IN THE SUPREME COURT OF FLORIDA

JOSEPH J. NODAR,

Petitioner,

v.

PATRICIA GALBREATH,

Respondent.

CASE NO. 63,724

RESPONDENT'S CORRECTED ANSWER BRIEF ON JURISDICTION

REVIEW OF A DECISION OF THE
FOURTH DISTRICT COURT OF APPEAL

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CASES:

ABBREVIATIONS:

(A) = Appendix

(P.B.) = Petitioner's Brief on Jurisidction

STATEMENT OF THE CASE AND FACTS

Petitioner seeks to invoke the discretionary jurisdiction of this Court to review the opinion of the Fourth District Court of Appeal affirming the jury verdict and final judgment in this defamation action brought by a school teacher against a parent of one of her students.

The facts that are not in dispute according to the Fourth District Court of Appeal are as follows: Respondent is an English teacher in the Broward County public high school system. Petitioner's son was a student in Respondent's English class and received a "B" in the course. Petitioner and his wife were extremely unhappy about the grade. They contacted the teacher (Respondent), the principal, the school superintendent, and the governor on several different occasions. Strong complaints were voiced as to the boy's teacher. At his father's suggestion the boy began keeping a detailed log of the teacher's activities. The situation escalated into a rather bitter controversy and although the facts are subject to different interpretations, the Petitioner's conduct in this regard was a sufficient basis upon which the jury would have been justified in finding malice on Petitioner's part. Petitioner finally appeared before the School Board and made comments which were extremely critical of Respondent. (A-1.)

A transcript of the remarks made by the Petitioner at the School Board hearing are contained in the Appendix. (A-7 through 10.)

ARGUMENT

GENERAL LAW

As identified by this Court, there are two principal situations which justify the invocation of conflict jurisdiction: (1) The decision announces a rule of law that conflicts with a rule previously announced by the Supreme Court or by another district court of appeal; (2) The decision applies a rule of law to produce a different result in a case involving controlling facts substantially similar to those in a prior case decided by the Supreme Court or another district court. Mancini v. State, 312 So.2d 732 (Fla. 1975); Nielson v. City of Sarasota, 117 So.2d 731 (Fla. 1960).

The test of jurisdiction under this provision is not whether the supreme court necessarily would have arrived at a conclusion different from that reached by the district court, but whether the district court decision on its face so collides with a prior decision of the supreme court or of another district court in the same point of law as to create an inconsistency or a conflict among precedents. Kincaid v. World Insurance Co., 157 So.2d 517 (Fla. 1963). The conflict must be of such magnitude that if both decisions were rendered by the same court, the later decision would have the effect of

overruling the earlier decision. Kyle v. Klye, 139 So.2d 885 (Fla. 1962).

It is conflict of decisions, not conflict of opinions, or reasons that supplies jurisdiction for review by certiorari. Gibson v. Maloney, 231 So.2d 823 (Fla. 1970).

The scope of review by the supreme court of a decision of the district court of appeal is extremely limited when the ground of the assertion of jurisdiction is an alleged conflict of such decision with the earlier decision of an appellate court on the same point of law. In order for the supreme court to interfere with the judgment of the district court of appeal on this ground, it must appear that the district court of appeal has, in the decision challenged, made a pronouncement of a point of law which the bench and the bar and future litigants may fairly regard as an authoritative precedent but which is in direct conflict with the pronouncement on the same point of law in a decision or decisions of the supreme court or of another district court of appeal. South Florida Hospital Corp. v. McCrea, 118 So.2d 25 (Fla. 1960).

I. FAILURE TO RECOGNIZE ANY DISTINCTIONS BETWEEN "EXPRESS MALICE" AND "ACTUAL MALICE" DOES NOT DIRECTLY CONFLICT WITH THE DECISIONS OF THIS COURT AND OTHER DISTRICT COURTS.

Since the decision sought to be reviewed and the cases cited by Petitioner in his Brief on Jurisdiction, Argument I, all are written opinions, the requirement that any conflict be

"express" is fulfilled. See Jenkins v. State, 385 So.2d 1356 (1980). The only examination that is necessary then is to determine whether or not the decision of the Fourth District Court of Appeal in the case at bar directly conflicts with any of the cases cited by Petitioner.

To accomplish this, we need to boil down the opinion of the Fourth District Court of Appeal to its bare bones decisions. They are:

> 1. A parent has a qualified privilege to make statements imputing inefficiency or lack of competency to a public school teacher when such statements are made within the established procedures of the public school system itself. (A-3.)
>
> 2. If the statements are untrue and made with actual or express malice, then the privilege is destroyed. (A-3.)
>
> 3. The statements of the defendant were facts rather than opinions. (A-5.)
>
> 4. Adequate precedent exists for the proposition that courts, and not juries, make this determination and that an appellate court may make the determination of opinion versus fact on review. (A-4.)
>
> 5. It was harmless error to submit the issue of opinion versus fact for jury consideration. (A-5.)
>
> 6. The evidence was sufficient to support the award of $5,000.00 in compensatory damages and $5,000.00 in punitive damages. (A-5.)

Petitioner first asserts that the decision of the Fourth District Court of Appeal sought to be reviewed "vitiates" New York Times Co. v. Sullivan, 376 U.S. 254 (1964). (P.B., p. 3.)

It is difficult, at best, to see how any of the above decisions by the Fourth District of Appeal even addresses the decisions contained in New York Times Co.

The Fourth District expressly refrained from deciding whether or not Respondent was a public official since the matter was not essential or relevant to a decision in the case at bar. (A-2.) The case at bar was tried and decided on the basis of Petitioner having a qualified privilege. (A-3.) New York Times Co. did not deal with qualified privileges.

The first case that Petitioner asserts is in direct conflict with the case at bar is Gibson v. Maloney, 231 So.2d 823 (Fla. 1970). The decision in Gibson was that Maloney made himself a public figure which made the comments of the defendant about him qualifiedly privileged for which there is no liability in the absence of express malice. Id., at 824. There is no definition of "express malice" contained in said opinion. In fact, a fair reading of the opinion indicates that "express malice" was used by this court to mean an affirmative showing of malice as opposed to the presumption of malice attendant to cases not subject to a qualified privilege. Id., at 825.

There does not appear in this court's opinion in Gibson any reversal of the First District Court of Appeal "because the trial judge refused to charge the jury on 'actual malice' in addition to 'express malice'" as urged by Petitioner. (P.B.,

p. 4.) In fact, that slight of hand is an obvious attempt to create conflict where none exists.

It is obvious, then, from a close reading of Gibson that conflict with it and the case at bar does not exist.

The Petitioner next cites From v. Tallahassee, Inc., 400 So.2d 52 (Fla. 1st DCA 1981) as directly conflicting with the case at bar. (P.B., p. 4.) Interestingly, Petitioner argues that since From "points out the differences between . . . ", it directly conflicts with the decision in the case at bar. (P.B., p. 4.) We must remember that it is conflict of decisions, not conflict of opinions or reasons that supplies jurisdiction for review by certiorari. Gibson v. Maloney, supra, at 824. "Pointing out" does not a decision make. We must, therefore, determine what decisions were announced in From. They are:

1. From was not a public figure. (Id., at 55);

2. The article complained of is not libelous. (Id., at 55);

3. The determination of whether a statement is one of fact or of opinion is a question of law for the court (Id., at 56); and

4. The statements complained of were pure opinion.

As is seen from the above, there is no direct conflict with the case at bar; rather, the two cases complement each other in that both hold that the determination of opinion versus fact is one for the court to make.

Petitioner next asserts that Lewis v. Evans, 406 So.2d 489 (Fla. 2d DCA 1981) directly conflicts with the decision in the case at bar, but does not explain how. Again, Petitioner merely asserts that a prior case "points out" certain matters. That is not the test for direct conflict.

Petitioner next asserts that Menendez v. Key West Newspaper Corporation, 293 So.2d 751 (Fla. 3d DCA 1974) directly conflicts with the decision in the case at bar since Menendez "states" (apparently) that the burden of proof in establishing "actual malice" is by clear and convincing evidence. (P.B., p. 5.) The case at bar does not at all deal with the burden of proof. Interestingly, this is the first time that Petitioner has raised any issue regarding burden of proof. The total absence of discussing burden of proof in the Fourth District Court opinion prevents it from being in conflict with Menendez.

Petitioner continues the burden of proof argument by citing both Coleman v. Collins, 384 So.2d 229 (Fla. 5th DCA 1980) and Palm Beach Newspapers, Inc. v. Early, 334 So.2d 50 (Fla. 4th DCA 1976). (P.B., p. 5.) Even if those cases contained the decisions that Petitioner urges, the case at bar does not address the issue of burden of proof.

As has been seen by a case by case examination of all of the cases cited by Petitioner in his brief in support of jurisdiction, there is not one single case that directly

conflicts with the case at bar. Accordingly, this Court is without jurisidiction to entertain the writ of certiorari.

II. THE DETERMINATION THAT THE REMARKS MADE BY PETITIONER WERE FACTS AND NOT OPINIONS IS NOT IN EXPRESS AND DIRECT CONFLICT WITH OPINIONS OF THIS COURT AND OTHER DISTRICT COURTS.

Petitioner's argument in support of his Point II is a study in the art of contradiction. Petitioner sets forth the test for evaluating a statement to determine whether or not it is an opinion, citing Information Control Corporation v. Genesis One Computer Corporation, 611 F.2d 781 (9th Cir. 1980):

> "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 in the context in which it was uttered or published. The court must consider all the words use, not merely a particular phrase or sentence. In addition, the court must give way 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."

Then, Petitioner pulls single words out of the defamatory statements cited by the Fourth District and fails to discuss the circumstances under which they were made. The Fourth District spent the first portion of its opinion examining the facts and the circumstances under which the statements were made. It is obvious that the Fourth District has performed the test cited by Petitioner. How the case at bar could directly conflict with From v. Tallahassee Democrat, Inc., whose test

was followed by the Fourth District Court of Appeal, is beyond the grasp of the author.

Then Petitioner compounds his error by examining two words contained in the defamatory statements, to wit: "Unqualified teacher". Since the case at bar did not turn upon only the defamatory statement, that Respondent was an unqualified teacher, even if the trial judge, the jury and the Fourth District Court of Appeal were wrong in determining that "unqualified teacher" was an allegation of fact as opposed to an opinion, it would not create direct conflict sufficient for this Court to envoke its discretionary jurisdiction.

Petitioner attempts to create a conflict with the decision in White v. Fletcher, 90 So.2d 129 (Fla. 1956). However, in White, the statement appeared as: "The Board Chairman said his personal investigation convinced him the man is not fit to be a police officer." The statement was made after investigation by a person knowledgeable of the police officer and his actions. The published statement was qualifiedly privileged and not immune from liability for defamation, which is not contrary to but rather similar to our case. The difference between White and the instant case is that the White plaintiff failed to prove express malice necessary to vitiate the privilege. There is no express and direct conflict since in both White and our case, the statements were determined to be qualifiedly privileged.

Petitioner claims that the court in White determined that the comment was an opinion. The court did not so hold. Rather, the court stated that:

> "It appears from the record that in the first instance Fletcher's comment might well constitute merely an 'opinion or inference from facts assumed to be true' and be, therefore, immune from liability for defamation." Supra, at 131.

However, the court goes on to discuss whether or not plaintiff proved express malice. If the court's decision affirming the summary judgment was based upon the statement being an opinion, and therefore not actionable, there would be no discussion of whether or not Plaintiff proved express malice.

III. PETITIONER MAY NOT SEEK DISCRETIONARY JURISDICTION REVIEW OF AN ISSUE NOT ADDRESSED BY THE DISTRICT COURT OF APPEAL.

Petitioner acknowledges on page 8 of his brief that the Fourth District Court of Appeal "did not feel that this argument raised by the Petitioner, in his brief, warranted discussion." The Supreme Court cannot review by conflict certiorari an issue which was not decided upon by the District Court of Appeal. Winn-Dixie Stores, Inc. v. Goodman, 276 So.2d 465 (Fla. 1973).

CONCLUSION

Since there is no express and direct conflict between the decision of the case at bar and any other case cited by Petitioner, this Court is without discretionary jurisdiction to entertain a review.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Corrected Answer Brief on Jurisidction and the Appendix were mailed June 27th, 1983, to: JAMES CARY JACOBSON, ESQ., Jacobson and Gottlieb, 3363 Sheridan Street, Suite 204, Hollywood, Florida 33021.

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