IN THE SUPREME COURT OF FLORIDA

JOSEPH J. NODAR,

Petitioner,

v.

PATRICIA GALBREATH,

Respondent.

CASE NO. 63,724

PETITIONER'S BRIEF ON JURISDICTION

REVIEW OF A DECISION OF THE
FOURTH DISTRICT COURT OF APPEAL

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INTRODUCTION

This is a Jurisdictional Brief filed pursuant to Rule 9.120 (d), Fla. R. App. P., which seeks to have this Court review the final decision of the Fourth District Court of Appeal rendered March 9, 1983, (A-1) rehearing and rehearing en banc denied April 25, 1983.(A-6) Although this case involves a significant question as to the rights of parents within the educational system and an application of the right of free speech as guaranteed by the First Amendment to the United States Constitution, which the District Court acknowledged as not having heretofore been decided in Florida, the District Court did not certify the question raised as being of great public importance.

In the decision rendered, the District Court affirmed the trial court's award of compensatory and punitive damages to a public school teacher for allegedly libelous remarks made at a public meeting of the school board by the parent of one of the teacher's students.

Petitioner was the Appellant/Defendant and Respondent the Appellee/Plaintiff in the proceedings below. The symbol "(A-)" shall be used to refer to the Appendix to this brief.

STATEMENT OF THE CASE AND FACTS

"No substantial dispute exists as to the facts."(A-1) Respondent was a public school teacher and Petitioner was the

parent of one of her students. Petitioner's son had been a straight "A" student. However, at the end of the first grading period, he received a "B" in Respondent's class. Petitioner in investigating the cause of his son's "B" grade, became concerned about the curriculum in Respondent's class. Petitioner made numerous phone calls and sent numerous letters to various school officials in an effort to investigate and correct the situation. However, he did not receive satisfactory responses. Eventually, a letter was received from an aide to the Governor suggesting that he bring this matter before the school board. Following this suggestion, Petitioner spoke at an open school board meeting. As a result of his remarks made at that meeting, Respondent sued Petitioner for slander, and recovered compensatory and punitive damages. A transcript of the remarks made by the Petitioner are contained in the Appendix (A-7).

At the pre-trial conference, the trial court ruled as a matter of law that Respondent was not a "public official" and refused to rule whether the statements made by Petitioner were statements of opinion or fact and whether the Petitioner had a qualified privilege.

After a verdict for the Respondent was entered and all motions directed to the judgment were denied by the trial court, the Petitioner appealed the trial court's denial of his Motion to Dismiss, Amended Motion for Summary Judgment, Motion for Directed Verdict, Motion for Judgment in Accordance with Motion for a Directed Verdict, and Motion for New Trial. The Petitioner

raised seven points on appeal. The Fourth District Court of Appeal affirmed the judgment with an opinion addressed to four of the points raised concluding that three of the points did not merit discussion, three points were correctly ruled on by the trial court and the seventh point although meritorious was harmless error.

ARGUMENT

I.
THE FAILURE TO RECOGNIZE THE DISTINCTIONS BETWEEN "EXPRESS MALICE" AND "ACTUAL MALICE" IS IN DIRECT CONFLICT WITH DECISIONS OF THIS COURT AND OF THE OTHER DISTRICT COURTS

The Fourth District in its opinion states, "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." (A-3)[1] This equating of "express malice" and

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[1]The Fourth District in its opinion continuously uses "malice", "actual malice" and "express malice" interchangeably and without recognition of there being any distinction between the phrases:

"* * *[T]he defendant's conduct in this regard was a sufficient basis upon which the jury would have been justified in finding **malice** on defendant's part." (A-1)
"If the statements were untrue and made with **actual or express malice** then the privilege is destroyed." (A-3)
"He had the privilege to make these statements with the proviso that they were true and made without **malicious** intent." (A-4)
"The jury answered specific questions in this regard and concluded that * * * the defendant's statements were untrue and uttered with **actual malice.**" (A-4) (Emphasis supplied.)

"actual malice" vitiates the holding of the United States Supreme Court in New York Times Company v. Sullivan, 376 U.S. 254 (1964), and is contrary to the decision of this Court in Gibson v. Maloney, 231 So. 2d 823 (Fla. 1970), the First District in From v. Tallahassee Democrat, Inc., 400 So. 2d 52 (Fla. 1st DCA 1981), the Second District in Lewis v. Evans, 406 So. 2d 489 (Fla. 2d DCA 1981), the Third District in Menendez v. Key West Newspaper Corporation, 283 So. 2d 651 (Fla. 3d DCA 1974) and the Fifth District in Coleman v. Collins, 384 So. 2d 229 (Fla. 5th DCA 1980).

In Gibson v. Maloney, supra, this Court reversed the decision of the First District Court of Appeal, which upheld the jury verdict entered in the trial court, because the trial judge refused to charge the jury on "actual malice" in addition to "express malice". Both dissenting opinions acknowledge this as the rationale for the majority decision. The decision in Gibson expressly and directly conflicts with the decision in the instant case.

The First District Court of Appeal in From v. Tallahassee Democrat, Inc., supra, in discussing New York Times Company v. Sullivan, supra, points out the differences between the qualified privilege of fair comment, which is overcome by a showing of "express malice", and the more extensive privilege to comment about public officials, which is overcome only by a showing of "actual malice". The decision in From expressly and directly conflicts with the decision in the instant case.

The opinion of the Fourth District Court of Appeal in the instant case is expressly and directly in conflict with the opinion of the Second District Court of Appeal in Lewis v. Evans, supra. In that case the Second District defines "qualified privilege" and points out the confusion that has resulted from the Supreme Court's use of the term "actual malice" in New York Times Company v. Sullivan, supra, as distinguished from "express malice", which is necessary to overcome a qualified privilege.

The Third District Court of Appeal in Menendez v. Key West Newspaper Corporation, supra, states that for a public official to recover he must "demonstrate clearly and convincingly that an allegedly libelous publication was made with actual malice", thus acknowleding the higher standard of proof necessary to show "actual malice". This decision expressly and directly conflicts with the decision in the case at bar.

Finally, in Coleman v. Collins, supra, the Fifth District Court of Appeal quoting the Fourth District's opinion in Palm Beach Newspapers, Inc v. Early, 334 So. 2d 50, (Fla. 4th DCA 1976) states,

> It thus appears that under the present state of the law concerning an action for libel by a public official, the plaintiff has the burden of showing by clear and convincing evidence that the defamatory statement was * * * made with 'actual malice'-that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

Both by definition and standard of proof required, "actual malice" is not equal to "express malice" and the decision in the

instant case not only expressly and directly conflicts with the quoted decision of the Fifth District but also conflicts with the decision of the Fourth District on which it is based.

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

The Fourth District Court lists "the defamatory statements" made by the Petitioner in a footnote to its opinion (A-4) and concluded that the statements "were facts rather than opinions." (A-5)

In From v. Tallahassee Democrat, Inc., supra, at 56, the First District Court of Appeal defined an "opinion" as "a critical judgment made by the author". The court, at page 57,quoting from Information Control Corporation v. Genesis One Computer Corporation, 611 F. 2d 781 (9th Cir. 1980), went on to establish the test for evaluating a statement.

> 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 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.

Petitioner's use of the phrases "harassment", "abused

verbally", "victimized" and "unqualified teacher" were not evaluated in accordance with the From test. This is evidenced by the District Court's failure to delineate the objectionable terms and its including "unqualified teacher" as a potentially objectionable term in direct conflict with this court's decision in White v. Fletcher, 90 So. 2d 129 (1956). In that case when a policeman claimed he was libeled by an article stating that he was "not fit to be a police officer", the Court stated: "* * * it appears from the record that in the first instance Fletcher's comment may well constitute merely an opinion or inference from facts assumed to be true" and be, therefore, "immune from liability" for defamation. White v. Fletcher, supra, at 131. Petitioner's use of the word "unqualified" was synonomous with "unfit". Webster's Twentieth Century Dictionary, Unabridged, second edition (1978) defines "unqualified" as: "not qualified; not fit; not having the usual or requisite talents, abilities, or accomplishments". The word "unfit" refers to "matters of opinion, not statements of fact." Palm Beach Newspapers, Inc. v. Early, supra at 52. The district court's determination that the Petitioner's statements were statements of fact and not opinions is expressly and directly in conflict with the decisions in From v. Tallahassee Democrat, supra, and White v. Fletcher, supra.

III.
THE DISTRICT COURT'S DEFINING OF MALICE SO AS NOT TO REQUIRE A FINDING OF AN INTENTION TO INJURE IS CONTRARY TO THE DECISIONS OF THIS COURT AND THE OTHER DISTRICT COURTS

The jury found that Defendant's remarks were made in a qualifiedly privileged context. Therefore, in order for Plaintiff to recover, she had to prove that Defendant acted with express malice. Coogler v. Rhodes, 38 Fla. 240, 21 So. 109 (1897), Gibson v. Maloney, supra. The court instructed the jury that, "It is malicious to make a false statement concerning another with ill-will, hostility **or** an evil intention to defame and injure." (Emphasis supplied.) The trial judge rejected Defendant's requested jury instruction defining express malice, which was offered verbatim from the jury instruction suggested in Lewis v. Evans, supra, "It is malicious to make a false statement concerning another with ill-will, hostility, **and** an evil intention to defame and injure." (Emphasis supplied.) The trial judge changed the Lewis v. Evans instruction from **"and"** to **"or"**, at the request of Respondent and over Petitioner's objection. The Fourth District Court of Appeal did not feel that this argument raised by the Petitioner, in his Brief, warranted discussion.

Intent to injure has been recognized as an essential element of express malice for almost one hundred years. Montgomery v. Knox, 23 Fla. 595, 3 So. 211 (1887). As this Court stated in Abram v. Odham, 89 So. 2d 334, at 336 (Fla. 1956), in quoting Loeb v. Geronemus, 66 So. 2d 241,at 244 (Fla. 1953), "When a matter which otherwise would be a qualifiedly privileged communication is published falsely, fraudulently and with express malice **and** intent to injure the persons against whom it is

directed, the communication loses its qualifiedly privileged character." (Emphasis Supplied.) Most recently the First District Court of Appeal stated, "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." (Emphasis supplied.) Lewis v. Evans, supra, at 493.

The decision of the Fourth District in the instant case conflicts expressly and directly with the decisions of this Court in Montgomery v. Knox, supra, Abram v. Odham, supra, and Loeb v. Geronemus, supra, and the First District in Lewis v. Evans, supra.

CONCLUSION

This Court should exercise its discretionary jurisdiction to review the decision of the Fourth District Court of Appeal because it expressly and directly conflicts with decisions of this Court and the other District Court's of Appeal on the same questions of law.

Respectfully submitted,

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By _____
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I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Brief on Jurisdiction and the Appendix have been hand-delivered this 2nd day of June, 1983 to: Ronald L. Gossett, Esquire, of Hodges, Gossett, McDonald & Gossett, P.A., Attorneys for Respondent, 3595 Sheridan Street, Suite 204, Hollywood, Florida, 33021.

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