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NEWS RELEASE #031

FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **22nd day of May, 2009**, are as follows:

BY JOHNSON, J.:

2008-C -1690 ASTORIA ENTERTAINMENT, INC. v. EDWARD J. DEBARTOLO, JR., DEBARTOLO ENTERTAINMENT LOUISIANA GAMING, INC., HOLLYWOOD CASINO CORPORATION, ROBERT GUIDRY, TREASURE CHEST CASINO, L.L.C., ET AL.
(Parish of Orleans)

For these reasons we find that the court of appeal erred in affirming the trial court's grant of defendants' motions for summary judgment. We hereby reverse the decision of the court of appeal, and remand this matter to the trial court for further proceedings.
REVERSED AND REMANDED.

KIMBALL, C.J., concurs.
KNOLL, J., concurs.
GUIDRY, J., concurs.

05/22/09

SUPREME COURT OF LOUISIANA

No. 08-C-1690

ASTORIA ENTERTAINMENT, INC.

VERSUS

EDWARD J. DEBARTOLO, JR., DEBARTOLO ENTERTAINMENT LOUISIANA GAMING, INC., HOLLYWOOD CASINO CORPORATION, ROBERT GUIDRY, TREASURE CHEST CASINO, L.L.C., ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL FOURTH CIRCUIT, PARISH OF ORLEANS

JOHNSON, Justice

We granted this writ application to determine whether the court of appeal correctly affirmed the trial court's grant of the defendants' Motions for Summary Judgment, finding that the defendants were immune from any liability by application of the *Noerr-Pennington* doctrine. Because we find that *Noerr-Pennington* does not apply to grant civil immunity for the defendants' illegal actions, we reverse the decision of the court of appeal.

FACTS AND PROCEDURAL HISTORY

On December 1, 1998, Plaintiff, Astoria Entertainment, Inc. ("Astoria"), filed suit against defendants Edward DeBartolo, Jr.[1] ("DeBartolo") and Robert Guidry ("Guidry"), as well as numerous other defendants,[2] essentially alleging that it was not

[1] DeBartolo's company, DeBartolo Entertainment Louisiana Gaming, Inc., also remains a defendant.

[2] Defendants Hollywood Park, Inc., Robert List, Louisiana Gaming Enterprises, Inc., Boomtown, Inc., and Louisiana-I Gaming, L.P., were dismissed without prejudice on March 5, 1999. Defendants Boyd Gaming Corporation, Boyd Louisiana, LLC, Boyd Kenner, Inc., and Treasure Chest Casino, LLC were dismissed with prejudice on October 21, 2003. Defendant, Hollywood Casino Corporation, was dismissed with prejudice on June 18, 2004.

awarded a licence to operate a riverboat casino due to the defendants' corrupt practices which permeated the riverboat gaming licensing process in Louisiana from 1991 to 1998. Astoria initially filed suit in federal court on November 12, 1998. The original Complaint was premised solely on the defendants' alleged violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C.1961 *et seq*., and sought civil damages under that statute. The suit named numerous defendants, including DeBartolo and Guidry. The federal case was stayed on April 11, 1999, pending the prosecution and conclusion of the criminal proceeding in the Middle District of Louisiana captioned *United States v. Edwin Edwards, et al.*, Cr. No. 98-165B. The stay was eventually lifted on February 23, 2001, after the criminal convictions were returned and sentences imposed. On March 6, 2001, Astoria filed an amended complaint in federal court, adding allegations of Sherman and Clayton Antitrust Act violations, as well as several causes of action under Louisiana state law. As in this case, the gist of Astoria's complaint was that it would have received a license to operate a riverboat casino in the absence of corruption. Defendants filed a Motion to Dismiss, which was granted by the federal court. The court found that Astoria's antitrust action was prescribed, and additionally found that the *Noerr-Pennington* doctrine applied to shield the defendants from federal antitrust liability. The court dismissed Astoria's federal Sherman antitrust and RICO claims with prejudice. Holding that the dismissal of Astoria's federal antitrust claims deprived the federal court of jurisdiction, the court declined to rule on Astoria's state claims, and dismissed them without prejudice, thereby preserving Astoria's right to pursue them in state court. *Astoria Entm't, Inc. v. Edwards*, 159 F.Supp. 2d 303, 320-321 (E.D. La. 2001).

In 1991, the Louisiana Riverboat Economic Development and Gaming Control

Act ("the Act") was enacted, which authorized the licensing and operation of fifteen riverboat casinos.[3] The Act created two separate bodies within the Department of Public Safety and Corrections and vested each with separate duties and responsibilities in furtherance of the Act's purposes.[4] See: *State Through Dept. of Public Safety and Corrections v. Louisiana Riverboat Gaming Commission and Horseshoe Entertainment*, 94-1872 (La. 5/22/95), 655 So.2d 292. The Gaming Enforcement Division was vested with regulatory and enforcement powers, and the Riverboat Gaming Commission ("the Commission") was a rule and policy making body appointed by the Governor and confirmed by the Louisiana Senate. *Id.* at 296. Under its rulemaking powers, the Commission required any prospective riverboat operator to apply to the Commission for a Certificate of Preliminary Approval ("CPA"). See former La. Admin. Code 42:XIII.303.[5]

In short, at issue in this litigation are two riverboat licences - one that was awarded to Guidry in 1993, and one that was awarded to DeBartolo in 1997. According to Astoria's Petitions, it originally pursued a license to operate a riverboat casino in Kenner, but abandoned that plan when it learned that Guidry "had been guaranteed" a Kenner license because of his "close relationship" with former Governor Edwin Edwards. Astoria contends that it then sought to pursue a Gretna license, and filed an application for a CPA to operate a riverboat in Gretna. Astoria

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[3] This Act was superceded in part in 1996 by the Louisiana Gaming Control Law, La. R.S. 27:1, *et seq*. The portions of the prior law that were not revoked are found at La. R.S. 27:41 *et seq*.

[4] This structure was revoked by the Louisiana Gaming Control Law, La. R.S. 27:1, *et seq*. The Gaming Control Law created the Louisiana Gaming Control Board, which inherited the powers of both the Gaming Commission and Enforcement Division. However, the two-body structure was still in place at all relevant times in this case.

[5] This rule was apparently struck down in *State Through Louisiana Riverboat Gaming Commission v. Louisiana State Police Riverboat Gaming Enforcement Division*, 95-2355 (La. App. 1 Cir. 8/21/96), 694 So.2d 316. The court essentially found Commission exceeded its authority by implementing the rule, which gave the Commission licensing power over the intended licensing body, the Louisiana State Police.

alleges that despite promises of support from some Commission members, it failed to obtain a CPA as a result of corruption. The 1997 license ("15th license") was eventually awarded to DeBartolo after a license previously awarded to another company was abandoned. Astoria alleges that DeBartolo paid Edwards $400,000.00 to prevent problems with his license application. Astoria asserts that DeBartolo's actions made it impossible for Astoria to have a fair and impartial consideration of its application for the 15th license, but Astoria makes no specific allegation that it actually applied for that particular license.

The crux of Astoria's argument is that DeBartolo and Guidry corrupted the licensing process by making illegal payments to former Governor Edwin Edwards in order to obtain Edwards' assistance in obtaining casino licenses for their respective companies;[6] and, but for their corrupt actions, Astoria would have received a license.[7]

The defendants filed various exceptions, including exceptions of no cause of action, which were denied by the trial court on February 13, 2004. On September 7, 2004, the court of appeal granted the defendants' writ applications, reversing the trial court's denial of their exceptions of no cause of action. The court of appeal stated:

> [T]he *Noerr-Pennington* doctrine is applicable to all of the claims set forth by Astoria against the defendant-relators in this case, specifically the claims for tortious interference (with economic and/or prospective business advantage), the claims for violations of the Louisiana Unfair Trade Practices and Consumer Protection Law and any other such unfair trade practices claims (such as under California law), the claims for conspiracy, and the claims for unjust enrichment. Therefore, we reverse the judgment of the trial court. . . .

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[6] DeBartolo pled guilty to misprision of a felony in violation of Title 18, United States Code Section 4 on October 6, 1998. Guidry pled guilty to conspiracy in violation of Title 18, U.S.C. § 371 on October 16, 1998. See *U.S. v. Edwards*, 39 F. Supp. 2d 716, 720 n. 7.

[7] Specifically, Astoria, by its original and amending petitions, asserted one or more of the following causes of action against the defendants: (1) intentional interference with economic advantage and/or prospective economic advantage; (2) unjust enrichment to the extent that the defendants were unjustly enriched to the detriment and impoverishment of Astoria; (3) civil conspiracy to corrupt the licensing process; (4) punitive damages under California law for fraud; (5) treble damages under the California business code for unfair trade practices; and (6) violations of the Louisiana Unfair Trade Practices and Consumer Protection Law, La. R.S. 51:1401 *et seq*.

Astoria Entertainment, Inc. v. Edward J. DeBartolo, Jr., et al, 2004-C-0415 c/w 2004-C-0417, 2004-C-0430, 2004-C-0431 (La. App. 4th Cir. 9/7/04), unpub.

Astoria then filed a writ application in this Court, which we granted with an order reversing the decision of the court of appeal. Specifically, this Court stated:

> The *Noerr-Pennington* doctrine provides an affirmative defense. *Bayou Fleet v. Alexander*, 234 F.3d 852 (5th Cir. 2000), and *Acoustic Systems, Inc. v. Wenger Corp.*, 207 F.3d 287 (5th Cir. 2000). Affirmative defenses must be raised in the answer. La. Code Civ. P. art. 1003 and art. 1005. The court of appeal was premature in reaching this issue in the context of an exception of no cause of action. Accordingly, the judgment of the court of appeal is vacated and the judgment of the district court denying the exception of no cause of action is reinstated.

Astoria Entertainment, Inc. v. DeBartolo, Jr., et al, 2004-2472 (La. 1/7/05), 891 So.2d 687.

Following remand to the trial court, DeBartolo filed an answer asserting defenses, including *Noerr-Pennington*. Guidry amended his answer to assert a *Noerr-Pennington* defense. Defendants subsequently moved for summary judgment asserting that they were entitled to immunity pursuant to the *Noerr-Pennington* doctrine.[8] The trial court granted the defendants' motions for summary judgment, finding that it was bound by the court of appeal's previous ruling on the applicability of *Noerr-Pennington*. Astoria appealed. While the court of appeal agreed with Astoria that its previous vacated decision was not law of the case and had no force or effect, the court of appeal again found, as a matter of law, that the *Noerr-Pennington* doctrine was dispositive. Astoria filed the instant writ application in this Court, which we granted. *Astoria Entertainment, Inc. v. DeBartolo, et al.*, 2008-1690 (La. 10/31/08), 993 So.2d 221.

DISCUSSION

Origins of the Noerr-Pennington Doctrine

[8] Alternatively, Guidry argued that he was entitled to summary judgment because Astoria's claims were barred by prescription and *res judicata*.

The *Noerr-Pennington* doctrine is derived from two United States Supreme Court decisions: *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). This immunity doctrine essentially provides that private parties who petition the government for governmental action favorable to them are not in violation of the antitrust laws, even though their petitions are motivated by anticompetitive intent. 5 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure*, § 20.54(e) (4th ed. 2008). The Court derived its decision in *Noerr* from the premise set forth in *Parker v. Brown*, 317 U.S. 341 (1943), that the States have freedom to engage in anticompetitive regulation. *Parker* provides immunity to governments and government actors from anti-trust claims, finding that the Sherman Act was intended to restrain only private action, but did not apply to anticompetitive restraints imposed by the State "as an act of government." *Parker*, 317 U.S. at 352.[9] However, *Parker* did not immunize the private parties who urge government or government actors to engage in anticompetitive regulation from antitrust liability. Reasoning that if state action, even if anticompetitive, is immune from antitrust liability, then petitioning the state for that action should not be unlawful, the Court developed a corollary to the *Parker* doctrine in *Noerr*. *Noerr*, 365 U.S. at 137.

In *Noerr*, the Court held that railroads, which had embarked on an advertising campaign designed to convince the legislature to pass laws which were detrimental to the trucking industry, were not subject to antitrust liability for those actions, even though their ultimate goal was to drive trucks out of business and limit the competition. In so holding, the Court concluded that "the Sherman Act did not reach political activity, nor was the anticompetitive purpose of the railroads in initiating the

[9] The Sherman Anti-Trust Act ("Sherman Act") is codified at 15 U.S.C. § 1, *et seq*. and was enacted to protect trade and commerce against unlawful restraints and monopolies.

advertising campaign, nor their deception in conducting that campaign, relevant to the antitrust analysis." *Noerr*, 365 U.S. at 138-141. The Court held that "the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or executive to take particular action with respect to a law that would produce a restraint or monopoly." *Id.* at 136.

The Court explained that to hold otherwise "would substantially impair the power of government to take actions through its legislature and executive that operate to restrain trade." *Id.* at 137. The Court stated that:

> [t]o hold that the government retains the power to act in [a] representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act.

Id. at 137.

The Court further reasoned that to construe the Sherman Act differently would raise important constitutional questions. The First Amendment protects the right of the people "to petition the Government for a redress of grievances." U.S. Const. amend. I. The Court explained:

> The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms. Indeed, such an imputation would be particularly unjustified in this case in view of all the countervailing considerations enumerated above. For these reasons, we think it clear that the Sherman Act does not apply to the activities of the railroads at least insofar as those activities comprised mere solicitation of governmental action with respect to the passage and enforcement of laws.

Id. at 138.

Thus, it seems clear that the *Noerr-Pennington* doctrine stems not only from the right to petition governments granted by the First Amendment, but is also based on the recognition that antitrust laws, "tailored as they are for the business world, are

not at all appropriate for application in the political arena." *Noerr*, 365 U.S. at 141.

Four years after *Noerr*, the Supreme Court issued its opinion in *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). In *Pennington*, the Court reaffirmed the principles in *Noerr*, and held that "[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition." *Pennington*, 381 U.S. at 670. The Court stated that *Noerr* shields from the Sherman Act a concerted effort to influence public officials "regardless of intent or purpose." *Id.* In 1972, the Court further extended the *Noerr-Pennington* doctrine to petitions before courts and administrative agencies. *California Motor Transport Co., v Trucking Unlimited*, 404 U.S. 508 (1972).

The Parties' Contentions

Astoria

Astoria argues that *Noerr-Pennington* is not a single broad brush doctrine which immunizes any activity simply because a politician is involved. Astoria asserts that the application of the doctrine is fact-intensive, and should not have been applied by the lower courts absent discovery by the parties, and fact development regarding the alleged petitioning process.

On the merits of the application of *Noerr-Pennington*, Astoria argues that the defendants' corruption was not part of any legitimate petitioning that would be protected by the Constitution, as the First Amendment was never meant to be a safe harbor for corruption. Astoria argues that the defendants' corrupt actions should not be given *Noerr-Pennington* protection.

DeBartolo

DeBartolo argues that *Noerr-Pennington* serves as a complete defense to the allegations in Astoria's petitions. DeBartolo argues that *Noerr-Pennington* applies

broadly to all efforts to influence governmental action, and that the doctrine is not limited to "legitimate" petitioning.

DeBartolo also disputes Astoria's assertion that *Noerr-Pennington* is a safe harbor for corruption. DeBartolo argues that *Noerr-Pennington* neither permits nor approves of unlawful activity, and that there are criminal statutes to address the types of misconduct that might be involved in improper relations with governmental officials. Here, DeBartolo and Guidry were punished for their actions.

DeBartolo argues that summary judgment was properly granted. Astoria has never articulated what additional facts should have been developed in this case that could change the trial court's legal analysis. Nor did Astoria request additional time for discovery in opposing the motion for summary judgment.

Guidry

Guidry argues that *Noerr-Pennington* is broadly applied, and had been used by courts to dismiss a variety of claims, including state law claims. Guidry argues that under *Noerr-Pennington*, this Court must look at the conduct in question, not the intent or motivation behind the conduct. Guidry argues that his conduct in attempting to influence the Commission through Edwards is exactly what *Noerr-Pennington* purports to protect.

Guidry argues that the trial court properly granted his motion for summary judgment, as Astoria failed to introduce any evidence to contravene the motion and Astoria did not request additional time for discovery. In addition, Astoria never conducted the court-ordered deposition of Guidry. Guidry argues that when the government activity in question is clearly defined, a court can conclude as a matter of law whether *Noerr-Pennington* is applicable. Courts routinely resolve this legal issue on the pleadings under motions to dismiss pursuant to Federal Rule of Civil

Procedure 12, or motions for summary judgment.

Application of *Noerr-Pennington*

La. C.C.P. art. 966(B) provides that a motion for summary judgment will be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact and that mover is entitled to judgment as a matter of law." This article further provides that the summary judgment procedure is favored and is designed to secure the just, speedy, and inexpensive determination of actions. La. C.C.P. art. 966(A)(2). As an appellate court, we review a judgment granting or denying a motion for summary judgment *de novo*. *Hood v. Cotter*, 2008-0215 (La. 12/2/08), --- So.2d ----, 2008 WL 5146659, at *5 (citing *Bonin v. Westport Ins. Corp*., 05-0886, p. 4 (La. 5/17/06), 930 So.2d 906, 910). Thus, we must determine, as the trial court does, whether there is any genuine issue of material fact, and whether the mover is entitled to judgment as a matter of law. *Id*. (citing *Smith v. Our Lady of the Lake Hosp*., 93-2512 (La. 7/5/94), 639 So.2d 730, 750).

Astoria's allegations against DeBartolo and Guidry are essentially allegations that these defendants sought to influence the administrative decision of the Commission in order to obtain a riverboat casino license. The defendants acted by making illegal and/or improper payments to Edwards so that he would use his political influence to obtain a favorable Commission decision. We must determine whether the defendants' actions, despite their corrupt and illegal nature, are protected from civil liability by *Noerr-Pennington*.

This Court has never directly considered the application of *Noerr-Pennington* in our state courts, but we note that this doctrine has been routinely applied in other state courts, even though it arose in the context of federal antitrust litigation. The

rationale is that the *Noerr-Pennington* doctrine is made applicable in state courts and to state law claims through the Fourteenth Amendment. Moreover, *Noerr-Pennington* is partially rooted in the First Amendment to the United States Constitution, which protects the right of the people to petition the government for a redress of grievances. Similarly, the Louisiana Constitution provides that "[n]o law shall impair the right of any person to assemble peaceably or to petition government for a redress of grievances." La. Const. art. 1, § 9. And, while the United States Supreme Court has not addressed *Noerr-Pennington* outside of the context of antitrust litigation, numerous federal and other states' high courts have, for years, extended this immunity to cases involving other types of claims.

In applying *Noerr-Pennington* to a tort claim, the United States Fifth Circuit noted that although the *Noerr-Pennington* doctrine initially arose in the antitrust field, other circuits had expanded the doctrine to claims brought under federal and state laws, including § 1983 and common-law tortious interference with contractual relations claims. *Video International Production, Inc. v. Warner-Amex Cable Communications, Inc*., 858 F. 2d 1075, 1084 (5th Cir. 1988), *cert. denied*, 491 U.S. 906 (1989) (citing: *Evers v. County of Custer*, 745 F. 2d 1196, 1204 (9th Cir. 1984); *Gorman Towers, Inc. v. Bogoslavsky*, 626 F. 2d 607, 614 (8th Cir. 1980)). The Fifth Circuit reasoned that the same rationale under antitrust law would apply to tort claims because "there is simply no reason that a common-law tort doctrine can any more permissibly abridge or chill the constitutional right of petition than can a statutory claim such as antitrust." *Video International*, 858 F. 2d at 1084. See also: *Bayou Fleet, Inc. v. Alexander*, 234 F. 3d 852 (5th Cir. 2000); *Brownsville Golden Age Nursing Home, Inc. v. Wells*, 839 F. 2d 155 (3rd Cir. 1988) (*Noerr-Pennington* doctrine protected individuals from tort liability for their actions in petitioning the

government to shut down a nursing home that was operating in violation of applicable regulations); *Tarpley v. Keistler*, 188 F. 3d 788 (7th Cir. 1999) (*Noerr-Pennington* doctrine applied to protect defendant from a § 1983 action).

In addition to the federal circuits, other states' high courts have also applied *Noerr-Pennington* to a variety of claims outside of the antitrust realm. The Mississippi Supreme Court has applied *Noerr-Pennington* to protect a casino's efforts to lobby the Mississippi Gaming Commission to deny approval of another casino operator's proposal to build a new casino. The Court applied *Noerr-Pennington* in rejecting the plaintiff's state tort claims of restraint of trade, tortious interference and civil conspiracy. *Harrah's Vicksburg Corp. v. Pennebaker*, 812 So. 2d 163 (Miss. 2002). In *Titan America, LLC v. Riverton Investment Corp*., 264 Va. 292, 569 S.E. 2d 57 (Va. 2002), the Virginia Supreme Court found that the *Noerr-Pennington* doctrine was available to a defendant in causes of action for tortious interference with business expectancy and conspiracy. In *Anderson Development Co., L.C. v. Tobias*, 116 P. 3d 323 (Ut. 2005), the Utah Supreme Court ruled that the lower courts had erred in failing to grant the defendants' motions for summary judgment based on *Noerr-Pennington* in a claim for intentional interference with prospective economic relations and existing contractual relations. In *Gunderson v. University of Alabama*, 902 P. 2d 323 (Alaska 1995), the Alaska Supreme Court affirmed the grant of defendants' motion for summary judgment on the basis of *Noerr-Pennington* in a suit alleging numerous claims, including misrepresentation, tortious interference with contractual relationship, claims under 42 U.S.C. 1983, and state antitrust law claims. The Rhode Island Supreme Court has applied *Noerr-Pennington* to common-law tort claims. *Pound Hill Corp., Inc. v. Perl*, 668 A. 2d 1260 (R.I. 1996); *Cove Road Development v. Western Cranston Industrial Park Associates*, 674 A. 2d 1234 (R.I.

1996); *Hometown Properties, Inc. v. Fleming*, 680 A. 2d 56 (R.I. 1996).

We agree that there is no reason that the constitutional protection of the right to petition should be less compelling in the context of claims that arise outside of the scope of antitrust laws. However, even accepting that *Noerr-Pennington* is generally applicable in our state courts, and to state law claims, we must still determine whether the doctrine is applicable based on the specific facts of this case.

The Supreme Court has specifically carved out only one exception to *Noerr-Pennington* immunity - the "sham" exception. The sham exception applies in cases where a person uses the process of government itself, rather than the outcome of that process, to reduce competition. *Rotunda & Nowak*, *supra* § 20.54(e)(ii). This exception was explained in *Noerr* as "situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application." *Noerr*, 365 U.S. at 144. While the sham exception to *Noerr-Pennington* immunity was initially broadly applied by many lower courts, the Supreme Court has limited its application to activities that are "not genuinely intended to influence government action." *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 507 n.10 (1988). The Court in *Allied Tube* criticized the use of sham to cover all activities deemed "unworthy of antitrust immunity." *Id*. The Court emphasized that genuine efforts to influence government does not constitute a sham, no matter how improper the methods used. *Id*. The Supreme Court has explained that to fall under this exception, a defendant's lobbying activities must be "objectively baseless." *Professional Real Estate Investors, v. Columbia Pictures Indus. Inc.*, 508 U.S. 49, 60 (1993). Lobbying activities are considered "baseless" if a reasonable private citizen could not "realistically expect

success on the merits." *Id*. at 60.

In this matter, because both Guidry and DeBartolo achieved favorable results as a result of their actions, we find that their endeavors were, by definition, not baseless, and thus do not fall under the sham exception. See: *Professional Real Estate Investors*, 508 U.S. at 61, n.5; *Bayou Fleet*, 234 F. 3d at 862.

The United States Supreme Court has neither specifically carved out an exception to *Noerr-Pennington* for corrupt or illegal actions, nor applied the doctrine to immunize criminal behavior. And, while the Court, in dicta, has discussed *Noerr-Pennington* immunity relative to illegal actions in several cases, we find no guidance in the Court's statements.

In *California Motor Transport*, the Court stated in dicta that "[t]here are many other forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations. Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process." *California Motor Transport*, 404 U.S. at 513.

In *Allied Tube,* the Court again expressed an opinion, also in dicta, that illegal actions, such as bribery, would not merit *Noerr-Pennington* protection. The Court stated that "one could imagine situations where the most effective means of influencing government officials is bribery, and we have never suggested that kind of attempt to influence the government merits protection." *Allied Tube*, 486 U.S. at 504.

However, the Court expressed a different view in *City of Columbia v. Omni Outdoor Advertising, Inc.,* 499 U.S. 365 (1991). In *Omni*, the Court refused to recognize a "conspiracy" exception to *Noerr-Pennington* which would apply when government officials conspired with a private party to employ government action as

a means of stifling competition. *Id*. at 382. The Court reasoned that a conspiracy in the antitrust sense usually means nothing more than an agreement to impose the regulation in question, and all successful petitioning encompasses an agreement between the petitioner and the government. *Id.* at 375, 383. The Court also reasoned that applying a conspiracy exception would require examining government officials' subjective motivation in taking certain action, and this sort of inquiry would be impracticable. *Id.* at 383-384. In addressing a suggestion that this problem could be avoided by confining the exception to conduct with some element of unlawfulness, the Court noted that it would then "have nothing to do with the policies of the antitrust laws." *Id.* at 383. Specifically, the Court stated:

> And if the invalidating "conspiracy" is limited to one that involves some element of unlawfulness (beyond mere anticompetitive motivation), the invalidation would have nothing to do with the policies of the antitrust laws. In *Noerr* itself, where the private party "deliberately deceived the public and public officials" in its successful lobbying campaign, we said that "deception, reprehensible as it is, can be of no consequence so far as the Sherman Act is concerned." 365 U.S. at 145.

Id. at 383-384.[10]

As stated earlier, the Supreme Court has not considered *Noerr-Pennington* outside of the antitrust field. And, as further explained, the extension of *Noerr-Pennington* beyond antitrust cases by lower courts is based solely on First Amendment considerations. Because the Supreme Court has only considered *Noerr-Pennington* immunity in the context of antitrust suits, the Court's statements regarding this immunity have necessarily been based on the Court's interpretation of the antitrust laws. Hence, the dicta in *Omni* which suggests that the Court may afford *Noerr-Pennington* protection to illegal actions is not based on First Amendment reasoning, but, rather, is based solely on the Court's analysis of antitrust laws. Thus,

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[10] This discussion is dicta, as there was no finding of illegal activity in *Omni*.

we do not find this language to be persuasive based on the facts of this case.

In *Cardtoons, L.C. v. Major League Baseball Players*, 208 F. 3d 885 (10th Cir. 2000), the United States Tenth Circuit explained:

> The logical dilemma in applying *Noerr-Pennington* outside of the antitrust context is that *Noerr*'s first rationale for immunity--an interpretation of the Sherman Act--is not present. Supreme Court precedent gives us scant guidance in resolving this issue. All of the cases in which the Supreme Court has applied *Noerr-Pennington* immunity as such have involved antitrust claims.

Cardtoons, 208 F. 3d at 889.

Further, that Court explained that while the circuits have extended *Noerr-Pennington* outside of the antitrust context, they have done so solely on the basis of the right to petition, and have eliminated the Sherman Act rationale. *Id.* at 889.[11]

Because the expansion of *Noerr-Pennington* to our state courts, and to state law claims, is based on the First Amendment, rather than federal antitrust laws, we must necessarily look to the First Amendment to reach our decision.

In *McDonald v. Smith*, 472 U.S. 479 (1985), the Court considered whether the Petition Clause of the First Amendment provides absolute immunity to a defendant charged with expressing libelous and damaging falsehoods in letters to the President of the United States. The Court noted that:

> The First Amendment guarantees "the right of the people ... to petition the Government for a redress of grievances." The right to petition is cut from the same cloth as the other guarantees of that Amendment, and is an assurance of a particular freedom of expression. In *United States v. Cruikshank*, 2 Otto 542, 92 U.S. 542, 23 L.Ed. 588 (1876), the Court declared that this right is implicit in "[t]he very idea of government,

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[11] The Court cited to *We, Inc. v. City of Philadelphia*, 174 F.3d 322, 326-27 (3d Cir.1999)("This court, along with other courts, has by analogy extended the *Noerr-Pennington* doctrine to offer protection to citizens' petitioning activities in contexts outside the antitrust area as well.... [T]he purpose of *Noerr-Pennington* as applied in areas outside the antitrust field is the protection of the right to petition."); and *Video Int'l Production, Inc. v. Warner-Amex Cable Communications, Inc*., 858 F.2d 1075, 1084 (5th Cir.1988) ("[a]lthough the *Noerr-Pennington* doctrine initially arose in the antitrust field, other circuits have expanded it to protect first amendment petitioning of the government from claims brought under federal and state laws....").

republican in form."

McDonald, 472 U.S. at 482. However, the Court went on to state that "[a]lthough the values in the right of petition as an important aspect of self-government are beyond question, it does not follow that the Framers of the First Amendment believed that the Petition Clause provided absolute immunity from damages for libel." *Id.* at 483.

In rejecting the petitioner's claim of absolute immunity, the Court reasoned that to hold otherwise "would elevate the Petition Clause to special First Amendment status." *Id.* at 485. The Court explained that:

> The Petition Clause, however, was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble. These First Amendment rights are inseparable, and there is no sound basis for granting greater constitutional protection to statements made in a petition to the President than other First Amendment expressions."

Id.

Whereas the right to petition granted by the First Amendment is not absolute, we find no reason to give the defendants' illegal actions First Amendment constitutional protection. In our view, while the Supreme Court has chosen to cast a wide net of protection afforded by *Noerr-Pennington*, this net should not be expanded to protect illegal activity, especially in claims that arise outside of the scope of antitrust laws.

And, although the dicta from *Omni* may indicate the Court's reluctance to carve out additional exceptions to *Noerr-Pennington*, this language is far from a clear mandate that the defendants' corrupt actions must be afforded civil immunity under the doctrine. Considering the extent of criminality alleged to be involved in this case, we do not believe that the United States Supreme Court would be inclined to find that *Noerr-Pennington* provides civil immunity to the defendants. We find that the alleged bribery and corruption in this case are not petitioning activities that should

be constitutionally protected. To hold otherwise would give *Noerr-Pennington* a sweeping effect far beyond the original purpose of the doctrine.

DECREE

For these reasons we find that the court of appeal erred in affirming the trial court's grant of defendants' motions for summary judgment. We hereby reverse the decision of the court of appeal, and remand this matter to the trial court for further proceedings.

REVERSED AND REMANDED.