O/A 2-13-84

IN THE SUPREME COURT OF FLORIDA

JOSEPH J. NODAR,

Petitioner,

v.

PATRICIA GALBREATH,

Respondent.

CASE NO. 63,724

ANSWER BRIEF OF RESPONDENT

REVIEW OF A DECISION OF THE
FOURTH DISTRICT COURT OF APPEAL
CASE NO. 82-721

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ABBREVIATIONS:

(A) = Appendix

(R) = Record on Appeal

STATEMENT OF THE CASE

Respondent disagrees with the Statement of the Case as set forth by Petitioner because it contains unnecessary matter to some extent and is incomplete to some extent. Accordingly, Respondent sets forth her own Statement of the Case.

This defamation action is before this Court for discretionary review based upon conflict jurisdiction.

A judgment based upon a jury verdict of $10,000.00 ($5,000.00 compensatory and $5,000.00 punitive) was entered by the trial court against Petitioner (Defendant below). (R. 454.) Petitioner unsuccessfully appealed to the Fourth District Court of Appeal. Its decision is reported at 429 So.2d 715, and is attached as an appendix to the initial brief of Petitioner.

Various pre-trial motions filed by Petitioner were denied. Those motions were for dismissal (R. 378), summary judgment (R. 388, 390), and advisory ruling on qualified privilege, opinion or fact (R. 411). The trial court determined at the pre-trial conference that Respondent was not a public official. (R. 411.)

Petitioner's motions for directed verdict made during trial were both denied. (R. 234-237, 240-242, 368.) Various

post-trial motions filed by Petitioner were likewise denied. Those motions were for a judgment in accordance with the motion for a directed verdict (R. 459), and for a new trial (R. 462-465).

Petitioner timely filed his Notice to Invoke Discretionary Jurisdiction. This Court has accepted jurisdiction.

STATEMENT OF THE FACTS

Respondent disagrees with the Statement of Facts contained in Petitioner's initial brief as not being supported by adequate record citations and as being totally skewed to present a misleading scenario. Accordingly, Respondent sets forth her own statement of facts herein.

At the time of the actions complained of, Respondent had been an English teacher employed by the School Board of Broward County for 15 years, teaching at Nova High School in Fort Lauderdale. (R. 83.) During the 1979-80 school year, Petitioner's son was a student in the 10th grade, gifted, advanced placement English class taught by Respondent. (R. 86.)

In ninth grade, Petitioner's son was enrolled in a remedial English class. (R. 100-101.) Prior to the beginning of the 1979-80 school year, Respondent sent a copy of a protected grading policy and the reading list for the year to the parents of all of the gifted, advanced placement Engligh students. (R. 86.) (A copy of the policy is found at R. 500.)

During the first grading period, Defendant's son received a "B-/F" on an English composition. (R. 45, 324, 489-493.) That grade resulted in Petitioner's son receiving a "B" in English for the first marking period. (R. 181.) The receipt of the "B" grade prompted Petitioner and his wife to attempt to have Respondent change their son's grade. (R. 322, 361, 482-485, 494-498A, 507-509.)

The attempts began with a telephone call by Petitioner's wife to Respondent. (R. 96.) The telephone call was followed by a note from Petitioner to Respondent (R. 482) with a response from Respondent to Petitioner inviting Petitioner to come to the school to examine his son's work. (R. 483.) Instead of pursuing the invitation, Petitioner wrote the Superintendent of Schools complaining of the actions of Respondent (R. 484-485) and had his son begin keeping a "daily log" of the activities in class of Respondent. (R. 484-488A.) (R. 494.) When Petitioner did not receive a successful response from the Superintendent of Schools, Petitioner wrote the governor of the State of Florida. (R. 495.) When he did not get a successful response from the governor, he wrote to him again. (R. 496.)

Petitioner next contacted a child advocacy attorney. (R. 80.) Petitioner's wife followed those actions by calling the area superintendent's office and speaking with an assistant area superintendent, Kha Dennard. (R. 328.) Some two weeks

after Petitioner's wife spoke with Kha Dennard, Petitioner himself spoke with her. (R. 57.) In the interim, Petitioner received a response from the governor's office suggesting that his complaint was a matter of local concern and would be inappropriate for the governor's office to entertain. (R. 497.)

Petitioner next wrote the School Board of Broward County. (R. 498-498A.) The School Board responded by setting up a meeting with all of the personnel requested by Petitioner, including Respondent. (R. 58, 62.) At said meeting, Petitioner vehemently attacked Respondent and another teacher who coincidentally had given Petitioner's son a "B" in chemistry. (R. 6, 12, 99, 160, 195-196, 207-208.)

Finally, on May 15, 1980, Petitioner spoke at a public meeting of the Broward County School Board, during a portion of the agenda entitled "Delegations." (R. 67.) An audio tape of the meeting was introduced into evidence and played for the jury. (R. 110-118, 507.) During Petitioner's speech, he asserted that Respondent was harassing his son, abusing his son verbally, victimizing his son, and referred to Respondent as "an unqualified teacher." (R. 111-118.) A transcript of the tape is attached as Appendix "1" for the convenience of this Court.

As a result of those remarks, Respondent sued Petitioner for slander, seeking both compensatory and punitive damages. (R. 371-373.)

ARGUMENT

I.

WHETHER EXPRESS MALICE, NECESSARY TO OVERCOME THE QUALIFIED PRIVILEGE OF AN "INTERESTED PARENT" IS THE SAME AS ACTUAL MALICE, NECESSARY TO OVERCOME THE "PUBLIC OFFICIAL" PRIVILEGE.

All four participants in this appeal are concerned about the distinction between "express malice" and "actual malice." (Petitioner's brief, pp.5-10, Amici's brief, pp. 19-28.)

"Actual malice" is the newer concept. It was solidified by the United States Supreme Court in 1964. New York Times Co. v. Sullivan, 376 U.S. 254, 279, 84 S.Ct. 710, 726 (1964). "Actual malice" is making a statement with knowledge that it is false or with reckless disregard of whether or not it is false. Id., at 279, 726.

"Express malice" (also referred to as common-law malice) was first defined in Florida in 1887. Montgomery v. Knox, 23 Fla. 595, 3 So. 211 (1887). It is defined as "ill will, hostility, evil intention to defame and injure." Id., at 217.

In order to prevail in a defamation action, a public official must prove that the defamatory falsehood relating to his official conduct was made with "actual malice." New York Times, supra, at 279, 726. That burden must be carried by "clear and convincing" evidence. St. Amant v. Thompson, 390 U.S. 727, 88 S.Ct. 1323 (1968); Rosenbloom v. Metromedia, 403 U.S. 55, 91 S.Ct. 1811 (1971); Palm Beach Newspapers, Inc. v. Early, 334 So.2d 50 (Fla. 4th DCA 1976).

In order to prevail in a defamation action where a qualified privilege exists (defined later), a plaintiff must prove that the defamatory falsehoods were made with "express malice." Loeb v. Geronemus, 66 So.2d 241, 244 (Fla. 1953); Abram v. Odham, 89 So.2d 334, 336 (Fla. 1956); Lewis v. Evans, 406 So.2d 489, 492 (Fla. 2d DCA 1981). That burden must be carried by a preponderance of evidence. Gibson v. Maloney, 231 So.2d 823 (Fla. 1970); Lewis v. Evans, 406 So.2d 489 (Fla. 2d DCA 1981).

Having established the distinction between express malice and actual malice, we now turn our attention to the opinion issued by the Fourth District. That distinction becomes important only in two statements in that opinion. Nodar v. Galbreath, 429 So.2d 715, 717 (Fla. 4th DCA 1983):

> If the statements are untrue and made with actual or express malice, then the privilege is destroyed.

and

> The jury answered specific questions in this regard and concluded that a qualified privilege did exist but that the defendant's statements were untrue and uttered with actual malice.

The above statements are not accurate statements of the present status of the law. However, those inaccuracies do not destroy the opinion of the Fourth District nor do they require reversal. The above statements would be more accurate if stated in the following fashion:

> If the statements are untrue and made with express malice, then the privilege is destroyed.

and

> The jury answered specific questions in this regard and concluded that a qualified privilege did exist but that the defendant's statements were untrue and uttered with express malice.

The only other statement made by the Fourth District that is influenced by the distinction between "actual malice" and "express malice" is:

> Defendant was not prejudiced by the court's refusal to declare the plaintiff school teacher a public official, a determination which would have required plaintiff to prove malice, as defendant still had the protection of the qualified privilege which required the same showing of malice. Id., at 717.

That statement is only influenced by the distinct definitions if the word "malice" is being used as a term of art. If it is

being used generically, there is no misstatement.[1] If the distinction between "actual malice" and "express malice" is employed in the above sentence, it could be worded thusly:

> Defendant was not prejudiced by the court's refusal to declare the plaintiff school teacher a public official, a determination which would have required plaintiff to prove actual malice, as defendant still had the protection of the qualified privilege which required a higher showing of express malice.

The above is clearly the intent of the Fourth District in refraining from deciding the issue of Respondent's status as a public official, since the same was not essential or relevant to a decision in this case. That is true because Respondent had a higher degree of malice to prove in order to overcome the qualified privilege than she would have had to prove to overcome the public official privilege.

A. FOUR TIERS OF DEFAMATION -- THREE HURDLES AND A BRICK WALL

Presently in Florida there are four tiers of defamation actions. They are simple negligence, public official/public figure privilege, qualified privilege, and absolute privilege. Gibson v. Maloney, 231 So.2d 823 (Fla. 1970); Miami Herald Publishing Co. v. Ane, 423 So.2d 376 (Fla. 3d DCA 1982).

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[1]"Malice" is defined as evil intent or motive arising from spite or ill will; culpable recklessness. Black's Law Dictionary, 4th Ed. (1969).

The simple negligence standard applies to private individuals or entities that are not public officials or public figures. Miami Herald Publishing Co. v. Ane, 423 So.2d 376, 378 (Fla. 3d DCA 1982). The public official doctrine has been extended to cover public figures (i.e., those who thrust themselves into the public limelight). Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

A qualified privilege exists where the communication is between two parties having a corresponding interest in the subject matter, or where one has a duty to report to the other. Belcher v. Schilling, 349 So.2d 185 (Fla. 3d DCA 1977); Lundquist v. Alewine, 397 So.2d 1148 (Fla. 5th DCA 1981); Lewis v. Evans, 406 So.2d 489 (Fla. 2d DCA 1981); Riggs v. Cain, 406 So.2d 1202 (Fla. 4th DCA 1981).

> The nature of the duty or interest may be public, personal or private, either legal, judicial, political, moral, or social. It need not be one having the force of a legal obligation; it may be one of imperfect obligation. The interest may arise out of the relationship or status of the parties. [Citation omitted.] It is called a qualified or conditional privilege, because the libelous statement must be made in good faith, that is, with a good motive, and not for the purpose of harming the subject of the defamation. [Citation omitted.] Lewis v. Evans, supra, at 492.

The concept of qualified privilege represents a delicate balancing between society's concerns for the right of

individuals to be protected from faults and defamatory statements which may seriously affect an individual's reputation and ability to secure employment, and the rights of concerned individuals to freely exchange information pertinent to the mutual concern. Riggs v. Cain, supra, at 1204.

Absolute privileges are rare. Where they exist, they are an absolute bar to any suit. City of Miami v. Wardlow, 403 So.2d 414 (Fla. 1981); Grady v. Scaffe, __ So.2d __ (Fla. 2d DCA Case No. 82-2381, opinion issued August 5, 1983) [8 FLW 2027]; Perl v. Omni International of Miami, Ltd., __ So.2d __ (Fla. 3d DCA Case No. 82-1420, opinion issued October 18, 1983) [8 FLW 2541]; Anderson v. Rossman & Baumberger, P.A., __ So.2d __ (Fla. 4th DCA Case No. 82-2397, opinion issued October 26, 1983) [8 FLW 2600].

The first three tiers require increasingly greater efforts to overcome, while there is no overcoming the brick wall (absolute privilege). As has been seen, each level of defamation action requires an increased amount of wrongdoing. The first tier (negligence) requires a showing of carelessness. Miami Herald Publishing Co. v. Ane, supra, at 378. The second tier (Public Official Doctrine) requires a showing of recklessness (i.e., knowing the statement is false and saying it anyway). New York Times, supra. The third tier (qualified privilege) requires a showing of some form of evilness (i.e., ill will, hostility or evil intent to injure). Lundquist v.

Alewine, supra, at 1149. Each successive step encompasses the former. In explanation, the Public Official Doctrine begins by encompassing negligence, and adds to it, knowledge.

So, as can be seen, the first three tiers of defamation can be treated as hurdles that are stacked one on top of the other. When one clears the second hurdle, he has necessarily cleared the first; and, when one has cleared the third hurdle, he has necessarily cleared the first two.

B. IS A PUBLIC OFFICIAL FINDING NECESSARY?

By the foregoing example, we can see that it is not necessary to determine whether or not Respondent is a public official for the purposes of this defamation action. Respondent cleared the highest hurdle, proving express malice, which encompasses the first two hurdles. The Fourth District followed this reasoning when it refrained from deciding the issue of Respondent's status as a public official. Nodar v. Galbreath, supra, at 717.

At first blush, Russell v. Smith, 434 So.2d 342 (Fla. 2d DCA 1983) argues against such a reasoning. The distinction between the two cases is that the jury in the case at bar returned a special interrogatory verdict (R. 452-453) which led the jury through considering a qualified privilege and overcoming the qualified privilege by express malice. The jury found a qualified privilege to exist and found that the

qualified privilege was destroyed by express malice. (R. 452-453.) In Russell v. Smith, the jury was presented with a general verdict. That can be deduced from the fact that the jury awarded the plaintiff damages while the appellate court opined:

> If the jury found no "common interest" to exist, the jury would not necessarily have considered the case in the same light as it would have if the "public official" instruction had been given. The "common interest" instruction left the jury free to consider the case as if no qualified privilege existed, whereas the "public official" instruction would have bound the jury to give consideration to a qualified privilege. Id., at 344.

Had a special interrogatory verdict been utilized, the court would not have been left to speculate as to the basis for the jury's award.[2]

If the jury had found no qualified privilege to exist in the case at bar, then the status of Respondent as a public official would be pertinent. However, since the jury found a qualified privilege to exist, the status of Respondent as a public official is no longer relevant.

While some confusion in terminology may exist in the Fourth District's opinion, that confusion is not fatal to the jury verdict and judgment rendered thereon, and should not

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[2]The use of a general verdict form was verified in telephone conversations with trial counsel.

result in a reversal of this matter. If this Court believes that the opinion of the Fourth District is inartfully drawn, it can easily clarify that opinion as suggested above.

II.

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN RULING THAT FOR THE PURPOSE OF A DEFAMATION ACTION, A PUBLIC SCHOOL TEACHER IS NOT A "PUBLIC OFFICIAL."

Should this Court determine that the issue of Respondent's status should have been addressed and resolved by the lower appellate court, it will see that the trial court committed no reversible error in ruling that Respondent was not a "public official." Florida has not previously addressed the issue of whether or not a public school teacher constitutes a "public official" under the guidelines of New York Times Co. v. Sullivan, supra. Other jurisidictions are divided over the issue.

Of the five cases cited by Petitioner, only two hold that public school teachers are public officials.[3] Basarich v. Rodeghero, 321 N.E. 2d 739 (Ill. 3d DCA 1974); Sewell v. Brookbank, 581 P.2d 267 (Ariz. C.A.2 1978). Contrary to the assertion of Petitioner, Johnson v. Corinthian Television

[3]Another case, not cited by Petitioner nor Amici, holds that teachers are public officials, albeit this position is reached by stipulation of counsel. Guam Federation of Teachers, Local 1581, A.F.T. v. Ysrael, 492 F.2d 438 (9th Cir. 1974).

Corp., 583 P.2d 1101 (Okla. 1978) does not hold that a public school teacher is a public official. Johnson holds that:

> [Johnson's] position as wrestling coach was of apparent importance in that public school's athletic program for the public to have an independent interest in Johnson's performance as to the method of disciplining a sixth grade boy in conjunction with the grade school wrestling team. Id., at 1103.

Accordingly, Johnson holds that a wrestling coach at a public school is a public official. Johnson also relies heavily upon Basarich to reach its decision.

Schulze v. Coykendall, 545 P.2d 392 (Kans. 1976), cited by Petitioner as holding that a public school teacher is a public official, also does not contain such a holding. Schulze was principal of an elementary school in Kansas. Certain statements made by Coykendall imputed to Schulze neglect of his duties as principal of the school and other actions which would indicate lack of capacity and fitness to properly perform his professional duties as a public school principal. Schulze, at 394. The case was on appeal from a summary judgment entered for the defendant because of procedural deficiencies. The order recites the procedural matters which had transpired and concluded:

> 1. The failure of plaintiff to so specify what alleged defamatory statements were made by defendant to specified persons and at certain places and times is fatal to a cause of action based on such general allegations as made by plaintiff. Ibid, at 395.

The allegations in the complaint centered around certain slanderous statements and certain libelous statements. The court's summary disposition of the slander charge was upheld because of the procedural deficiencies. However, the summary disposition of the libel charges was reversed because "[t]here was adequate disclosure as to the claim of libel." Ibid, at 397.

The court then discussed whether or not the allegedly libelous communication was absolutely privileged. The court determined that the statements were not subject to an absolute privilege, but they were subject to a qualified or conditional privilege. Ibid, at 398. Lastly, the burden of proof necessary to overcome a conditional privilege was discussed by the court. Nowhere in the opinion does the Supreme Court of Kansas hold that a public school teacher is a public official.

Likewise, Defendant has cited Hoover v. Jordan, 150 P. 333 (Colo.App. 1915), as standing for the proposition that a public school teacher is a public official. Like Schulze and Johnson, Hoover does not stand for such a proposition. The holding in Hoover was that the statements complained of were subject to a qualified privilege.

At least three jurisdictions have directly addressed the issue and held that a public school teacher is not a public

official.[4] Poe v. San Antonio Express-News Corp., 590 S.W.2d 537 (Tex. C.A. 1979) was a libel action brought by a high school teacher against a local newspaper. The court stated that the defendant relied heavily on New York Times v. Sullivan, supra:

> [B]oth here and in the trial court. It appears that under such holding Poe is a "public official" and, as such, is not entitled to recover liability unless he shows that the statement was made [with actual malice]. Poe, supra, at 539.

The court held that the trial court erred in holding that Poe was a public official, recognizing that other jurisdictions held to the contrary but further recognizing that they were not compelled to follow those holdings. Id., at 540.

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[4]Additionally, while not a part of their holding, both the former Fifth Circuit Court of Appeals and the United States Supreme Court have indicated that public school teachers are not public officials. Curtis Publishing Co. v. Butts, 351 F.2d 702, 712 n.23 (5th Cir. 1965):

> Even if plaintiff was a professor or instructor at the University and not an agent of a separate governmental corporation carrying on a "business comparable in all essentials to those usually conducted by private owners," he would not be a public officer or official.

In reviewing the Fifth Circuit opinion, the U.S. Supreme Court in Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) discussed what constitutes a public official, at 1987-1991, and held that Butts was a public figure, at 1991, but not a public official.

McCutcheon v. Moran, 425 N.E.2d 1130 (Ill. 1st DCA 1981), decided six years after its sister court decided Basarich, held that a public school teacher is not a public official:

> We are unwilling to place the imprimatur of "public official" on a school teacher. . . .The relationship a public school teacher or principal has with the conduct of government is far too remote, in our minds, to justify exposing these individuals to a qualifiedly privileged assault upon his or her reputation. Ibid, at 1133.

The most analytical opinion written on the subject of whether or not a school teacher is a public official is Franklin v. Lodge 1108, Benevolent and Protective Order of Elks, 159 Cal.Rptr. 131 (Cal. 1st DCA 1979). The case was on appeal from an adverse summary judgment. The trial court had granted defendants' Motion for Summary Judgment, concluding, first, that because plaintiff was a public figure, actual malice was an essential element of her case and, second, that the record deomonstrated as a matter of law that defendants had published without such actual malice. Id., at 134. The trial court had concluded that the school teacher was not a public official, but rather was a public figure. Id., at 135. The appellate court agreed that the teacher was not a public official and disagreed with the trial court's conclusion that the teacher was a public figure. Id., at 135. The court's

reasoning and analysis was so clear and convincing that it bears repeating herein:

> Respondents argue that as a school teacher, appellant was a public official. It is uncontested that appellant was a school teacher: The only issue for the trial court to resolve was whether as a matter of law a school teacher is a public official within the meaning of New York Times Company v. Sullivan, supra. The trial court correctly concluded that a school teacher is not a public official but, as earlier stated, in our view erred in deeming her to be a public figure.
>
> The New York Times privilege represents a painstaking balance of two critically important but not always wholly compatible rights: Freedom of expression, and sanctity of reputation. New York Times was considered "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, rebust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." (376 U.S. at 270, 84 S.Ct. at 721.) The Supreme Court recognized "That erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need * * * to survive'." (376 U.S. at 271-272, 84 S.Ct. at 721.) "'Cases which impose liability for erroneous reports of the political conduct of officials reflect the obsolete doctrine that the governed must not criticize their governors. * * * The interest of the public here outweighs the interest of appellant or any other individual. The protection of the public requires not merely discussions, but information. Political conduct and views which some respectable people approve, and others condemn, are

constantly imputed to Congressmen. Errors of fact, particularly in regard to a man's mental states and processes, are inevitable. * * * Whatever is added to the field of libel is taken from the field of free debate.'" (376 U.S. at 272, 84 S.Ct. 721-722, quoting from Sweeney v. Patterson (D.C. Cir. 1942) 76 U.S.App. D.C. 23, 128 F.2d 457, 458).

But New York Times expressly did not decide "how far down into the lower ranks of government employees the 'public official' designation would extend." (376 U.S. at 283, n.23, 84 S.Ct. at 727, n.23.) In Rosenblatt v. Baer (1966) 383 U.S. 75, 86 S.Ct. 669, 15 L.Ed.2d 597, the Supreme Court noted that it need not precisely define "public official" for purposes of that case, then generalized that "the 'public official' designation applies to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs" (383 U.S. at 85, 86 S.Ct. at 676), but then limited the generalization: "[A] conclusion that the New York Times malice standards apply could not be reached merely because a statement defamatory of some person in government employ catches the public's interest; that conclusion would virtually disregards society's interest in protecting reputation. The employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy." (383 U.S. at 86-87, n.13, 86 S.Ct. at 676, n.13; cf. also People's v. Tautfest, (1969) 274 Cal.App.2d 630, 636, 79 Cal.Rptr. 478.)

Respondents urge that a public high school teacher necessarily occupies a position which, independent of particular issues, "would invite public scrutiny and discussion." This may well be so. But it does not necessary follow that a public high school teacher is therefore a public

official within the meaning of New York Times company v. Sullivan, supra. Implicit in the reasoning of New York Times and of Rosenblatt is the concept of a freedom of the governed to question the governor, of those who are influenced by the operation of government to criticize those who control the conduct of government. The governance or control which a public classroom teacher might be said to exercise over the conduct of government is at most remote and philosophical: Far too much so, in our view, to justify exposing each public classroom teacher to a qualifiedly privileged assault upon his or her reputation. In Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789, the Supreme Court points out that extension of the qualified Constitutional privilege of those who comment upon public officials is to be rationalized in part by the consideration that: 'An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs.' (418 U.S. at 344, 94 S.Ct. at 3009.) We are unwilling to hold that a school teacher must be deemed to have assumed the risk of nonmalicious defamation. We perceive in such a rule a real and intolerable danger to their freedom of intellect and of expression which the teacher must have to teach effectively.

We conclude that an appropriate balancing of freedom of expression against sanctity of reputation does not require, and that appropriate regard for the role of the classroom teacher in our society should not permit, extension of the public official concept to a school teacher "entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy." (383 U.S. at 86-87, n.13, 86 S.Ct. at 676, n.13.) Accordingly, we agree with the trial court that appellant was not a 'public official' within the meaning of New York Times. We

> acknowledge that appellate courts in two other states have concluded to the contrary that public school teachers are 'public officials' (Johnson v. Corinthian Television Corp. (S.Ct. Okla. 1978) 583 P.2d 1101, 1102-1103; Basarich v. Rodeghero, (1974) 24 Ill. App.3d 889, 321 N.E.2d 739, 742; we respectively disagree with the conclusions reached by those courts. Franklin, supra, at 135-137.

Applying the superb reasoning contained therein to the case at bar, it is apparent that the trial judge did not err in determining that Respondent is not a "public official."

Petitioner asserts that Martin v. Kearney, 124 Cal.Rptr. 281 (Cal.2d 1975) stands for the proposition that a public school teacher is a "public official." (Petitioner's brief, p.16.) Such is not the holding in that case as can be seen by the failure of its sister court (deciding Franklin) to acknowledge a contrary holding within the State of California while at the same time acknowledging contrary holdings outside of the State of California. Franklin, supra, at 137. Martin, was decided by application of two statutes dealing with absolute privilege and qualified privilege. Nowhere in the opinion is the Public Official Doctrine addressed.

Most of the jurisdictions having the opportunity to decide similar cases on other grounds take that opportunity and refrain from determining whether or not a school teacher is a public official within the meaning of the Sullivan rule. DeLuca v. New York News, Inc., 438 N.Y.S.2d 199 (S.Ct. 1981);

Ramsey v. Zeigner, 444 P.2d 968 (N.Mex. 1968); Byers v. Southeastern Newspapers Corporation, Inc., 288 S.E.2d 698 (Ga. Ct.App. 1982).[5]

Admittedly, none of the cases cited thus far are controlling precedent for this Court. These cases are persuasive only. However, it is Respondent's position that the astute reasoning of the California court in Franklin should be followed by this Court.

Petitioner next turns his attention to other persuasive authority being those cases deciding that various individuals for various reasons are public officials. (Petitioner's brief, p.14.) All of the cases cited by Defendant concerning elected officials are clearly not applicable in this situation since the public school teacher in this case is not an elected offical. Accordingly, Palm Beach Newspapers, Inc. v. Early, 334 So.2d 50 (Fla. 4th DCA 1976) and Menendez v. Key West Newspaper Corp., 283 So.2d 751 (Fla. 3d DCA 1974) are not even persuasive authority for this Court. Policemen and city attorneys have consistently been held to be

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[5]Additionally, other jurisdictions have determined that certain professors or teachers under certain factual conditions are public figures as opposed to public officials. El Paso Times, Inc. v. Trexler, 447 S.W.2d 403 (Tex. 1969); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967). The import of those opinions is that those courts deem it necessary to find a public school teacher to be a public official to apply the Sullivan rule, as opposed to merely stopping at a finding that they are public officials simply because they are public school teachers.

public officials because of their day-to-day involvement in governmental affairs. Accordingly, White v. Fletcher, 90 So.2d 129 (Fla. 1956), Coleman v. Collins, 384 So.2d 229 (Fla. 5th DCA 1980), and Finkel v. Sun-Tattler Co., 348 So.2d 51 (Fla. 4th DCA 1972) are inapplicable to our case. That leaves Bishop v. Wometco Enterprises, Inc., 235 So.2d 759 (Fla. 3d DCA 1970).

As has been seen previously, Petitioner runs fast and loose with the holdings of various cases he cites. Bishop does not hold that the investigator hired and paid by the city is a public official. The court held that:

> Whether he was a public official, a public figure, or whether he simply involved himself in a matter of public interest, or whether his appearance and testimony before the Miami City Commission was a matter of public interest, it is clear that the rule in New York Times v. Sullivan, supra, applies. . . ." Ibid, at 761.

Accordingly, none of the Florida cases cited by Petitioner are persuasive of the issue before this Court.

Petitioner last attempts a public policy argument, as do Amici. It is apparent from the record in this case that the public policy arguments championed by Petitioner and Amici have no connection with Petitioner's actions. Communications between school officials and parents must be open; but those parents must be held accountable for whimsical, unfounded and spurious attacks on teachers, especially where the purpose of

the attack is a blatent attempt by the parent to manipulate the teacher to gain for the child a grade that the child has not earned.

It is important to note that the Petitioner in this case is not a "media defendant" as was found in Gertz, supra. Cf. Palm Beach Newspapers, Inc. v. Parker, 417 So.2d 323 (Fla. 4th DCA 1982).

Petitioner asserts that a defamation action of the type at bar would have a "chilling effect" on concerned parents speaking about teacher qualifications. (Petitioner's brief, p.17.) Such an argument is preposterous in light of the facts of this case. The Petitioner admitted he did nothing to determine what qualifications Respondent held. (R. 268-271.) Had Petitioner investigated Respondent's qualifications and actions in the classroom, he would not have made such blatently false and defamatory statements about Respondent. Public policy then should put the Petitioner to the burden of being responsible for his comments when they are injurious in nature and when the Petitioner has done nothing to obtain the information necesary to support his statements. The type of responsible communication made by the overwhelming majority of concerned parents who take an interest in their children's education would not be chilled in the least by an affirmation of the trial court's decision.

III.

PETITIONER'S STATEMENTS AT A MEETING OF THE BROWARD COUNTY SCHOOL BOARD ASSERTING THAT RESPONDENT WAS HARASSING, VERBALLY ABUSING AND VICTIMIZING PETITIONER'S SON AND STATING THAT RESPONDENT WAS UNQUALIFIED WERE ALLEGATIONS OF FACT AND NOT EXPRESSIONS OF OPINIONS.

A review of the transcript (Appendix 1) reveals four blatently defamatory statements:

> 1. . . . the harassment my son has been receiving from this particular teacher because of our investigation or inquiry as to his grades and why his grades are going down.
>
> 2. He has been harassed since then, he has been abused by her verbally, and his grades have been dropping.
>
> 3. My son is being victimized by these two teachers.
>
> 4. . . . and the only thing he gets is an unqualified teacher. That's all he's got, and that's all the rest of the children in that class have -- an unqualified teacher.

Respondent agrees with Petitioner's statement of the law. A statement of opinion as opposed to a statement of fact is immune from liability for defamation and not actionable as a matter of law. (Petitioner's brief, p.19.) Each court and jury that has reviewed the evidence has determined that the statements were allegations of fact. (R. 235-242, 367-368, 391, 452-453, and 467.) Petitioner could not convince the trial court on four occasions that the statements made were

pure statements of opinion. (R. 235-242, 367-368, 391 and 467.) The matter was submitted to the jury for its determination. Petitioner could not convince the jury that the statements made were matters of opinion rather than allegations of fact. (R. 452-453.) Lastly, Petitioner could not convince the lower appellate court that the statements made were matters of opinion rather than fact. In the opinion under review, the Fourth District stated:

> We thus conclude on review that the statements of the Defendant were facts rather than opinions. The jury was not incorrect in reaching this conclusion. Nodar v. Galbreath, supra, at 718.

From v. Tallahassee Democrat, Inc., 400 So.2d 52 (Fla. 1st DCA 1981), at 57 (citing Information Control v. Genesis One Computer Corp., 611 F.2d 781, 784 (9th Cir. 1980)) sets forth the test to determine whether statements constitute allegations of fact or opinions:

> In sum, the test to be applied in determining whether an allegedly defamatory statement constitutes an actionable statement of fact requires that the court examine the statement in its totality and the context in which it was uttered or published. The court must consider all the words used, not merely a particular phrase or sentence. In addition, the court must give weight to cautionary terms used by the person publishing the statement. Finally, the court must consider all of the circumstances surrounding the statement, including the medium by which the statement is

disseminated and the audience to which it is published.

While the trial court, at Respondent's urging, allowed the jury to determine whether the statements constituted allegations of fact or opinions, the jury was provided the necessary evidence to apply the above test. The jury heard the entire speech made by the Petitioner to the Broward County School Board (R. 110-118, 507) and received evidence regarding the activities over the school year leading up to the speech at the School Board. Indeed, as the Fourth District pointed out in its opinion, supra, at 718, the appellate court can make that determination on review. In doing so, the Fourth District held that the statements were opinions.

After recognizing the test set forth in From, Petitioner plucks out three words to examine as to their character, violating the test he just quoted. (Petitioner's brief, p.21.) Petitioner's logic would result in no statement ever constituting an allegation of fact, but rather every statement constituting an opinion. For instance, stating that Jane Doe is a prostitute constitutes an opinion since it is a conclusion drawn from individual interpretations of the following facts: She has sexual intercourse with men in exchange for money.

In the context that the statements were made, given the course of conduct for the school year, considering all of the cautionary words used by Petitioner, and being cognizant of the underlying facts, reasonable men could not differ in their conclusion that the defamatory statements were allegations of fact. As a matter of fact, thus far, Petitioner is the only one who differs in that conclusion.

Forgetting the test set forth in From, supra, referred to above, Petitioner extracts the word "unqualified" from the defamatory statements, replaces it with "unfit", and argues that the statement is an opinion. (Petitioner's brief, p.22.) In doing so, Petitioner attempts to ignore what he said. It is clear that Petitioner told Respondent's employer that she did not have the qualifications to teach. Since a teacher must have certain qualifications to teach (R. 22-24), the assertion that she does not have those qualifications is an allegation of fact.

There is a distinct difference in alleging that someone does not hold the qualifications necessary to teach and asserting that she is not fit to teach. Most certainly, the latter is an expression of opinion. But just as certainly, the former is an assertion of fact.[6]

---

[6]In fact, the assertion that a law school assistant dean and professor was lacking in his qualifications as a professor and scholar of law was the subject of a defamation action in Arkansas. Gallman v. Carnes, 497 S.W.2d 47 (Ark. 1973). The court did not hold that such an assertion was an opinion.

Petitioner attempts to hoodwink this Court into believing that the trial judge and Respondent's counsel "acknowledged during the trial that whether [Respondent] was competent or qualified were matters of opinion" and set forth a portion of the testimony of Rhoda Radow in support of that statement. (Petitioner's brief, pp.23-24.)

A review of Mrs. Radow's testimony will show that the colloquy set out in Petitioner's brief took place in the middle of re-direct examination. Petitioner's counsel objected to Respondent's question to Mrs. Radow concerning the competency of Respondent. The court sustained Petitioner's objection as to the issue of competency and expressed no ruling on any other questions posed to the witnesses:

> But the court determines that this is an area dealing with competence that only one who deals with such person and persons can conclude; so, the witness is permitted to give her opinion. (R. 19, line 22.) (Emphasis added.)

Having understood the Court's ruling, Respondent's counsel asked the expert questions dealing with competency and then proceeded to finish re-direct examination of the nonexpert witness. In so understanding the court's ruling and so proceeding, Respondent's counsel in no way acknowledged that an expression of qualification was a matter of opinion.

The totality of the statements made by Petitioner were allegations of fact and not expressions of opinion.

Accordingly, the immunity from liability for defamation expressed in White v. Fletcher, 90 So.2d 129 (Fla. 1956), Pomeroy v. Southern Bell Telephone and Telegraph Company, 410 So.2d 647 (Fla. 3d DCA 1982), From v. Tallahassee Democrat, Inc., 400 So.2d 52 (Fla. 1st DCA 1981), and Palm Beach Newspapers, Inc. v. Early, 334 So.2d 50 (Fla. 4th DCA 1976), does not apply in this situation.

The apparently inartful language utilized by the Fourth District, set forth in Petitioner's brief at page 24, does not vitiate the holding of the case. Rather, the dicta expressed therein may be inaccurate.

Accordingly, the statements made by Petitioner at the School Board meeting are clearly allegations of fact as so found by the trial court, the jury, and the Fourth District. As such, those allegations did not enjoy immunity from liability as Petitioner now urges.

IV.

PETITIONER FAILED TO PRESERVE HIS OBJECTION TO THE JURY INSTRUCTION CLAIMED TO BE ERRONEOUS. THE INSTRUCTION WAS NOT ERRONEOUS.

A. FAILURE TO OBJECT.

In a civil action, to properly preserve error for appellate review on the giving of an instruction requested by the opposing party, it is necessary that a distinct and specific objection be made. A general objection is not

sufficient. Middelveen v. Sibson Realty, Inc., 417 So.2d 275 (Fla. 5th DCA 1982), Coleman v. Allen, 320 So.2d 864 (Fla. 1st DCA 1975); DePuis v. 79th Street Hotel, Inc., 231 So.2d 532 (Fla. 3d DCA 1970). The objection may not be made for the first time on appeal. Middelveen v. Sibson Realty, Inc., 417 So.2d 275, (Fla. 5th DCA 1982), Tollie v. General Motors Corp., 407 So.2d 613 (Fla. 1st DCA 1981). Thus, in the face of no objection or only a general objection to instructions requested by the opposing party, the trial court has not been given the opportunity to rule on a specific point of law, and there is no issue created or preserved for appellate review. Middelveen v. Sibson Realty, Inc., 417 So.2d 275, (Fla. 5th DCA 1982).

In a civil proceeding, if a party submits a written request for a jury instruction, and it is rejected by the trial court, the issue is preserved for appellate review without more. Middelveen v. Sibson Realty, Inc., 417 So.2d 275 (Fla. 5th DCA 1982); Hattaway v. Florida Power and Light Company, 133 So.2d 101 (Fla. 2d DCA 1961).

Having thus established the rule, an examination of the proceedings in light of the rule will reveal that Petitioner has not preserved this issue for appeal.

The jury instruction under attack was initially requested by Petitioner in a different form. The alteration of Petitioner's requested instruction by Respondent should cause the altered instruction to become Respondent's requested

instruction. Certainly, Petitioner could be expected to speak out about the requested alteration if he opposed it, and certainly he should be required (under the reasoning of Middelveen) to speak out with a specific objection to the proposed change in order to give the trial court the opportunity to rule on a specific point of law.

All of Respondent's requested jury instructions were designated as such and consecutively numbered. (R. 418-451.) The transcript of the charge conference reveals that the jury instruction under attack was not numbered (R. 515), therefore, it must have been originally requested by Petitioner. Respondent's counsel requested that the court change the word "and" to "or." (R. 515.) There was discussion about the change and the court ruled that the word "and" would be changed to "or." At that point, there was no objection by Petitioner's counsel to the change (R. 515-516):

> MR. GOSSETT: In the second paragraph, Judge, of this one, it's not numbered, it's -- for the record, it deals with privilege. The conjunctive "and," I think is improper and it should be the disjunctive "or." It should read, "it is malice to make a false statement with ill will, hostility, or an evil intention to . . ." and not the word "and." My concern is that he will argue that I need to prove all three of those things.
>
> MR. JACOBSON: That's a quote from Lewis v. Evans which was decided

three weeks ago. Express malice or malice in fact, this has been defined as ill will, hostility, and --

MR. GOSSETT: Yes, but defined in that statement is quoting another case out of the jurisdiction. We don't have that case.

MR. JACOBSON: No. It's quoted by Montgomery and Cox.

MR. GOSSETT: Oh, a State case.

THE COURT: Well, I think that's a fair change. I don't think all three of those -- all three of those need to be approved. That word "and" will be changed to "or."

Third one is the definition of greater weight.

Subsequent to the jury being instructed and sent to deliberate, the following occurred:

THE COURT: Was there something else other than this?

MR. JACOBSON: Yes. I just want to ask a question on the charge. We changed an "and" to an "or" in there, and that's the one from the case where the court had suggested an instruction with the word "and" instead of an "or."

THE COURT: We did.

MR. GOSSETT: And the Judge decided there wasn't a --

THE COURT: It's in the record what I decided.

MR. JACOBSON: Okay. I'm sorry.

THE COURT: I changed it. I know which one you're talking about. (R. 574.)

Nowhere in any of the above does Petitioner object to the change with sufficient clarity to advise either the court or opposing counsel of the objection and the reason therefor. As was stated in Middelveen, supra, in a civil action, to properly preserve error for appellate review in the giving of an instuction requested by the opposing party, it is necessary that a distinct and specific objection be made. A general objection is not sufficient.

B. SUFFICIENT INSTRUCTION.

Even if this Court were to determine that Petitioner preserved the issue for appeal, the instruction given by the court was not erroneous. Petitioner requested the instruction by given in the conjunctive relying upon Lewis v. Evans, 406 So.2d 489 (Fla. 2d DCA 1981), which states:

> However, we think that the jury should have been guided by a more informative instruction, perhaps along the following lines: Id., at 494. (Emphasis added.)

The suggested instruction does not carry with it any citation of authority from which the Second District Court of Appeal garnered the language suggested. The root of the definition of express malice is Montgomery v. Know, 3 So. 222 (Fla. 1887):

> If there is nothing in the character of the publication itself to show express malice, -- that is ill will, hostility, evil intention to defame and injure, -- the occasion for exemplary or punitive damages does not arise, unless there is

> some proof to establish such express malice; in other words, proof of malice in fact. But the charge was not intended to authorize exemplary damages for mere legal malice. It adds: "Ill will," and proof that the publication was made from the state of feeling this word implies, would be evidence of the express malice that might justify exemplary damages. Ibid, at 217.

As can be seen by a gramatical examination of the phrase defining express malice, there are three clauses that are joined by neither the conjunctive nor the disjunctive, to wit: (1) ill will, (2) hostility, (3) evil intention to defame and injure. Montgomery did not define express malice as being all three phrases conjunctively, the absence of any one of which would defeat a claim of express malice. In fact, Montgomery passed upon the correctness of the following instruction:

> That in a suit for libel, if no special damage is proved, as, for instance, a loss in a man's business, still the plaintiff may recover what is known as exemplary or punitive damages, when the jury are satisfied that the publication was made from malice or ill will to the plaintiff, and the jury may find such amount of damages as the facts and circumstances in the evidence may justify. Ibid, at 216.

This Court held that the above quoted charge was not objectionable. Ibid, at 217. As has been seen from the language of the court's opinion, "ill will" alone was sufficient to justify an award of exemplary damages under a

finding of express malice. Accordingly, the jury instruction given by the trial court was correct.

All of the cases cited by Petitioner show that the trial court's instruction was correct. In Abram v. Odham, 89 So.2d 334, 336 (Fla. 1956), citing Loeb v. Geronemus, 66 So.2d 241, 244 (Fla. 1953), this Court stated:

> When a matter which otherwise would be a qualifiedly privileged communication is published falsely, fraudelently and with express malice and intent to injure the persons against whom it is directed, the communication loses its qualifiedly privileged character . . . (Emphasis added.)

If express malice were to be defined as "ill will, hostility, and intent to injure," as urged by Petitioner, there would have been no need for this Court to add to "express malice" the words "and intent to injure the persons." In Lewis v. Evans, 406 So.2d 489 (Fla. 2d DCA 1981), had the court determined that express malice is defined as Petitioner urges, then the court that suggested the jury instruction in the conjunctive erred itself when it stated:

> [U]nder the laws of this state, appellant could defeat appellee's claim to qualified privilege by proving malice-in-fact, that is, by presenting evidence from which the jury could reasonably infer that appellee was motivated by ill will and a desire to harm. Ibid, at 493.

What happened to hostility? Obviously, this Court intended in all of these cases from Montgomery through Loeb and Abram that

any one of the three factors by itself was sufficient to show express malice. Accordingly, the jury instruction given by the trial court in the disjunctive was proper.

Petitioner asserts that "it is irrefuted that his remarks to the School Board were made as a parent concerned about his son's education." (Petitioner's brief, p.27.) Respondent most definitely refutes that statement. Petitioner's remarks to the School Board were intended to ridicule, defame and embarrass Respondent, and cause her to lose her job. After being called to task for that act, Petitioner offers his self-serving testimony as demonstrating his "good faith." (Petitioner's brief, p.27.) The trier of fact heard all of the evidence, including that testimony, and determined that Petitioner's remarks were made with express malice. (R. 452-453.)

Petitioner next raises for the first time a variance between pleading and proof. (Petitioner's brief, p.28.) Petitioner doesn't argue that the difference between pleading and proof should defeat Respondent's judgment, but rather argues that Respondent's pleading should be repeated to the jury as an instruction. (Petitioner's brief, p.28.) Obviously, that is not the purpose for a pleading, nor the genesis for jury instructions.

Since the jury instruction was a proper instruction, even though Petitioner did not preserve his objection thereto, the verdict should not be set aside.

V.

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR BY PERMITTING THE JURY TO DETERMINE WHETHER OR NOT PETITIONER'S REMARKS WERE EXPRESSIONS OF OPINION OR ALLEGATIONS OF FACT.

Whether an allegedly defamatory remark is a statement of fact or a statement of pure opinion is a question of law for the court. Petitioner wants this court to believe that the statements were pure opinion. (Petitioner's brief, Argument III.) However, as has been stated earlier in this brief, the trial court on four occasions refused to hold the statements to be opinions, the jury found them to be allegations of fact, and the Fourth District applying the test set forth in From additionally found them to be allegations of fact.

Since the statements were allegations of fact, there was no reversible error in the trial court allowing the jury to make that decision.

An analogy of the "pure opinion/mixed opinion" dichotomy is the "could it be defamatory/is it defamatory" dichotomy found in Belli v. Orlando Daily Newspapers, Inc., 389 F.2d 579 (5th Cir. 1967). The Fifth Circuit, in interpreting Florida law, stated that any doubt as to the defamatory effect

of a publication should be resolved by the common mind of the jury and not by even the most carefully considered judicial pronouncement. The court stated that both the judge and the jury play a part in determining whether certain language constitutes libel. It is for the trial court in the first instance to determine whether words are reasonably calculated of defamatory interpretation, or whether they are necessarily so; and it is then for the jury to say whether they were in fact understood as defamatory. Where a communication is ambiguous and is reasonably susceptible of a meaning which is defamatory, it is for the trier of fact to decide whether the communication was understood in a defamatory sense. Wolfson v. Kirk, 273 So.2d 774 (Fla. 4th DCA 1973).

The Fourth District reversed the trial judge's determination tht certain allegedly defamatory words were not reasonably susceptible of the defamatory meaning assigned to them by the plaintiff. Wolfson, supra. Similarly, where words are susceptible of either an expression of mixed fact and opinion or pure allegations of fact, the trier of fact should make the determination. Where words are expressions of pure opinion, then the trial court should interject his decision. From v. Tallahassee Democrat, Inc., supra.

Petitioner next embarks upon additional folly in his arguments. He asserts that he was placed in a predicament in having to argue to the jury that the remarks were opinions and

therefore not susceptible of proof and on the other hand having to prove the truth of the remarks. (Petitioner's brief, p. 29.) As he states in the very next sentence, there was no attempt to prove the truth of the remarks, nor did he assert that they were true in his answer and affirmative defenses. (R. 382-383.)

As can be seen by From, supra, at 57, the appellate court may make the determination of opinion versus fact on appellate review. In the opinion under review, the Fourth District acknowledged that ability and concluded on a review of the record that the statements made by Petitioner were facts rather than opinions. Nodar v. Galbreath, supra, at 718.

Accordingly, there is no reversible error in the trial court submitting that question to the jury.

VI.

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR BY EXCLUDING CERTAIN TESTIMONY THAT WAS OSTENSIBLY OFFERED TO PROVE PETITIONER'S STATE OF MIND WHEN SUCH STATEMENTS WERE MADE SIX MONTHS PRIOR TO PETITIONER'S ACTIONS AND WHEN PETITIONER HAD THE OPPORTUNITY TO PRESENT THE SAME EVIDENCE THROUGH OTHER WITNESSES BUT CHOSE NOT TO DO SO.

Petitioner complains of being precluded from placing into evidence through Petitioner certain statements made to him by his wife and his son ostensibly to prove the Petitioner's "state of mind" at the time of addressing the School Board.

(Petitioner's brief, p.32.) No offer of testimony, or proffer, was made by Petitioner so it is difficult at best to determine what detrimental effect the exclusion had on Petitioner's case. Petitioner had already testified that his wife spoke to Respondent at Petitioner's request, (R. 250), and that Petitioner's wife advised him of how Petitioner's wife reacted to the phone call. (R. 271.) The phone call took place during late September or early October, 1979.

When Petitioner's counsel attempted to elicit from Petitioner what Petitioner's wife told him, the court sustained Respondent's objection as hearsay. (R. 251.)

The stated purpose in eliciting the testimony was to establish Petitioner's frame of mind at the time of the statement, some six months prior to Petitioner uttering the defamatory words to the School Board. (R. 251.) As such, those statements were totally irrelevant.

However, if Petitioner truly believed that that particular evidence was crucial to the defense, he had Mrs. Nodar (Petitioner's wife), the declarant, available to testify. She in fact did testify, but Petitioner's counsel did not attempt to elicit from her what she told her husband of the telephone call with the Respondent. (R. 320-338.) Apparently, that evidence was determined by Petitioner's counsel not to be crucial; otherwise, those questions would have been asked.

Petitioner was successful in establishing what actions he took as a result of the statement that Petitioner's wife made to him regarding the telephone conversation with Respondent. Petitioner did nothing. (R. 253.)

Once again, Petitioner runs fast and loose with the record by stating that: "Thereafter, Plaintiff's counsel continually objected to the entire line of questions as hearsay and the Court sustained each objection." (Petitioner's brief, p.32.) Throughout the 15 pages of direct examination cited by Petitioner, (R. 251-266), Respondent's counsel made five hearsay objections. The first has already been discussed, the second appears at R. 254:

> Q What happened after your son got that paper; what did you do next?
>
> A Actually, he came home that evening from school and my wife called, and told us how the teacher --
>
> MR. GOSSETT: Judge, object to what the son said.
>
> THE COURT: Sustained.

Obviously, the answer was unresponsive and was hearsay. There was no argument by Petitioner's counsel that he was attempting to elicit the unresponsive response in an attempt to show the Petitioner's state of mind. In fact, there was no argument by Petitioner's counsel at all on Respondent's objection.

The next hearsay obejection appears at R. 257:

> Q Why did you go to that meeting?

A Mrs. Harrington's office called. I wasn't at home. She spoke to my wife and said --

MR. GOSSETT: I'll object to what Mrs. Harrington said, Judge.

THE COURT: Sustained.

THE WITNESS: There was a conversation between Mrs. Harrington's office and my wife which --

BY MR. JACOBSON:

Q Did you get a message as a result of that conversation?

A Yes.

Q What was the message?

MR. GOSSETT: I'll object to what the message was. That's hearsay as well.

THE COURT: Objection sustained.

There was no argument by Petitioner's counsel that he was attempting to elicit the hearsay solely to show the state of mind of the recipient.

The next hearsay objection occurred in the continuing attempt by Petitioner's counsel to have the witness testify as to what Mrs. Harrington's office told his wife, appearing at R. 258:

Q Did Mrs. Harrington suggest that you go to the School Board?

MR. GOSSETT: I'll object to what Mrs. Harrington said to him as hearsay.

THE WITNESS: I never spoke to Mrs. Harrington.

THE COURT: Leading. Otherwise improper. Sustained..

Again, there was no argument by Petitioner's counsel that he was attempting to elicit the hearsay to establish the frame of mind of the recipient. However, the trial judge determined the question to be objectionable on other grounds as well.

The last hearsay objection in this passage occurs at R. 260:

Q You stated that he was harassed since then, and has been abused verbally, and his grades had been dropping. Did you have any basis for making those statements?

A From what he told me she did abuse him in class.

MR. GOSSETT: I object to what the son told him.

THE COURT: Objection sustained.

BY MR. JACOBSON:

Q Just answer the question yes or no.

Did you have a basis for making those remarks?

A. Yes.

As can be seen, the only question that was asked by Petitioner's counsel that was designed to elicit a hearsay response for the purpose of showing the Petitioner's state of mind was the very first question. That question concerned a

converation that took place six months prior to Petitioner making his defamatory statements to the School Board.

If Petitioner truly believed that the evidence was necessary and crucial to the defense of the case, when Mrs. Nodar took the stand, those questions would have been asked of her. At least, Petitioner would have made an offer of proof. Obviously, Petitioner did not believe those questions to be crucial to the defense of the case since the questions were never posed to Mrs. Nodar, nor was a proffer made.

The argument quoted in Petitioner's brief at pages 32 through 33 was over the following question (R. 261-262):

> Q Did you know whether or not Mrs. Galbreath had been certified?
>
> A I was told that she was not certified.
>
> Q Not certified for what?
>
> A For gifted.

The court opined that the answer was insufficient since it was based upon hearsay. (R. 262.) The court advised Petitioner's counsel that whatever testimony Petitioner wants to introduce on the statements made by the wife and son to the Petitioner should come through the declarants who were available to testify and had not yet taken the stand. (R. 262-264.) As had already been pointed out, those questions apparently were never asked of Petitioner's wife and son, nor was a proffer of Petitioner's testimony made at the time.

Accordingly, Petitioner has not preserved the issue for this appeal.

VII.

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN FAILING TO CHARGE THE JURY THAT THERE IS A PRESUMPTION OF GOOD FAITH WHEN DEFAMATION REMARKS ARE MADE IN A PRIVILEGED CONTEXT.

Petitioner asserts that he requested a particular instruction on a presumption of good faith. (Petitioner's brief, p.35.) However, nowhere in the instruction conference does Petitioner ask that such an instruction be given. (R. 511-526.) In any event, the jury found the statements to be subject to a qualified privilege. (R. 452-453.) To overcome this, Respondent had to prove that the statements were made with express malice. Respondent successfully proved express malice which was defined by the court to be a statement made with ill will, hostility or the intent to injure. An instruction of a presumption of good faith would be superfluous where Respondent has the burden of proving not just lack of good faith, but ill will, hostility or the intent to injure.

Accordingly, the trial court did not err in failing to give the supposedly requested charge in light of the above.

VIII.

PETITIONER NEVER REQUESTED DISMISSAL OF PLAINTIFF'S COMPLAINT FOR FAILURE TO ALLEGE SPECIAL DAMAGES. FAILURE TO PROVE

AN ALLEGATION IS NOT A BASIS FOR DISMISSAL PRE-TRIAL. RESPONDENT PROVED SHE SUFFERED DAMAGES AS A RESULT OF PETITIONER'S STATEMENT TO THE SCHOOL BOARD.

In his last point on appeal, Petitioner urges error in failing to dismiss Respondent's Complaint for failure to allege and prove special damages. (Petitioner's brief, pp. 36-40.) Petitioner overlooks the fact that he never requested dismissal on that basis.

Petitioner's Motion to Dismiss (R. 378) is on three bases:

1. The transcript fails to identify Respondent;

2. An injunction is not proper because it prevents the exercise of first amendment rights; and

3. Plaintiff failed to plead the necessary elements to overcome a qualified privilege.

Nowhere in said motion is the failure to plead special damages mentioned.

The motion to dismiss is for failure to state a cause of action. As such, it is a deficient motion since Fla.R.Civ.P. 1.140(b) requires that the grounds on which that motion is based and the substantial matters of law intented to be argued shall be stated specifically and with particularity in the motion. Since that was not done, the motion was defective. See Spinner v. Wainer, 430 So.2d 595 (Fla. 3d DCA 1983).

Since the failure to plead special damages was not raised by Petitioner in his responsive pleading or motion, it was waived. Fla.R.Civ.P. 1.140(b).

Respondent presented evidence of her damages without objection by Petitioner. (R. 134-138, 219-234.) Since Petitioner did not object, the issue was tried by the implied consent of the parties. Robbins v. Grace, 103 So.2d 658 (Fla. 2d DCA 1958). Although at that point it wasn't necessary, Respondent moved for leave to amend her pleadings to conform to the evidence pursuant to Fla.R.Civ.P. 1.190(b), prior to resting her case. (R. 234.)

Respondent presented adequate evidence of the damages she suffered as a result of the defamatory statements made by Petitioner. (R. 134-138, 219-234.) Part of those damages were mental anguish and personal humiliation. Such damages are adequate to support a compensatory award of $5,000.00. Miami Herald Publishing Co. v. Ane, 423 So.2d 376 (Fla. 3d DCA 1982); Gertz v. Robert Welch, Inc., 418 U.S. 323, 348-350 (1974).

CONCLUSION

As has been seen through this brief, the trial court committed no reversible error. Accordingly, Petitioner's appeal should be denied and the decision of the Fourth District Court of Appeal should be affirmed. Any inartful uses of "malice," "express malice," and "actual malice" can be

clarified in this Court's opinion. The same is not a basis for reversal of the final judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed this 16th day of December, 1983, to JAMES C. JACOBSON, ESQ., Attorneys for Petitioner, Jacobson and Gottlieb, 3363 Sheridan Street, Suite 204, Hollywood, Florida 33021; TALBOT D'ALEMBERTE, ESQ., Attorneys for The Miami Herald Publishing Company, Steel, Hector & Davis, 1400 Southeast Bank Building, Miami, Florida 33131; RICHARD J. OVELMEN, ESQ., General Counsel for The Miami Herald Publishing Company, One Herald Plaza, Miami, Florida 33101; and GEORGE RAHDERT, ESQ., Attorneys for Times Publishing Company, Rahdert, Anderson & Richardson, Post Office Box 960, St. Petersburg, Florida 33731.

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RPG/bjf/12&15
12/15/83