No. 20-20209

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOANNA BURKE; JOHN BURKE

Plaintiffs-Appellants,

v.

MARK DANIEL HOPKINS; SHELLEY HOPKINS; HOPKINS LAW, P.L.L.C.

Defendants-Appellees.

On Appeal from the United States District Court
For the Southern District of Texas, Houston Division;
USDC No. 4:18-CV-4543

APPELLANTS MOTION TO STRIKE APPELLEES BRIEF

Joanna Burke
46 Kingwood Greens Dr
Kingwood, Texas 77339
Telephone: (281) 812-9591
Fax: (866) 805-0576

John Burke
46 Kingwood Greens Dr
Kingwood, Texas 77339
Telephone: (281) 812-9591
Fax: (866) 805-0576

Pro Se Appellants

Appellants, Joanna Burke and John Burke ("Burkes"), now file a Motion to Strike Appellee's ("Hopkins") Brief, a work of pure fiction and make believe.

In Hopkins opening statement, they attempt to rewrite the law by alleging that the Burkes **delayed** the erroneous foreclosure judgment issued by this court in Nov. 2018 whilst looking to magnify the Burkes involvement beyond the law. In particular, Hopkins renamed the related case *Deutsche Bank National Trust Co v. Burke*, as "*Burke I*" and "*Burke II*". This is legally, factually and malevolently erroneous. See excerpt below;

> "This appeal marks the fourth time Appellants John Burke and Joanna Burke ("Appellants" or "Burkes") have been before this Court **over their delay** of the foreclosure of a deed of trust lien. In the first two appeals, the Court determined that the Burkes' mortgagee was entitled to proceed with foreclosure. (*Burke I* and *Burke II*). After losing both *Burke I* and *Burke II* to their mortgagee Deutsche Bank, the Burkes brought a third lawsuit, electing to sue their mortgage servicer. (*Burke III*). *Burke III* has been fully briefed by the parties and is currently pending before the Court awaiting resolution."

In support of the Burkes request to strike, see *Johnson v. Ashmore*, No. 16-11141, at *4 n.2 (5th Cir. Mar. 10, 2017);

> "In his reply brief, Johnson asserts that Ashmore "was fired" from her law firm after the settlement negotiations with him. Ashmore filed a motion to strike this statement as *defamatory* and *unsupported by the record*. Because the statement is impertinent, we GRANT the motion. See *Chambers v. NASCO*, Inc., 501 U.S. 32, 43 (1991) ("Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their

> presence . . . ." (quoting *Anderson v. Dunn*, 6 Wheat. 204, 227 (1821)); *Theriault v. Silber*, 574 F.2d 197, 197 (5th Cir. 1978) (granting motion to strike notice of appeal that contained "vile and insulting references to the trial judge."); cf. FED. R. CIV. P. 12(f) ("The court may strike from a pleading . . . any redundant, immaterial, impertinent, or scandalous matter.").”

Legally, the Burkes cannot appeal a case decided in their favor at the lower court after the bench trial in 2015 and again after remand in 2017. Both appeals were instigated unlawfully by Hopkins, who does not hold the required surety bond with the State of Texas and as such should not be submitting any appeals in Texas courts while unlicensed to perform debt collection legal services in the state. Secondly, Hopkins stating the Burkes were **delaying** is impertinent, scandalous, defamatory and not supported by the record, hence should be stricken.

> “On March 29, 2019, the Burkes filed their First Amended Complaint, again only asserting claims taking issue with the manner in which the Attorney Appellees represented the mortgagee and mortgage servicer in *Burke I – Burke III*. (ROA.531-690).”

If anyone was **delaying**, it was Hopkins, who at the September conference before Magistrate Judge Peter Bray, failed to correct the court that the Burkes had filed their first amended complaint, extending the time for the Judge’s ruling by several months. The elder Burkes were not asked to prepare for a motion hearing that day and were confused by the courts’ statements, but assumed, as most *pro se’s* would, that they know what they are doing and had reviewed the docket in

preparation of the conference. The Burkes were mistaken, the court did not know what it was doing that scandalous day.

No, Mark Hopkins - who would admit later to his lies - stated twice on the record that;

> "My concern is with the Burkes' social media postings where they are defaming my firm and my wife and suggesting that some members of the judicial should be shot, and I would like to see that come to an end sooner than later and I have sat on such a counterclaim, for hopes that the case would be resolved sooner" and "But in the event it's not, those types of posts, which Twitter tells me have been viewed over 5,000 times, are certainly damaging to my firm's reputation and myself, and I would also think the Court would be interested to know that the Burkes are posting that certain judges should be shot." (ROA.1260).

In contradiction, Hopkins requested an extension to file this reply brief with this court. The Burkes **opposed**. Hopkins request was granted by the court. Hopkins streaming lies pervade into this court again in this appeal.

> "Attorney Appellees refuse to dignify the Burkes' **caustic personal attacks**. Based on an overriding public policy, an opposing party "does not have a right of recovery, **under any cause of action**, against another attorney arising from the discharge of his duties in representing a party…". *Taco Bell Corp. v. Cracken*, 939 F. Supp. 528, 532 (N.D. Tex. 1996)(emp. in the original)."

As the Burkes have documented in the lower court and in this appeal, Hopkins misdeeds went beyond any attorney immunity protection. In support, the Burkes

now cite another foreclosure case in S.D. Tex., discussing Barrett Daffin's "immunity". It references, as does Hopkins, the *Taco Bell* case. The case is *Hunt v. Bac Home Loans Servicing*, LP, CIVIL ACTION No. C-11-261, at *16-17 (S.D. Tex. Jan. 24, 2012);

> "Defendant Barrett Daffin suggests that it is immune from the claims in this case because, as attorneys, the firm owes no duty to its client's adversaries. As support for this proposition, Defendant cites several cases that hold attorneys to be immune for actions taken in connection with litigation and claims investigation prior to filing suit: ***Taco Bell Corp. v. Cracken***, 939 F.Supp. 528, 532 (N.D. Tex. 1996); *Kruegel v. Murphy*, 126 S.W. 343 (Tex. Civ. App.—Dallas 1910, writ ref'd); *Bradt v. West*, 892 S.W.2d 56, 71 (Tex. App.—Houston [1st Dist. 1994, writ denied); *Martin v. Trevino*, 578 S.W.2d 763, 771 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.); *Lewis v. Am. Exploration Co*., 4 F. Supp. 2d 673 (S.D.Tex. 1998).
>
> Those cases are good—as far as they go. However, attorney litigation **immunity has <u>never</u> been held to exempt attorneys, personally**, from sanctions payable to the opposing party for misconduct during litigation under **Fed. R. Civ. P. 11(c)(1) (signing of pleadings)**, **37 (discovery)**, and *Carroll v. The Jaques Admiralty Law* Firm, P.C., 110 F.3d 290, 292 (5th Cir. 1997**) (court's inherent power)** or Tex. R. Civ. P. 13 **(signing of pleadings)**, 215 **(discovery)** and Tex. Civ. Prac. & Rem. Code chapter 10. See e.g. *Crowe v. Smith*, 151 F.3d 217 (5th Cir. 1998) **(assessing sanctions against attorney, personally)**; *O'Neill v AGWI Lines*, 74 F.3d 93, 94 (5th Cir. 1996) (sanctions can include attorney reimbursing opposing party for attorney's fees and costs); *Daniels v. Indemnity Ins. Co. of North America*, 345 S.W.3d 736, 741 (Tex. App.—Dallas 2011, no pet.) **(sanctions under Tex. R. Civ. P. 13 and Tex. Civ. Prac. & Rem. Code chapter 10)**; *Werley v. Cannon*, 344 S.W.3d 527, 535 (Tex. App.-El Paso 2011, no pet.) **(sanctions for**

> **discovery abuse under Tex. R. Civ. P. 215)**. See also, *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 127, 110 S.Ct. 456, 460 (1989) **(Rule 11 creates a personal, nondelegable responsibility of the attorney)**; *Rivera v. Kalafut*, No. 10-41040, 2011 WL 3241967, *1 (5th Cir. July 27, 2011)."

In ROA.1252-1253 the Magistrate Judge was discussing, incorrectly, the fact that the Burkes failed to answer Hopkins second motion to dismiss. Hopkins never corrected Magistrate Judge Peter Bray, even though he had direct opportunities to do so, as shown below;

> THE COURT: So this complaint, which is now Docket entry No. 27, that -- okay? Docket entry No. 27 is your complaint. That's it, period, stop. Do you understand?
> MR. BURKE: Yes.
> THE COURT: No. 27. Okay. Write that down. That's the complaint. **Do you agree with that Mr. Hopkins**?
> MR. HOPKINS: Yes, Your Honor.

In Hopkins subsequent reply to the Burkes Response to the Motion to Dismiss (ROA.801), they once again attacked the Burkes citing ad hominem and making the following statement;

> "Professionalism requires Attorney Defendants to rise above the Burkes' personal mud throwing and not respond in kind. Instead, the Burkes' own writings damn their cause. Parsed from the slop of the Burkes' Response [Doc. 32] is revealed the very crux of why attorneys are granted immunity against "ax grinding" litigants such as the Burkes. The Burkes muse in their pleading, "The first thing we do, let's kill all

the lawyers." [Doc. 32, at 2](emp. added). Musings or not, the Burkes statements have no place in a civilized society."

Mark Hopkins' sudden amnesia at the subsequent conference hearing and his failure to correct the court, confirming the Burkes had answered Hopkins reply was therefore disingenuous.

In Hopkins Brief they return to the Burkes lower court reply brief (ROA.733) and intentionally manipulate the context and content of the following actual extract;

Correcting an Injustice

"While reading Hopkins response and subsequently referencing Texas law and absolute immunity' pertaining to lawyers, the Burkes' happened upon an article about how lawyers knowingly let an innocent man go to jail for murder for 26 years and only came forward when the actual killer died and had left them an agreed confession release. Then, after further research, another legal author on the subject matter printed a mini-thesis, claiming as Hopkins does, adversaries only seek vengeance and they are all 'bastards'. Is it any wonder why citizens are concerned. Below is the **clickbait[1] header to the authors'** article.

"The first thing we do, let's kill all the lawyers."
- William Shakespeare, Henry VI, Part II, Act 4, Sc. 2

The Burkes' suggest supplementing Shakespeares' quote with; "However, you should pass the State Bar of Texas exam first, create two shell companies, one as a legal firm and one as a general services' company and then ask the services company to hire the legal firm, and

[1] See definition; HTTPS://WWW.MERRIAM-WEBSTER.COM/DICTIONARY/CLICKBAIT

> you'll be immune from prosecution because "attorney immunity" is impregnable in Texas. p.s. You might have an "ethics" violation to contend with, but that's nothing to worry about.
>
> "Attorney Immunity does not grant attorneys the right to violate ethical rules, but merely limits third-party recovery against attorneys acting within the scope of their representative capacity. Other mechanisms are in place to discourage and remedy [wrongful] conduct, such as sanctions, contempt, and attorney disciplinary proceedings."
>
> "If an attorney's conduct violates his professional responsibility, the remedy is public, not private."– see Defendants' motion p. 10."

A review of google confirms the Burkes stance. See "J.B. Hopkins concludes that Shakespeare's line, "Let's kill all the lawyers," is, contrary to its facial meaning, a statement in praise of lawyers, not in derogation of them." – Florida Bar Article[2] and "Those who use this phrase pejoratively against lawyers are as miserably misguided about their Shakespeare as they are about the judicial system which they disdain so freely. Even a cursory reading of the context in which the lawyer killing statement is made in King Henry VI, Part II, (Act IV), Scene 2, reveals that Shakespeare was paying great and deserved homage to our venerable profession as the frontline defenders of democracy." – Howards Nation[3]

[2] HTTPS://WWW.FLORIDABAR.ORG/THE-FLORIDA-BAR-JOURNAL/LETS-KILL-ALL-THE-LAWYERS-SHAKESPEARE-MIGHT-HAVE-MEANT-IT/

[3] HTTPS://WWW.HOWARDNATIONS.COM/WP-CONTENT/UPLOADS/2013/08/SHAKESPEARE.PDF

The Burkes statements are and always have been factual and true, unlike Hopkins. Recent events in this appeals case proved beyond a reasonable doubt that BDF and Hopkins play the "shell game". The *Hunt* case opinion confirms the statements made in the lower court filings by the Burkes that Attorney immunity is not absolute and Hopkins has violated ethical rules repetitively, without sanction(s). This is contrary to the rules and the laws as discussed above.

Next, we have Hopkins being untruthful on the record again. "The Burkes additionally asked, without citing an explanation or basis, for leave to amend their complaint a second time. (ROA.729-732)." This is an extract of the motion, which clearly provides 'an explanation or basis' for leave to amend:

Motion for Leave to Amend Complaint

> "The Plaintiffs are filing this motion together with the response to the Attorney-Defendants second Motion to Dismiss. **The reasons for this motion are detailed in the response. The Leave to Amend is not requested for delay, but to ensure the record is factual and correct.** The Burkes' defer to this Court to determine the time allowed. The Plaintiffs assume Defendant-Attorneys would oppose this civil request.

Prayer

> WHEREFORE, pursuant to the reasons set out herein, John Burke and Joanna Burke, Plaintiffs, would respectfully request they are allowed Leave to Amend their Complaint, as necessary, to the first amended complaint **which has numerous known errors as discussed**."

Next, Hopkins amnesia, with the record in front of them as they prepared this fictitious brief, continues as they write;

> "At the conclusion of the status conference, and despite the Attorney Appellees' 12(b) motion being pending for five months, the Magistrate extended the Burkes the ability to respond to Attorney Appellees' 12(b) motion until September 30, 2019. (ROA.1251)(ROA.1009)."

As stated above, the court erred in its rulings and Hopkins could have circumvented the courts incorrect statements at the conference hearing, which Mark Hopkins declined to do. This statement is devious and should be stricken.

> "The Burkes' *attitude* toward Attorney Appellees exemplifies the need for the public policy at the core of the attorney immunity doctrine. Put simply, attorneys are shielded from liability **associated with the misplaced rage litigants experience when those litigants are unsuccessful when given their day in court.**"

The above statement has no place in a reply brief when it is based on the attorney's personal views. It is impertinent, scandalous, defamatory and not supported by the record. It should be stricken.

The following statement immediately raised the Burkes suspicions when reading the brief for the first time. Firstly, that's not what the Burke's 'extreme issue' was about at all and secondly, why is Hopkins, who cites everything in the brief with precision, now not cross-referencing this 'statement'? Below is the statement in question;

> "The Burkes take extreme issue with what they believe to be "fraudulent conduct" on the part of the Attorney Appellees when Attorney Appellees discussed the Burkes' loan origination file, in open court, when questioned about the origination file by the then magistrate judge after the remand of *Burke I*. **The Burkes alleged that the loan documents reviewed and/or discussed by Attorney Appellees were altered in some manner**."

The Burkes 'issue' is the fact that Hopkins knowingly withheld the mortgage/loan file from the Burkes which would prove lender application fraud.[4] Below is an excerpt from the status conference (Doc. 126) in *Deutsche Bank v Burke* before Magistrate Judge Stephen Wm. Smith, Mark Hopkins and representing the Burkes, Constance Pfeiffer and Fatima Hassan Ali of Beck Redden.

> "I've had the benefit of reviewing that closing file, **which wasn't put in evidence before the Court** because the allegations were raised by the Burkes."

Hopkins admits on the record to withholding evidence (ROA1045). The reason is undisputable. If the Burkes had access to the file, it would prove their case and that is why Mark Hopkins withheld it. He now relies upon attorney immunity as a shield which the Burkes will correctly address in their reply brief. However, Hopkins is misstating in order to cite a case that is inapposite, namely *Santiago v. Mackie Wolf Zientz & Mann, P.C.*, 2017 WL 944027 (Tex. App.—Dallas 2017);

[4] The lender added a false income to the loan application, unbeknownst to the Burkes.

> "The Dallas Court of Appeals dealt with this exact type of issue in *Santiago v. Mackie Wolf Zientz & Mann*. In *Santiago*, the Dallas Court of Appeals applied the Texas Supreme Court's opinion in *Cantey Hanger*, to the factual situation in which a borrower argued that legal counsel for a mortgagee presented the borrower with a fraudulent and altered note when the borrower asked to inspect the note at the attorney's office. The *Santiago* Court observed that the attorneys obtained and presented the borrower with the note in connection with their legal representation of a client and immunity therefor attaches to that conduct. As further provided by the *Santiago* Court."

The above case does not even closely resemble the Burkes 'issue'. Hopkins admitted on the record to withholding evidence (the mortgage/loan file) from the court and the Burkes. Unlike in *Santiago*, the Burkes did not have an opportunity to inspect the withheld mortgage/loan file. Hopkins self-disclosure in open court waived any reliance on 'attorney immunity'. He volunteered the information. The Burkes have argued throughout the lower court case and on appeal that the mortgage/loan file does not fall under 'attorney immunity' or 'attorney work product' protection. See;

> "Factors that courts rely on to determine the primary motivation for the creation of a document include the retention of counsel and his involvement in the generation of the document and whether it was a routine practice to prepare that type of document or whether the document was instead prepared in response to a particular circumstance." *Gator Marshbuggy Excavator L.L.C. v. M/V Rambler*, 2004 WL 1822843, *3 (E.D. La. Aug. 12, 2004) (Mag. J. Wilkinson). The court continued that, "[i]f the document would have been created regardless of whether litigation was also expected to ensue, the

> document is deemed to be created in the ordinary course of business and not in anticipation of litigation." Id.; See also *Piatkowski v. Abdon Callais Offshore, L.L.C.*, No. Civ.A. 99-3759, 2000 WL 1145825, *2 (E.D. La. Aug. 11, 2000); 8 Charles Alan Wright, Arthur R. Miller, Richard L. Marcus, Federal Practice and Procedure § 2024 (2d ed. 2007). - *In re Stone Energy Corporation*, CIVIL ACTION No. 05-2088 (LEAD), 05-2109 (MEMBER), 05-2220 (MEMBER), at *7 (W.D. La. Aug. 14, 2008).

In this case, the mortgage/loan file is clearly generated in the course of business and not in anticipation of litigation. No immunity can be used as a shield.

Whilst the court should recognize both sides are adversaries, they also have a duty to review Hopkins pleadings under the Fed. R. Civ. P. 11(c)(1) signing of pleadings standard. See;

> “Thus, there is simply no excuse for Pia's failure to make a reasonable inquiry into these critical factual representations. Pia [attorney] violated Rule 11.” *Syncpoint Imaging, LLC v. Nintendo of Am. Inc.*, No. 2:15-CV-00247-JRG-RSP, at *9 (E.D. Tex. Dec. 26, 2018).

Here, Hopkins has violated the pleading standards by willfully misconstruing the facts in a devious and repugnant manner, rather than asserting their case based on actual facts. This court has inherent power to sanction in such matters as well as granting the Appellants Motion to Strike the Appellee’s brief as a work of fiction.

Conclusion

Appellants Joanna & John Burke respectfully request that the Court grant Appellants' Motion to Strike the Appellees Brief in its entirety and/or all revelent section(s) as discussed in this motion, as approved by this Court. Appellants further request all such other and further relief, at law or in equity, to which they are justly entitled.

Respectfully submitted,

DATED: October 5, 2020

JOANNA BURKE

By *s/ Joanna Burke*
JOANNA BURKE

JOHN BURKE

By *s/ John Burke*
JOHN BURKE

46 Kingwood Greens Dr.,
Kingwood, TX, 77339
Telephone: (281) 812-9591
Facsimile: (866) 705-0576

Pro Se for Plaintiffs-Appellants

CERTIFICATE OF CONFERENCE

We hereby certify that on October 5, 2020, we emailed Appellees Mark D. Hopkins and Shelley L. Hopkins of Hopkins Law, PLLC along with staff member Kate Barry of Hopkins Law PLLC at 0635 hrs on October 5, 2020 asking for a response by 1200 hrs. Hopkins did not reply. We assume the MOTION is OPPOSED.

CERTIFICATE OF SERVICE

We hereby certify that, on October 5, 2020, a true and correct copy of the foregoing Motion to Strike Appellees Brief was served via the Court's EM/ECF system on the following counsel of record for Appellees:

Mark D. Hopkins
Shelley L. Hopkins
HOPKINS LAW, PLLC
3 Lakeway Centre Ct, Ste 110
Austin, Texas 78734
Telephone: (512) 600-4320
Facsimile: (512) 600-4326

s/ Joanna Burke
JOANNA BURKE

s/ John Burke
JOHN BURKE

CERTIFICATE OF COMPLIANCE

The undersigned counsel certify that this motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because this motion contains **3,154** words according to Microsoft Word's word count, excluding the parts of the motion exempted by Fed. R. App. P. 32(f).

s/ Joanna Burke
JOANNA BURKE

s/ John Burke
JOHN BURKE