No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JANICE M. HORNOT,
Petitioner

VERSUS

LEONARD CARDENAS III,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE
LOUISIANA FIRST CIRCUIT COURT OF APPEAL

PETITION FOR WRIT OF CERTIORARI

Harvey S. Bartlett III
Counsel of Record
The Bartlett Law Firm, APLC
5000 West Esplanade Avenue, Box 632
Metairie, Louisiana 70006
(504) 756-6334

Counsel for Petitioner

QUESTIONS PRESENTED

1. Is there a right under the Fourteenth Amendment's due process guarantee to be represented at trial by retained counsel in civil matters, and was this right violated by the trial court's denial of a continuance to allow the petitioner to replace hired counsel who failed to appear for trial, compelling the petitioner to proceed *pro se*?

2. Is there a right under the Due Process Clause of the Fourteenth Amendment to civil trial by a trial judge free from hostility and appearance of pre-judgment, and was this right violated by the trial court's comments at the commencement of trial that he did not believe the petitioner should take the stand and that he wanted to get the case off his docket?

3. Can a formulation of a cause of action in an initial pleading in a lawsuit, so long as it is pertinent to the legal proceedings, be the basis for liability for defamation, either under this Court's formulation of the absolute privilege for statements in judicial proceedings or under the more qualified privilege employed in other jurisdictions?

LIST OF PARTIES

All parties appear in the caption of this case on the cover page. As all parties are natural persons, no statement under U.S. S. Ct. Rule 29.6 is required.

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OPINIONS BELOW

The Petitioner respectfully requests that a writ of certiorari issue to review the judgments in this matter rendered by the courts of the State of Louisiana as follows: The opinion of the highest state court to review the merits of this case, the Louisiana First Circuit Court of Appeal, appears at Appendix A to this petition, and is unpublished.[1] The Louisiana First Circuit Court of Appeal's decision affirmed in part the judgment of the Louisiana Nineteenth Judicial District Court for the Parish of East Baton Rouge, at Appendix B to this petition.[2] The Louisiana Supreme Court denied the Petitioner's application for writ of certiorari and review of the Louisiana First Circuit Court of Appeal's decision on September 26, 2008, which denial is at Appendix C to this petition.[3]

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[1] *Janice M. Hornot v. Leonard Cardenas III*, No. 2007 CA 1489 (La. App. 1st Cir. June 20, 2008).

[2] *Janice M. Hornot v. Leonard Cardenas III*, No. 534,772 (La. 19th Jud. Dist. Ct. Feb. 16, 2007).

[3] *Janice M. Hornot v. Leonard Cardenas III*, No. 2008-C-2131 (La. Sept. 26, 2008).

STATEMENT OF JURISDICTION

As indicated above, and as shown in Appendix C to this petition, the date on which the Louisiana Supreme Court entered its order denying the Petitioner's application for writs to that Court in this matter was September 26, 2008. The ninetieth day following the issuance of that order was December 25, 2008; due to that day being a federal holiday, this Court's closure on December 26, and the following two days falling on weekend days, this petition is due to be filed no later than December 29, 2008. This petition is therefore timely filed under U.S. S. Ct. Rule 13.1, and the jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

1. United States Constitution First Amendment

"Congress shall make no law … abridging the freedom of speech, or of the press …."

2. United States Constitution Fourteenth Amendment

"Section 1. … No state shall … deprive any person of life, liberty, or property, without due process of law …."

STATEMENT OF THE CASE

The Petitioner, Janice Hornot, is an attorney who has been licensed to practice law in the State of Louisiana for more than twenty-eight years. In March 1996, Ms. Hornot was seriously injured in an automobile accident; subsequently, represented by another attorney, she filed suit in connection with that automobile accident for recovery of damages related to her injuries. After her counsel filed suit on her behalf and conducted initial discovery, Ms. Hornot contacted the Respondent, Leonard Cardenas, to take over her representation. In October 2001, Mr. Cardenas agreed to represent Ms. Hornot in the automobile accident matter.

As discovery neared a close, the defendants proposed that the parties enter mediation. Mr. Cardenas informed Ms. Hornot that counsel for the defendants had indicated that he had evidence that Ms. Hornot had committed insurance fraud in some way or manner, but Mr. Cardenas did not know the basis for the accusation of insurance fraud. Mr. Cardenas did not relay what information the defendant's counsel had, or might have, to corroborate such an accusation, nor did he investigate the matter further; rather, he informed Ms. Hornot that he would withdraw as her counsel if she did not agree to participate in the proposed mediation. In Spring 2002, Ms. Hornot reluctantly attended the mediation. At the mediation, Mr. Cardenas again related to Ms. Hornot the accusations of insurance fraud, but would not tell her who had leveled the accusation nor any further information about the basis of the accusation; Ms. Hornot, while certain she had done nothing wrong, felt intimidated by the prospect of any civil or criminal charges or investigation that might stigmatize her and harm her professional practice, and so agreed to a settlement amount of

$95,000.00. Indeed, her anxiety over the uncorroborated accusations relayed by Mr. Cardenas was so great that she never took action to perfect the final disbursement of the settlement funds. In April 2003, she sought the return of her file from Mr. Cardenas, but only received a copy of file materials, rather than any of the original materials, and noted that certain tax documents that she believed to be part of the file were missing.

In July 2005, Ms. Hornot, acting initially on her own behalf, brought this suit against Mr. Cardenas in the Nineteenth Judicial District Court for the Parish of East Baton Rouge, State of Louisiana, for causes of action arising from Mr. Cardenas's representation of her in the automobile accident case.[4] Specifically, Ms. Hornot alleged, *inter alia*, that (1) Mr. Cardenas's actions or omissions constituted negligent and intentional infliction of emotional distress; (2) Mr. Cardenas's actions or omissions constituted fraud or suppression of the truth; (3) Mr. Cardenas was not entitled to a fee for his legal services in the automobile accident matter due to fraud or suppression of the truth; and (4) Ms. Hornot was entitled to return of her file from Mr. Cardenas, as well as to the full settlement proceeds from the automobile accident matter.[5] Mr. Cardenas filed a cross-claim seeking his attorneys' fees for his services in the automobile accident matter, and seeking damages for defamation arising from Ms. Hornot's allegations in her lawsuit against him.[6] On August 22, 2006, the trial court held a pretrial

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4 Petition for Damages, R. Vol. 1, pp. 3-5.
5 Petition for Damages, at ¶¶ 3-9, R. Vol. 1, pp. 3-4.
6 Answer and Reconventional Demand, R. Vol. 1, pp. 10-12.

conference and set this matter for a two-day bench trial for January 11 and 12, 2007.[7]

Approximately six weeks prior to the trial date, Ms. Hornot contacted Kevin Stockstill, an attorney in Lafayette, Louisiana, regarding representing her at the trial. She met with Mr. Stockstill on December 5, 2006, and he indicated his interest in representing her[8]; Ms. Hornot communicated with Mr. Stockstill repeatedly throughout the month of December 2006 regarding the possible representation.[9] On January 5, 2007, a Friday six days before trial, Mr. Stockstill's assistant informed Ms. Hornot that Mr. Stockstill would be unable to represent her at trial due to personal issues he was encountering.[10] Ms. Hornot immediately continued her search for counsel to represent her at the trial, and contacted Christopher Alexander on January 8 or 9, meeting with him on January 9, 2007.[11] Mr. Alexander met with Ms. Hornot a second time on January 10, the day before trial was set; at this second meeting, he accepted a $10,000.00 retainer check, and prepared and signed a Motion to Enroll and to Continue Trial.[12] Mr. Alexander, however, advised Ms. Hornot not to file the motion until he had an opportunity to contact Mr. Cardenas's counsel to attempt to settle the case.[13]

The next day, on the morning of the trial, Ms. Hornot spoke with Mr. Alexander via telephone, and he indicated he was still trying to reach Mr. Cardenas's counsel regarding settlement; Mr. Alexander did not indicate that he

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7 Pretrial Order, R. Vol. 1, pp. 75-82.
8 R. Vol. 2, p. 119.
9 R. Envelope 1, H-1.
10 R. Vol. 2, p. 119.
11 R. Vol. 2, pp. 119, 122.
12 R. Vol. 2, pp. 122-23.
13 R. Vol. 2, pp. 122-23.

would not be attending the trial later that morning.[14] Nevertheless, Mr. Alexander failed to show up at the court for trial. At that point, Mr. Cardenas's counsel informed the trial court and Ms. Hornot that he had spoken with Mr. Alexander and that Mr. Alexander would not be attending the trial and would not be enrolling in the matter.[15] Mr. Cardenas's counsel concluded, "So somebody is not being up front with this Court at this point, and I invite you [the trial judge] to ask Mr. Alexander what he told Ms. Hornot this morning."[16]

The trial court then recessed and the trial judge retired to his chambers and called Mr. Alexander via telephone and held an *ex parte*, off-record conversation with him about representation of Ms. Hornot.[17] When the judge returned to the courtroom, he noted on the record that he had spoken with Mr. Alexander and that Mr. Alexander had indicated he had informed Ms. Hornot and Mr. Cardenas's counsel that he had determined he would not be enrolling in the matter and had no intention of participating in the trial of this matter.[18] Mr. Alexander never appeared in court to discuss the circumstances of his representation of Ms. Hornot on the record. Ms. Hornot immediately sought the court's permission to take the stand to testify as to her attempts to retain representation for trial, and specifically her discussions with Mr. Alexander. The trial judge indicated his predisposition to not believe Ms. Hornot's testimony, responding, ***"I'd be very cautious about taking the stand, Ms. Hornot."***[19]

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14 R. Vol. 2, p. 120.
15 R. Vol. 2, p. 121.
16 R. Vol. 2, p. 121.
17 R. Vol. 2, p. 121-22.
18 R. Vol. 2, p. 121-22.
19 R. Vol. 2, p. 122.

Ms. Hornot and the trial judge then engaged in a colloquy regarding Mr. Alexander's absence, concluding with Ms. Hornot's request for a continuance of the trial:

> **Ms. Hornot:** … I understood that he was going to be here this morning. I am not in a position to represent myself, Your Honor. I was not aware that he was not going to be here. I gave him a retainer check. He did not ask me to sign a contract, but I gave him the retainer check, which he accepted. I am literally caught between a rock and a hard place. … I'd like to proffer into evidence in support of my verbal motion for continuance this morning copies of the e-mails that I sent to Kevin Stockstill ….[20]

This motion for continuance was Ms. Hornot's first motion to continue the trial. She continued to urge, in rambling fashion, her grounds for continuance, proffering evidence of her communications with Mr. Stockstill, as well as the signed, albeit un-filed, motion to enroll and for continuance that Mr. Alexander had provided to her.[21] The trial court denied the motion to continue.[22] The trial court then denied a stay of the proceedings for Ms. Hornot to file an emergency supervisory writ to the appellate court to review the denial of her continuance

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[20] R. Vol. 2, p. 123-24.

[21] R. Vol. 2, p. 122-25. Ms. Hornot's unfocused argument for continuance illustrates how unsuited she was to represent herself at trial, and her reliance on the supposed representation by Mr. Alexander:

> Okay. Your Honor, Your Honor, I've been an attorney for 26 years. I went to Catholic school for 13 years. I've been practicing in the Baton Rouge area for 26 years. I have never made statements about people that I believe are untrue or false. ***I'm not sure exactly what's happening.*** I had a good-faith belief that Mr. Alexander was going to be here this morning. He did not tell me he would not be representing me. I was under the impression that he was trying to work this out with Mr. Saunders. ***I do not – you know, other than what Your Honor is telling me, I do not know why he's not here.***

R. Vol. 2, p. 125 (emphasis added).

[22] R. Vol. 2, p. 132.

motion.[23] Knowing that the trial was scheduled for two days, Ms. Hornot responded to the denial of the stay request by asking, "Your Honor, is there any way that you would grant me a continuance ***just until this afternoon to start***?" The trial judge responded, "No, ma'am. It is time to get this matter off my docket."[24]

After a five-minute break, the court proceeded with trial, and Ms. Hornot again pressed the court to continue at least to the next day (a date that was also scheduled for the trial), concluding by explicitly urging the justice and fairness issues at the heart of the instant petition to this Court for writ of certiorari:

> **Ms. Hornot:** … I can't go forward today. I simply cannot. I relied on the representations made by Mr. Alexander to me in good faith. I am not –
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> **The Court:** Ms. Hornot, I'm not revisiting that issue again. I've already told you, even if Mr. Alexander was here and sitting at counsel table and asking this Court for a continuance based upon his enrollment, I would have denied the motion to enroll at this late date, and I definitely would not have granted a continuance on that ground. I'm through talking about that. Okay?
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> **Ms. Hornot:** Okay. Your Honor, I need him with respect to the direct exam and the cross-exam, and he has some of my documents, Your Honor. Please. Your Honor, he has my documents. I can't go forward without being prepared. I relied in good faith upon the fact that I gave him the retainer. He did sign an original of the motion to enroll.
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> **The Court:** You keep telling me the same things over and over again, Ms. Hornot.
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> **Ms. Hornot:** I know, Your Honor, but in the interest of justice, in the interest of fairness, please don't make me go forward. I'm not prepared to go forward. Truly, Your Honor, I cannot go forward. I have not – I don't have a problem with telling the truth. I don't

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23 R. Vol. 2, p. 132.

24 R. Vol. 2, p. 132 (emphasis added).

> have a problem with taking the stand, but I cannot act as my own attorney, Your Honor.[25]

The district court rejected Ms. Hornot's entreaties and the trial commenced. That same day, without need to go into the second scheduled day for trial, and following testimony by only Ms. Hornot and Mr. Cardenas, the district court announced oral reasons for judgment finding that none of Ms. Hornot's claims had merit; that the allegations of Ms. Hornot's lawsuit were defamatory *per se* as to Mr. Cardenas; that Mr. Cardenas was entitled to $20,000.00 in damages from the defamation; that Mr. Cardenas was entitled to full payment from the auto accident settlement proceeds of a 17.5-percent contingent fee, plus expenses; and that Ms. Hornot, despite no separate motion for sanctions or hearing as to sanctions, was liable for sanctions in the amount of $10,000.00 under Louisiana Code of Civil Procedure article 863.[26] Final written judgment was entered by the district court on February 26, 2007.[27]

Ms. Hornot appealed (now represented by counsel) to the Louisiana First Circuit Court of Appeal, arguing that the district court's failure to grant her motion for continuance was manifestly unfair in that it forced Ms. Hornot to move forward on a *pro se* basis even though she had diligently sought to retain

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[25] R. Vol. 2, p. 133.

[26] R. Vol. 1, pp. 302-08, Appendix 3, at pp. 24a-29a. La. C.C.P. art. 863 is substantively equivalent to Fed. R. Civ. P. 11. The Louisiana First Circuit Court of Appeal vacated the award of sanctions upon finding that the article's hearing requirement was not met, and remanded to the district court to hold such a hearing. The sanctions order, therefore, is not part of the ruling before this Court in this petition, though it is still a live issue in the district court and its resolution will likely be impacted by the disposition of this petition.

[27] R. Vol. 1, pp. 105-06, Appendix B, at pp. 21a-23a.

hired counsel to represent her at trial[28]; and that the trial court should not have found her lawsuit to have presented defamation in the face of at least a qualified privilege attaching to allegations made in a judicial proceeding.[29] In arguing the unfairness of the trial court's actions with regard to the motion for continuance, Ms. Hornot also argued to the Court of Appeal the apparent bias and hostility in the trial judge's demeanor.[30] The Louisiana First Circuit affirmed these portions of the district court's rulings and judgment, holding with regard to the motion for continuance that the district court was acting within its discretion; and with regard to the finding of defamation *per se* that the district court was not wrong in finding that there was no factual basis for Ms. Hornot's allegations against Mr. Cardenas.[31] After full briefing of these issues by Ms. Hornot on application for writs of certiorari and review, the Louisiana Supreme Court denied writs on September 26, 2008.[32]

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[28] *Hornot v. Cardenas*, No. 2007 CA 1489 (La. App. 1st Cir.), Plaintiff's Application for Rehearing, at p. 6.

[29] Appendix A, at pp. 14a-15a.

[30] *Hornot v. Cardenas*, No. 2007 CA 1489 (La. App. 1st Cir.), Plaintiff's Application for Rehearing, at pp. 4-6.

[31] Appendix A, at pp. 12a, 15a.

[32] Appendix C, at p. 30a.

REASONS FOR GRANTING THE PETITION

The Louisiana First Circuit Court of Appeal's ruling on the merits in this matter, affirming the district court's denial of Ms. Hornot's motion for continuance and affirming the district court's finding of defamation *per se* by Ms. Hornot in her allegations in her lawsuit against Mr. Cardenas, presents conflicts with due process decisions by this Court and the U.S. Courts of Appeals, and presents a significant unresolved issue regarding the privilege from defamation liability that should attach to pleadings in judicial proceedings.[33]

A. Review is Warranted to Resolve a Conflict Between the Louisiana Court's Decision and Decisions of this Court and of the U.S. Courts of Appeals Regarding the Constitutional Guarantees Related to Retention of and Representation by Hired Counsel in Civil Proceedings.

The right to representation by retained counsel in civil proceedings has its genesis in this Court's decision in *Powell v. Alabama*, 287 U.S. 45 (1932). Examining specifically the question of the right to representation by counsel in a criminal case, this Court observed the due process foundations of such a right:

> It never has been doubted by this court, or any other so far as we know, that notice and hearing are preliminary steps essential to the passing of an enforceable judgment, and that they, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirement of due process of law. … What, then, does a hearing include? Historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right. The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.

Id. at 68-69. Then, clarifying that such a right was not limited to the criminal context before it, the *Powell* Court held that,

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[33] *See Hicks v. Feiock*, 485 U.S. 624, 629 (1988) (noting grant of certiorari in the face of denial of review by state supreme court); *see also Foucha v. Louisiana*, 504 U.S. 71, (1992) (noting grant of certiorari to resolve due process issues arising from conduct of state civil proceedings).

> [i]f in any case, ***civil or criminal***, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore of due process in the constitutional sense.

Id. at 69 (emphasis added).

This Court has specifically applied this holding as a basis to find constitutional error in the denial of a motion for continuance to allow retained counsel to be present in court. In *Reynolds v. Cochran*, 365 U.S. 525 (1961), a habeas petitioner challenged his confinement in Florida prison under that state's "second-offender" statute. *Id*. at 529. After serving prison sentences for two unrelated convictions, the petitioner had been arrested and brought to court for trial under the second-offender statute on the basis of the two prior convictions. The petitioner informed the court that his counsel had been contacted and would arrive later in the morning on the day of the trial; the trial court responded, "[Y]ou do not need counsel in this case. … No point in calling a Doctor to a man already dead." *Id*. While the petitioner raised issues in his habeas petition regarding double jeopardy and *ex post facto* prohibitions, this Court instead reversed the denial of habeas relief

> for a hearing in order to afford petitioner an opportunity to prove his allegations with regard to another constitutional claim – that ***he was deprived of due process by the refusal of the trial judge to grant his motion for a continuance in order that he might have the assistance of the counsel he had retained*** in the proceedings against him.

Id. at 530 (emphasis added). The *Reynolds* Court based this holding in the pronouncement from *Powell*. *Id*. at 530-31.

Several years later, this Court moved its right-to-retained-counsel analysis expressly into the civil sphere, in *Goldberg v. Kelly*, 397 U.S. 254 (1970). In

Goldberg, this Court held that administrative proceedings by New York state and city officials to remove an AFDC-recipient from the benefits program must include a pre-termination hearing and that, at such hearing, "the recipient must be allowed to retain an attorney if he so desires. Counsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipient." *Id*. at 270-71 (citing *Powell*, *supra*).

By the time of this Court's opinion in *Maness v. Meyers*, 419 U.S. 449 (1975), "[t]he right to be advised by retained counsel in a civil proceeding" had become a concisely articulated right recognized by members of the Court. *See id*. at 472 (Stewart, J., concurring). In *Maness*, a civil proceeding regarding an order of contempt levied against an attorney, Justice Stewart concurred in the Court's reversal of judgment upholding the contempt order, noting that "[t]he 'right to be heard by counsel' is frustrated equally ***by denying the right to have counsel present during trial*** as by preventing counsel, once in the courtroom, from giving good-faith professional advice to his client." *Id*. (emphasis added).

The federal Courts of Appeals have also followed *Powell*'s dictate that the denial of the right to be represented by retained counsel, including in civil proceedings, is a denial of constitutional due process. In a case very similar to Ms. Hornot's situation, the U.S. Sixth Circuit Court of Appeals examined a case where the district court, expressing overt hostility to the plaintiff, allowed a plaintiff's counsel to withdraw two days before trial was set, then denied the plaintiff's request for a twenty-five-day continuance to obtain new counsel, forcing the plaintiff to proceed *pro se*. *Anderson v. Sheppard*, 856 F.2d 741, 742-45 (6th Cir. 1988). The *Anderson* court held that, "[w]hile case law in the area is

scarce, the right of a civil litigant to be represented by retained counsel, if desired, is now clearly recognized." *Id*. at 747. Specifically regarding the interplay of the due process right to retained counsel at trial and the discretion normally accorded to a motion for continuance, the Sixth Circuit held,

> [T]he district court abused its discretion in failing to grant [plaintiff] a reasonable time to obtain counsel. While the matter of continuance is traditionally within the discretion of the trial judge, ***a myopic insistence upon expeditiousness in the face of justifiable request for delay can render the right to defend with counsel an empty formality.***

Id. at 748 (citations, internal quotation marks, and internal ellipsis in original omitted) (emphasis added).

The District of Columbia Circuit and the Fifth Circuit have also held that the right to retained counsel is a constitutionally guaranteed component of due process. In *American Airways Charters, Inc. v. Regan*, 746 F.2d 865 (D.C. Cir. 1984), then-Judge Ginsburg wrote that a statutory requirement for obtaining a government license prior to obtaining counsel would be an invalid "attempt to deny counsel to a civil litigant" as recognized in *Powell*. *Id*. at 873. In *Texas Catastrophe Property Insurance Association v. Morales*, 975 F.2d 1178 (5th Cir. 1992), the Fifth Circuit held that a Texas statute requiring a pool of insurers to rely exclusively for legal representation on the state's attorney general violated "a constitutionally guaranteed right to retain hired counsel in civil matters, [a right] grounded in the Fourteenth Amendment due process clause." *Id*. at 1180.

The denial of Ms. Hornot's motion for continuance in this matter, upheld by the Louisiana First Circuit Court of Appeal, directly conflicts with this line of decisions from this Court and the federal Courts of Appeals and has resulted in a patent denial of Ms. Hornot's due process rights under the Fourteenth

Amendment. This matter falls fully within the confines of the right to retained counsel as that right has been developed, particularly in this Court's *Reynolds* decision and the Sixth Circuit's *Anderson* decision. In each of those cases, as with Ms. Hornot, the trial court's denial of a motion for brief continuance in order to allow retained counsel to be present or to allow the litigant the opportunity to retain new counsel resulted in the litigant being compelled to proceed *pro se*, with clearly adverse impact on the outcome of the underlying litigation. In direct conflict with the *Anderson* court's handling of the issue of a trial court's discretion in the face of the Fourteenth Amendment guarantee, the Louisiana First Circuit here dispensed with Ms. Hornot's arguments purely on the basis that a "trial court has great discretion in granting or denying a motion for continuance, and its ruling will not be disturbed on appeal in the absence of a clear showing of an abuse of discretion."[34]

Indeed, Ms. Hornot's situation is more egregious in some respects than each of those cases. Here, there is no dispute that Ms. Hornot had retained counsel upon an extended and diligent search, but the trial court did not even require that counsel to appear in court to explain on the record the reason for his non-participation in the trial, instead taking Mr. Alexander's word in an *ex parte*, non-sworn telephone conversation over the word of an officer of the court, Ms. Hornot, appearing in open court, on the record, and prepared to take the stand. While the Sixth Circuit was quick to find constitutional violation in the denial of a twenty-five-day continuance in the circumstance of withdrawal of counsel two days before trial in *Anderson*, here the trial court denied continuance for even

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[34] Appendix A, at 12a.

part of one day where the court allowed retained counsel to not appear on the morning of trial. And here, the reason proffered by the trial court for the denied continuance does not stand up to even facial scrutiny, as the trial took less than one day, but had been scheduled on the court's schedule for two days, showing that the partial-day continuance would have had no impact on the court's ability to get the case off its docket.

Accordingly, this case presents an ideal opportunity for this Court to resolve a conflict between the Louisiana court and its own decisions and those of the federal Courts of Appeals. U.S. S. Ct. Rule 10(b), (c).

B. Review is Warranted to Resolve a Conflict Between the Louisiana Court's Decision and Decisions of this Court and of the U.S. Courts of Appeals Regarding the Constitutional Guarantee to a Non-Hostile and Fair Tribunal.

Due process requires a fair and non-hostile tribunal. In *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980), this Court held that the federal statutory regime regarding assessment and distribution of civil penalties under the Fair Labor Standards Act did not create an impermissible conflict of interest for the adjudicating administrative body at issue. In arriving at this holding, however, the *Marshall* Court set out the due process-derived framework bearing the neutrality requirement for adjudicative proceedings:

> The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process. The neutrality requirement helps guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. At the same time, it preserves both the appearance and reality of fairness, "generating the feeling, so important to a popular government, that justice has been done," … by ensuring that no

> person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him. The requirement of neutrality has been jealously guarded by this Court.

Id. at 242 (quoting *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring)).

The Sixth Circuit's *Anderson* opinion recognized that this constitutional requirement of judicial neutrality extended to prohibit comments by the trial judge exhibiting pre-judgment and hostility to the claims of the private litigants before it. 856 F.2d at 746-47. In *Anderson*, during the colloquy between the plaintiff and the trial judge regarding the denial of a continuance to allow the plaintiff to retain new counsel, the trial judge made several comments indicating his hostility, his pre-judgment of the plaintiff's claims, and his desire to just get the case done:

> "If I had my druthers I would start the trial of this case tomorrow morning, but I can't because I have another case I'm trying." … "The odds are against you, you know that, don't you?" … "If it [the first trial] had gone to the jury, the jury would have sent you down the tube. You got a second chance in this case, in my judgment, on a technicality." … "You're gambling here, you're shooting craps."

Id. at 743-44. The court held that, "when a trial judge exhibits the open hostility and bias at the beginning of a judicial proceeding as was exhibited here, it follows that the judgment entered therein ***must be reversed***." *Id*. at 747.

Here, the trial judge exhibited similar open hostility to Ms. Hornot and her claim; as with *Anderson*, this hostility was expressed at the trial's outset during colloquy regarding the need for retained counsel to be present or for new counsel to be allowed to be retained. The trial judge here expressly called into question Ms. Hornot's veracity when, after his *ex parte* telephone conversation with Mr. Anderson, he cut off Ms. Hornot's offer to take the stand to provide

sworn testimony as to her efforts to retain Mr. Alexander by stating, "I'd be very cautious about taking the stand, Ms. Hornot."[35] The trial judge then engaged in a back-and-forth with Ms. Hornot, essentially advocating Mr. Alexander's position on an issue of Ms. Hornot's due process rights and even though Mr. Alexander never sought to provide an on-record explanation of his own: "[He] has no intention of representing you in connection with this matter."[36] Despite the proffered evidence and the testimony Ms. Hornot was prepared to give on the stand on the issue of her diligence in seeking and retaining counsel to represent her at trial, still relying on his *ex parte* communication with Mr. Alexander the trial judge essentially rolled over the facts on the record to place the entire blame for Ms. Hornot's lack of counsel on Ms. Hornot: "You had ample time if you chose to do so to obtain counsel to represent you, and the fact that you waited until December and now January is of no fault of any party but yourself, Ms. Hornot."[37] The trial judge flatly shut Ms. Hornot down when she tried to avail herself of remedies short of a longer-term continuance, seeking first a brief stay while she took an emergency writ to the Louisiana First Circuit, then seeking a continuance within the scheduled trial period, to later that same afternoon: "You can take a writ, but I'm not going to stay this trial. I'm not staying the trial to take a writ." (Regarding the request for a brief stay). "No, ma'am. It is time to get this matter off of my docket." (Regarding the request for a continuance to that same afternoon).[38]

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35 R. Vol. 2, p. 122.
36 R. Vol. 2, p. 123.
37 R. Vol. 2, p. 131.
38 R. Vol. 2, p. 132.

Intertwined with the due process violation in the trial court's failure to grant the continuance and the resulting compulsion of Ms. Hornot to proceed to trial without retained counsel is the independent due process violation evident in the trial judge's hostility and apparent pre-judgment of her veracity and her claims. In the face of the open hostility and bias, the result – a complete denial of Ms. Hornot's claims, a full grant of the relief requested by her opponent on his cross-claim, and an order of sanctions against Ms. Hornot – is subject to doubt as to whether, indeed, "justice has been done." *Marshall*, 446 U.S. at 242. To the extent this doubt runs in conflict with this Court's decision in *Marshall* and the Sixth Circuit's decision in *Anderson*, granting of this petition will provide opportunity for this Court to resolve that conflict. U.S. S. Ct. Rule 10(b), (c). More importantly, to the extent this Court has not yet expressly extended its neutrality-of-adjudication holdings to the situation of judicial hostility, this case would provide the ideal vehicle to explore the efficacy of doing so. U.S. S. Ct. Rule 10(c).

C. Review is Warranted to Resolve Whether the First Amendment Requires a Privilege From Defamation Liability for Pleadings in Judicial Proceedings, and, if so, to Determine the Minimum Protections of Such a Privilege.

The damages awarded against Ms. Hornot in this matter based on the trial court's finding of defamation *per se* were based entirely on Ms. Hornot's allegations in her lawsuit against Mr. Cardenas. The Louisiana First Circuit rejected the application of a privilege to protect Ms. Hornot's speech in allegations made in pleadings in judicial proceedings, holding, "[W]e cannot say that the trial court's finding that there was no factual basis for any of the

allegations made by Ms. Hornot was wrong."[39] The Louisiana First Circuit articulated the scope of the privilege it was examining as whether the allegations Ms. Hornot made were "based on her good faith, reasonable belief that they were true or made without malice."[40]

In *Briscoe v. LaHue*, 460 U.S. 325 (1983), this Court made clear that, under either the "English Rule" or the "American Rule," statements in judicial proceedings were subject to an absolute privilege:

> The immunity of parties and witnesses from subsequent damages liability for their testimony in judicial proceedings was well established in English common law. Some American decisions required a showing that the witness' allegedly defamatory statements were relevant to the judicial proceeding, but once this threshold showing had been made, the witness had an absolute privilege. The plaintiff could not recover even if the witness knew the statements were false and made them with malice.

Id. at 330-31 (internal citations and footnotes omitted); *see also* Restatement 2d of Torts § 587 ("A party to a private litigation … 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, if the matter has some relation to the proceeding."). In discussing the relative lack of distinction between the English and American rules, the *Briscoe* Court specifically examined those jurisdictions requiring a showing that the judicial proceedings statements were in good faith in order to qualify for a privilege: "Although some cases use the words 'good faith,' good faith was established … if the statements were pertinent and material to the judicial proceeding and given in response to

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39 Appendix A, at 15a.

40 Appendix A, at 15a.

questions. Indeed, even if the testimony was not pertinent, ***the [defamation claim] plaintiff had the burden of proving bad faith***." *Id* at 331 n.11.[41]

Accordingly, even if the Louisiana First Circuit's formulation of the privilege applicable in Louisiana is correct, that it requires a "good faith" belief, that formulation is in conflict with the *Briscoe* Court's examination of what "good faith" requires for purposes of the privilege from defamation liability: materiality to the judicial proceeding. The question is not, as the Louisiana court here put it, whether Ms. Hornot could produce sufficient evidence to support the allegations,[42] but whether the allegations were pertinent and material to the proceedings. Here, Ms. Hornot's allegations all stemmed directly from Mr. Cardenas's representation of her in the personal injury matter, and related to her good faith belief in the harms she suffered arising from that representation. Such testimony, whether the district court ultimately finds it sufficient to prevail on the claims brought through those allegations, should clearly suffice to invoke the privilege from defamation liability. The Louisiana First Circuit's holding that it was not is in conflict with *Briscoe*, and is therefore a solid basis for granting certiorari. U.S. S. Ct. Rule 10(c).

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[41] The leading Louisiana case regarding the qualified privilege applied in this civil law jurisdiction comports with the *Briscoe* Court's understanding of the limited "good faith" requirement: "[A]n attorney in Louisiana cannot make disparaging statements, either in pleadings, briefs or argument, ***if the defamatory statements are not pertinent to the case or are made maliciously or without reasonable basis***." *Freeman v. Cooper*, 414, So. 2d 355, 359 (La. 1982) (emphasis added).

[42] Indeed, in light of the trial judge's disallowal of Ms. Hornot's requests to have time to retain new counsel or, at the very least, retrieve documents that she had provided to Mr. Alexander upon her belief that he was going to represent her at the trial of this matter, Ms. Hornot's inability to meet such a standard was essentially guaranteed from the outset.

The zero-sum analysis imposed by the Louisiana court here essentially requires a plaintiff to be successful in proving the allegations of her complaint or face liability for defamation. Such a chilling effect on the seeking of redress in the courts should run afoul of the First Amendment's free speech guarantees. *See Imbler v. Pachtman*, 424 U.S. 409, 426 n.23 (1976) ("In the law of defamation, a concern for the airing of all evidence has resulted in an absolute privilege for any courtroom statement relevant to the subject matter of the proceeding. In the case of lawyers the privilege extends to their briefs and pleadings as well. … Chief Justice Shaw expressed the policy decision as follows: 'Subject to this restriction [of relevancy], it 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, or their constituents; and this freedom of discussion ought not to be impaired by numerous and refined distinctions.'") (quoting *Hoar v. Wood*, 44 Mass. 193 (1841)) (emphasis added). To the extent that the current scope of the judicial proceedings privilege is defined as a prudential matter and has not been explored by this Court for its constitutional scope, granting certiorari in this matter would enable the Court to take up this task. U.S. S. Ct. Rule 10(c).

CONCLUSION

Ms. Hornot respectfully requests that this Court grant this petition for writ of certiorari. The decision of the Louisiana First Circuit Court of Appeal, allowed to stand by the Louisiana Supreme Court, conflicts with the decisions of this Court and with the decisions of the U.S. Courts of Appeals with regard to the Fourteenth Amendment due process guarantees to be represented by retained

counsel in civil proceedings, and to be free from a hostile or biased adjudication of private rights. Moreover, the Louisiana First Circuit's decision provides the opportunity for this Court to examine the First Amendment foundation for, and the appropriate scope of, a privilege (whether "absolute" or "qualified") from defamation liability for allegations made in judicial proceedings. The attention of this Court is merited on each of these issues.

Respectfully submitted,

Harvey S. Bartlett III, *Counsel of Record*
The Bartlett Law Firm, APLC
5000 West Esplanade Avenue, Box 632
Metairie, Louisiana 70006
(504) 756-6334

Counsel for Petitioner