
22 conf - - -

23 JUDGE ABDUS-SALAAM: - - - downloading that
24 particular thing.

25 MR. MARANTZ: I'm sorry?

1 JUDGE ABDUS-SALAAM: Whatever it was, I
2 don't know. They caught him with - - - with one of
3 those sticks - - -

4 MR. MARANTZ: They say they caught him - -
5 -

6 JUDGE ABDUS-SALAAM: Yeah.

7 MR. MARANTZ: - - - downloading a hard
8 drive.

9 JUDGE ABDUS-SALAAM: Right. So - - -

10 MR. MARANTZ: It was open and notorious,
11 but that's a different issue.

12 JUDGE ABDUS-SALAAM: Yeah. Well, that's
13 the - - -

14 MR. MARANTZ: The bottom line is they
15 confiscated it. So they had it.

16 JUDGE PIGOTT: Well - - - well - - -

17 JUDGE ABDUS-SALAAM: But that may not have
18 been - - -

19 MR. MARANTZ: And it says that in the
20 letter.

21 JUDGE ABDUS-SALAAM: Okay. But that may -
22 - - since they found out that he was doing other side
23 work and possibly for the company that he said he was
24 going to be joining, were they limited to what they
25 thought they caught him doing with the - - - the hard

1 drive? Or once they found out about these other
2 projects, they might be interested in what - - -
3 whatever else he might have taken from the company.

4 MR. MARANTZ: Well, I am a bit unsure as to
5 why the emphasis on the sympathies of this act that
6 they - - - that they affirmatively have a claim
7 against my client, when the issue is stating claims
8 of illegal conduct, breach of an immigration out - -
9 - violation of immi - - - immigration outpatient
10 status, and publishing that to third parties.

11 JUDGE PIGOTT: Okay.

12 MR. MARANTZ: To me that's the gravamen of
13 what's happening here.

14 JUDGE PIGOTT: What third parties? What
15 third parties?

16 MR. MARANTZ: This Mr. O'Callaghan and - -
17 - and a Brian Eckersley.

18 JUDGE PIGOTT: Well, aren't they part of
19 the lawsuit now?

20 MR. MARANTZ: Mr. Callaghan is. Mr.
21 Eckersley - - - the - - - the company is, but Mr.
22 Eckersley is not.

23 JUDGE ABDUS-SALAAM: Yeah. But he's a part
24 of the company. Isn't he?

25 MR. MARANTZ: Well, that's - - -

1 JUDGE ABDUS-SALAAM: He's a partner in the
2 company.

3 MR. MARANTZ: Possibly.

4 JUDGE ABDUS-SALAAM: And may have - - -

5 JUDGE READ: And is that evidence not in
6 the record too?

7 MR. MARANTZ: I'm sorry?

8 JUDGE READ: Is that something that's also
9 not in the record, whether he's part of the company?

10 MR. MARANTZ: Well, the - - - what is in
11 the record is that he's not part of the lawsuit.

12 That's - - -

13 JUDGE PIGOTT: Well, Eckersley O'Callaghan
14 Structural Design is not part of the lawsuit?

15 MR. MARANTZ: Right. But be that as it
16 may, there's no - - - if - - - if the implication is
17 that there's a shared interest or what have you, I
18 don't believe this is a proper application of that.
19 I think that's usually where you have a group of
20 employees discussing something, for example an - - -
21 and - - -

22 JUDGE PIGOTT: Well, you raised Block and -
23 - - and Block is - - - is substantially different
24 from this. Don't you agree?

25 MR. MARANTZ: The federal case?

1 JUDGE PIGOTT: Yeah.

2 MR. MARANTZ: Well, I raised Block not for
3 the precedent of its factual holding, but merely
4 because it made a survey of New York Law and quite
5 correctly stated that New York Law has never
6 recognized an absolute privilege application where
7 there's no pending litigation.

8 JUDGE PIGOTT: Right.

9 MR. MARANTZ: And as I started to say - - -

10 JUDGE PIGOTT: But you don't - - - you
11 don't say that what - - - what - - - what Sirota did
12 in that comports with what was done here? I mean, he
13 went to the newspapers. I mean, he - - - you know,
14 he went to people not involved in any litigation or
15 threatened litigation.

16 MR. MARANTZ: Right. Well, it's a
17 completely - - - I mean, it's - - - it's a different
18 fact pattern altogether.

19 JUDGE PIGOTT: Okay.

20 CHIEF JUDGE LIPPMAN: Okay, counsel.

21 Thanks.

22 JUDGE RIVERA: I'm sorry. May I ask a
23 question?

24 CHIEF JUDGE LIPPMAN: Oh, I'm sorry, Judge
25 Rivera.

1 JUDGE RIVERA: I know your light is off.
2 But let - - - I just want to clarify what - - - what
3 you are proposing as a rule. So your - - - your
4 position is that until a lawsuit is filed, opposing
5 counsel cannot send any kind of letter or - - - or
6 give any kind of notice to you of these potential
7 claims in an effort to perhaps resolve them?

8 MR. MARANTZ: Of course not. There's a
9 diff - - - there's a world of difference between
10 saying that - - - first of all, qualifying language,
11 it has come to our attention it appears you may have
12 done this, you may have done that. But to outright
13 accuse somebody of crimes and to publish that to
14 other people is per se defamatory, to accuse them of
15 violating their professional standard.

16 Again, this is a situation where the writer
17 recognizes that the parties are about to start a
18 business in New York. That this individual, Khalil,
19 is going to be the person in New York opening this
20 business for this UK company and a lawyer is telling
21 him that he's - - - this guy has violated his
22 immigration status, which has nothing to do with the
23 litigation that actually ensued, and that he's
24 committed crimes for which he should be expected to
25 spend ten years in prison. It's clearly designed to

1 interfere with the business relationship.

2 JUDGE RIVERA: So - - - so let me ask you
3 this. It - - - it almost sounds like, in part - - -
4 if - - - if we disagreed with you and we said no, we
5 think an absolute privilege applies, sounds like you
6 may be arguing, as I think the court mentioned in
7 Youmans v. Smith so many years ago, that it's
8 possible to abuse the privilege.

9 MR. MARANTZ: Oh, absolutely.

10 JUDGE RIVERA: And at that point, the
11 privilege doesn't apply to the kinds of statements
12 you're referring to.

13 MR. MARANTZ: Right. What I was trying to
14 - - - if I had the opportunity I'd say Youmans v.
15 Smith - - -

16 JUDGE RIVERA: You've got it now for two
17 seconds.

18 MR. MARANTZ: - - - from 1897 says that
19 statements have to be pertinent to the litigation.
20 They can't be needlessly defamatory. If there's no
21 litigation, then there's no context. How can you
22 determine whether these statements are pertinent to
23 litigation if there's no - - - if it's quote/unquote
24 "prospective litigation"?

25 CHIEF JUDGE LIPPMAN: Okay, counsel.

1 MR. MARANTZ: There's no context.

2 CHIEF JUDGE LIPPMAN: We get your argument.
3 Let's hear what your adversary - - -

4 MR. MARANTZ: Thank you.

5 CHIEF JUDGE LIPPMAN: - - - has to say.

6 MS. SHREWSBERRY: Good afternoon. May it
7 please the court, my name is Lisa Shrewsberry. I
8 represent the respondents Jeffrey Kimmel and Meister
9 Seelig & Fein LLP.

10 CHIEF JUDGE LIPPMAN: Counsel, how do you
11 get absolute privilege when you're sending a letter
12 to an unrepresented party? And - - - and, you know,
13 what's - - - what's the logic in that, again from a
14 policy perspective?

15 MS. SHREWSBERRY: Well, the - - - the
16 policy perspective in the - - - the cases that
17 discuss it, society encourages parties and their
18 lawyers to - - - to work out problems.

19 CHIEF JUDGE LIPPMAN: Yeah, but you're not
20 sending it to a lawyer. You're sending it to
21 unrepresented parties, right?

22 MS. SHREWSBERRY: But you want people to
23 work out their differences.

24 CHIEF JUDGE LIPPMAN: Yeah. Or - - - but
25 do you want people to try to intimidate people who

1 don't have an attorney by a browbeating letter that's
2 not sent to a lawyer? To lawyers, we understand;
3 there's a lot of hyperbole and veiled and not-so-
4 veiled threats. But when you send it to an
5 unrepresented party, isn't that a different situation
6 that would argue against absolute privilege?

7 MS. SHREWSBERRY: No. I don't - - - I
8 don't think so.

9 CHIEF JUDGE LIPPMAN: Why not?

10 MS. SHREWSBERRY: I - - - I think that the
11 policy really enc - - - encourages people - - - and
12 these aren't unsophisticated people.

13 CHIEF JUDGE LIPPMAN: It encourages people
14 to - - - to try - - -

15 MS. SHREWSBERRY: Work out their
16 differences.

17 CHIEF JUDGE LIPPMAN: - - - to intimidate
18 non-lawyers before litigation has started?

19 MS. SHREWSBERRY: I don't know - - -

20 CHIEF JUDGE LIPPMAN: I don't understand
21 that from the policy perspective of - - - of what
22 this is supposed to achieve.

23 MS. SHREWSBERRY: Well, if you - - - if you
24 could only send it to a lawyer, then people would
25 already have to have lawyers - - -

1 CHIEF JUDGE LIPPMAN: By sending that
2 letter, you were working towards a settlement?

3 MS. SHREWSBERRY: I think so. I mean, this
4 - - - this was a high level - - -

5 CHIEF JUDGE LIPPMAN: How do we know that?

6 MS. SHREWSBERRY: Well, it was a high-level
7 employee. And you have to kind of look at the - - -
8 the context. So this man came here from the UK in
9 2003. And my clients' client hired him and - - - and
10 sponsored him for resident alien status. They - - -
11 they saw him through all that. He had access to all
12 this confidential information.

13 CHIEF JUDGE LIPPMAN: Let's say he's a
14 terrible guy. Let's - - - let's agree that he's a
15 terrible guy. You're still sending a letter to a
16 non-lawyer accusing him of all kinds of things.
17 Where is that pre-litigation in nature?

18 MS. SHREWSBERRY: I don't know how you - -
19 - you make the distinction between a party and a
20 party's lawyer.

21 CHIEF JUDGE LIPPMAN: Well, I know how you
22 can make a distinction.

23 MS. SHREWSBERRY: And you - - - you'd have
24 to ask someone to retain an attorney.

25 CHIEF JUDGE LIPPMAN: Lawyers use very

1 different language than lawyers (sic).

2 Judge Pigott.

3 JUDGE PIGOTT: I was going to say your
4 alternative. I mean, you could have just sued.

5 MS. SHREWSBERRY: But they didn't want to
6 sue. They wanted to work it out.

7 JUDGE PIGOTT: I know, but if you had just
8 sued them, they'd have gone and gotten a lawyer.

9 MS. SHREWSBERRY: They would have gotten a
10 lawyer then. And he probably took that - - - that
11 letter and went to a lawyer. I mean, that's - - -
12 maybe that's what happens. But I - - - I don't think
13 it's realistic to wait for someone to retain an
14 attorney before you try to - - -

15 JUDGE RIVERA: Well, why - - - why mention
16 the - - - the - - - what you argue are violations of
17 the criminal law? Why mention the immigration
18 status? Why is that - - - that - - - that - - - he
19 says well, that's where you crossed the line.

20 MS. SHREWSBERRY: Well, these are huge
21 issues. So this man came here ostensibly to become a
22 resident alien and did so. But all the while, he was
23 working also for a UK company in violation with his
24 contract with our company, in violation of his
25 ethical rules and everything else, and in violation -

1 - -

2 JUDGE RIVERA: But that - - - is that then

3 - - -

4 MS. SHREWSBERRY: - - - of immigration - -

5 -

6 JUDGE RIVERA: Is that, then, in your

7 lawsuit?

8 MS. SHREWSBERRY: I don't think there's a
9 private action for that, but I think that the - - -

10 JUDGE RIVERA: Then why do you mention that
11 in the letter?

12 MS. SHREWSBERRY: - - - the company has
13 obligations to be truthful in reporting that. If
14 something happened on their watch, I think they had
15 to really sit down and figure out what occurred.

16 JUDGE RIVERA: Well, then that - - - then I
17 think his point is, then I get to sue you if it's
18 defamatory, because that has nothing to do with the
19 litigation.

20 MS. SHREWSBERRY: Well, I - - - I - - - the
21 - - - the test is - - - the pertinent test is barest
22 rationality, and this is all part and parcel of - - -
23 of what this man did. He came here. He duped the
24 company into supporting him, all the while diverting
25 economic opportunities to - - - he had - - - he had

1 an e-mail address that - - -

2 CHIEF JUDGE LIPPMAN: Yeah. But there are
3 only certainly you can do in response. One of them,
4 as Judge Pigott says, is sue them. I mean you - - -
5 you can't, you know, grab him and flog him. You
6 can't say defamatory things. You can, again, get an
7 absolute privilege if you're doing something in the
8 context of litigation. But these things that you're
9 accusing him of - - - you know, yeah, if there's no
10 malice and it's true, well, that's all great and
11 good.

12 Doesn't he have the opportunity to come
13 back if it's not in the context of - - - of
14 litigation? And assuming you only have qualified
15 privilege, then you'll duke it out at - - - at that
16 point as to whether there's malice, whether it's
17 true. But - - - but where do you come within this
18 rule? Now let's talk about the precedents.

19 MS. SHREWSBERRY: Yes.

20 CHIEF JUDGE LIPPMAN: Where do our cases
21 say that in this particular kind of situation with a
22 letter to a non-represented party that this is okay?
23 What cases back up your position?

24 CHIEF JUDGE LIPPMAN: Well, this court
25 issued Park Knoll and my adversary's relied upon that

1 throughout this whole case to stand for the rule that
2 - - - that it - - - that the pre-litigation
3 statements aren't subject to an absolute privilege.
4 But that's not what that case says. That case says
5 that there's no absolute privilege for witnesses pre-
6 suit.

7 JUDGE PIGOTT: Right.

8 MS. SHREWSBERRY: It doesn't talk about
9 parties.

10 JUDGE PIGOTT: One - - - one of - - - one
11 of the concerns - - -

12 JUDGE RIVERA: But don't - - -

13 JUDGE PIGOTT: - - - that goes through my
14 head when I'm - - - when I was thinking about
15 absolute privilege as opposed to a qualified
16 privilege in which you'd have to establish malice, is
17 not this kind of case but matrimonials, landlord-
18 tenant, family court, where an attorney in - - - in
19 an aggressive fashion can - - - can take advantage of
20 - - - were he to - - - or she to have absolute
21 privilege to really intimidate and cause problems for
22 someone with - - - without that person having any
23 recourse because it's absolute privilege. Would you
24 agree with me that shouldn't happen?

25 MS. SHREWSBERRY: Well, I think the - - -

1 that the - - - the law is broader than that. I mean,
2 the law talks about the possibility of abuse. And -
3 - - but they - - - but all the cases that discuss it
4 say that the - - - the policy to promote the
5 intelligent administration of justice and the - - -
6 the free communication between prospective parties
7 far outweighs the potential abuse. And pertinence
8 really is the - - - the key that - - - that any
9 possible abuse is determined by.

10 JUDGE RIVERA: Counsel, can I just go back
11 to your reference to Park Knoll? I'm looking at Park
12 Knoll. Court says, "A lawyer has immunity for
13 defamatory words spoken at a judicial proceeding but
14 not for words spoken while representing a client in a
15 non-judicial proceeding."

16 MS. SHREWSBERRY: In a non-judicial
17 proceeding. And it - - - and the - - - the - - - the
18 - - -

19 JUDGE RIVERA: So if you don't have the
20 immunity in a non-judicial proceeding, how do you
21 have immunity where there is no proceeding?

22 MS. SHREWSBERRY: But the - - - the courts
23 distinguish between judicial proceeding and
24 everything that leads up to that, which is pre-
25 litigation and non-judicial proceeding. So there - -

1 - there's a whole body of case law involving non-
2 judicial proceedings, but that's not this. It's not
3 crystal-clear but if you - - -

4 CHIEF JUDGE LIPPMAN: So, counsel, what's
5 your best case? That's what I asked you before.

6 MS. SHREWSBERRY: Well - - -

7 CHIEF JUDGE LIPPMAN: What cases - - - what
8 cases do you want us to look at that support your
9 position that you have absolute privilege in this
10 circumstance?

11 MS. SHREWSBERRY: Okay. There are a lot of
12 cases, and I know that you heard from my adversary
13 there is no support. There is a lot of support. The
14 First Department had - - -

15 CHIEF JUDGE LIPPMAN: Name your best - - -
16 your best cases.

17 MS. SHREWSBERRY: Sexter and Warmflash in
18 the - - - in the First Department. But I'd also
19 refer you to the Second Department which has since
20 changed its - - - its position on this issue, which
21 is not in the briefing because it's a - - - a new
22 case. I urge Your Honors to look at Sklover v. Sack.

23 JUDGE ABDUS-SALAAM: Say that again,
24 counsel.

25 MS. SHREWSBERRY: Sklover - - -

1 JUDGE ABDUS-SALAAM: Sklover.

2 MS. SHREWSBERRY: - - - v. Sack, 102 A.D.2d
3 (sic) 855.

4 JUDGE PIGOTT: That'd be A.D.3d.

5 JUDGE READ: AD2d?

6 JUDGE ABDUS-SALAAM: Third.

7 MS. SHREWSBERRY: A.D.3d, I'm sorry.

8 JUDGE PIGOTT: What's the - - - what's the
9 last number?

10 MS. SHREWSBERRY: 855.

11 JUDGE RIVERA: You said Second Department?

12 MS. SHREWSBERRY: Second Department, and it
13 cites Vodopia and Lieberman, which are also very good
14 First Department cases. But there's a federal court
15 case that's very factually similar to our case which
16 I think is very, very helpful and has a great
17 analysis. And that's OfficeMax v. Cinotti, that's
18 Eastern District and that's a 2013 case. That's also
19 - - - that's in the brief.

20 JUDGE PIGOTT: The - - - and that says - -
21 -

22 JUDGE ABDUS-SALAAM: Where would - - -

23 JUDGE PIGOTT: - - - absolute?

24 MS. SHREWSBERRY: Yes.

25 JUDGE ABDUS-SALAAM: Where would we draw

1 the line, counsel? Would it be just cases that - - -
2 or instances that lead to litigation or is it pre-
3 litigation that doesn't end in litigation? Could - -
4 -

5 MS. SHREWSBERRY: The Restatement also
6 addresses this issue, the Restatement (Second) of
7 Torts. And it supports absolute privilege for pre-
8 litigation statements. It's Restatement (Second) of
9 Torts, Section 586, "An attorney is absolutely
10 privileged to publish defamatory matter concerning
11 another in communications preliminary to a proposed
12 judicial proceeding if it has some rel - - - relation
13 to the proceeding."

14 And 586(e) addresses your issue, "It only
15 applies" to issues - - - "to cases that are
16 contemplated in good faith and under serious
17 consideration." And that's the test as to whether or
18 not the lawsuit will follow.

19 CHIEF JUDGE LIPPMAN: Does it matter who
20 the letter or the communication goes to?

21 MS. SHREWSBERRY: All the - - - all the
22 cases - - -

23 CHIEF JUDGE LIPPMAN: In other words, a
24 represented or a non-represented party?

25 MS. SHREWSBERRY: That's never, never been

1 addressed in any of the cases that I've read. They
2 all talk about parties and their attorneys - - - but
3 parties.

4 CHIEF JUDGE LIPPMAN: Yeah, but here there
5 was no attorneys at the time.

6 MS. SHREWSBERRY: That's right. And I
7 think that that's usually - - -

8 CHIEF JUDGE LIPPMAN: Plaintiff and his
9 employer, right?

10 MS. SHREWSBERRY: That's usually the case,
11 because it's pre-litigation.

12 CHIEF JUDGE LIPPMAN: Okay, counsel.

13 MS. SHREWSBERRY: Thank you.

14 CHIEF JUDGE LIPPMAN: Thanks.

15 Rebuttal, counsel.

16 MR. MARANTZ: Briefly; I've addressed
17 Vodopia and - - -

18 CHIEF JUDGE LIPPMAN: Go ahead.

19 MR. MARANTZ: - - - OfficeMax and
20 distinguished them completely in the brief. I just
21 point out a few things; number one, you know, a
22 letter from an attorney is sufficiently intimidating
23 to a person who, in many cases - - -

24 JUDGE PIGOTT: Not in my experience.

25 MR. MARANTZ: - - - who does not have - - -

1 not represented by counsel.

2 JUDGE PIGOTT: That's not what I found.

3 MR. MARANTZ: The - - - the issue here - -
4 - well, perhaps.

5 JUDGE PIGOTT: Here's the - - - here's the
6 point. You're - - - you - - - you are trying to get
7 them thrown off this case. You want to say they may
8 be witnesses and therefore they can't represent their
9 client with whom they've had a - - - looks like a
10 working relationship for a substantial period of
11 time.

12 And if all of what you claim in that third-
13 party action can be included in the first-party
14 action, either as an affirmative defense or a
15 counterclaim, there is no reason in the world why it
16 shouldn't go forward like that, because all of these
17 accusations are to those defendants.

18 MR. MARANTZ: Well, Your Honor, I firmly
19 believe and - - - that attorneys should act
20 appropriately. And the New York Law Journal every
21 day shows me disciplinary proceedings brought about -
22 - - against attorneys.

23 JUDGE PIGOTT: This letter seems so clear -
24 - -

25 MR. MARANTZ: This was outrageous conduct.

1 JUDGE PIGOTT: Excuse me. This letter
2 seems to clear to me that they were pointing out to
3 your client serious, serious defalcations and - - -
4 and - - - and problems in his workplace, and he
5 didn't respond for six months. What are they
6 supposed to do? And they - - - and - - -

7 MR. MARANTZ: That is not true, though,
8 Your Honor.

9 JUDGE PIGOTT: Yes, it is, sir.

10 MR. MARANTZ: You're reading outside - - -

11 JUDGE PIGOTT: I'm sorry. Look it, if
12 you've got something that you thought you should have
13 put in the record and you didn't, now we can talk
14 about lawyers who should have done what they didn't
15 do or did what they shouldn't have done. But the
16 fact of the matter here is they said this is what the
17 problems are, and six months later, they sued you.
18 And I don't understand why that's somehow defamatory.
19 I'm just missing it.

20 MR. MARANTZ: Okay. Well, Your Honor, the
21 - - - the failure to put my letter - - - which was
22 immediate, to say, in essence, what are you doing?
23 This is - - - this is totally inappropriate, may
24 influence Your Honor's empathy towards the other
25 party, but it has nothing - - -

1 JUDGE READ: It's not - - - we have to
2 decide - - -

3 MR. MARANTZ: - - - to do with the law.

4 JUDGE READ: We have to decide things on
5 the record, counsel.

6 MR. MARANTZ: But I am - - -

7 JUDGE PIGOTT: The highest court in the
8 state.

9 MR. MARANTZ: I'm - - - I'm completely
10 focused on the record. The bottom line here is that
11 - - -

12 JUDGE READ: Well, you're telling us
13 there's something critical that's not in the record,
14 unfortunately. What are we supposed to do?

15 MR. MARANTZ: This - - -

16 JUDGE READ: We have to rely on the record.

17 MR. MARANTZ: Of course. Rely on the
18 record. Look at the letter. The letter does much
19 more than - - - than Your Honor has just stated.

20 JUDGE PIGOTT: The letter - - -

21 MR. MARANTZ: It - - - it accuses Mr.
22 Khalil of crimes - - -

23 JUDGE PIGOTT: The letter frames - - -

24 MR. MARANTZ: - - - and immigration
25 violations.

1 JUDGE PIGOTT: The letter frames the - - -

2 MR. MARANTZ: And forwards it to third

3 parties.

4 JUDGE PIGOTT: The letter frames the
5 complaint. It frames the complaint. It does exactly
6 what they said they were going to do.

7 MR. MARANTZ: Well, as we just stated, the
8 immigration is not in the complaint. And indeed,
9 immigration, as counsel acknowledged, might be a non-
10 judicial proceeding.

11 JUDGE PIGOTT: So - - - so - - -

12 MR. MARANTZ: We can't tell if - - -

13 JUDGE PIGOTT: So you no longer have to
14 worry about that, do you?

15 MR. MARANTZ: But this was a pre-answer
16 motion to dismiss. The bottom line is they did
17 something wrong. They're not allowed to do what they
18 did, okay? You're not allowed to accuse people of
19 crimes and - - - and gratuitously. And if a court
20 says that you are allowed to, that you could do it
21 before there's pending litigation, then you've thrown
22 out - - -

23 JUDGE PIGOTT: Well, wait a minute. Wait a
24 minute.

25 MR. MARANTZ: - - - case - - - case law and

1 - - - and - - -

2 JUDGE PIGOTT: Let me - - - let just finish
3 this thought.

4 MR. MARANTZ: - - - precedent - - -

5 JUDGE PIGOTT: You've got the - - - you've
6 got the - - -

7 MR. MARANTZ: - - - and policy.

8 JUDGE PIGOTT: You make the immigration
9 claim, all right. There's nothing in this record - -
10 - and - - - and I looked at it and I thought, you
11 know, they may be right. I mean they're - - -
12 they're saying that this is a violation of the
13 Espionage Act because of whatever - - - whatever was
14 claimed that was done. And - - - and maybe it's
15 true. But they didn't sue you on it so you don't
16 have to worry about it.

17 MR. MARANTZ: Well, they accused him of
18 violating his immigration status and application and
19 that has - - - that's not in the complaint and it has
20 nothing to do with an employer-employee dispute. And
21 what this case really is about is a jealous former
22 employer trying to stop his former employee from
23 opening a competing business in New York.

24 JUDGE PIGOTT: And - - - I don't think they
25 work here. I don't - - - I - - -

1 MR. MARANTZ: Can you say, Your Honor, as a
2 matter of law, that the - - - that this letter could
3 not have been designed to interfere with the new
4 business entity - - -

5 JUDGE PIGOTT: No, I'm saying that you - -
6 -

7 MR. MARANTZ: - - - Eckersley O'Callaghan
8 in New York?

9 JUDGE PIGOTT: I'm saying - - -

10 MR. MARANTZ: You can't - - -

11 JUDGE PIGOTT: Let me finish.

12 MR. MARANTZ: But that's what's happened.

13 JUDGE PIGOTT: Or don't let me finish.

14 MR. MARANTZ: I'm sorry.

15 JUDGE PIGOTT: Whichever one you want.

16 What I'm saying - - -

17 MR. MARANTZ: Well, I'm trying to make a
18 point, Your Honor. I'm sorry.

19 JUDGE PIGOTT: What I'm saying is that what
20 you make - - - what you - - - the point you make can
21 be a counterclaim. Fine. It can be an affirmative
22 defense. That's okay. But - - - but to - - - to
23 begin one - - - there's only one of the defendants,
24 not the other two who were included in this letter
25 too, who now claim to be offended, who brings this

1 action which could only be designed to get them off
2 the case. I just don't get it.

3 MR. MARANTZ: Well, obviously Your Honor
4 has trouble with the attorney being sued. The
5 question is is this a gratuitous claim against an
6 attorney or is this something where an attorney
7 really has stepped over the line and we, the Court of
8 Appeals, really shouldn't allow this. And in fact,
9 never has the case law and the - - - and the policy
10 that has been at least intimated doesn't permit it.

11 CHIEF JUDGE LIPPMAN: Okay, counsel. Thank
12 you both.

13 MR. MARANTZ: Okay.

14 CHIEF JUDGE LIPPMAN: Appreciate it.

15 MR. MARANTZ: Thank you.

16 (Court is adjourned)

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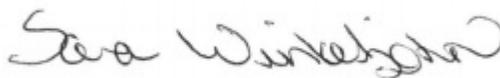
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Front, Inc. v. Philip Khalil, No. 19 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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Date: January 18, 2015