IN THE SUPREME COURT OF FLORIDA

CASE NO. 63,724

0/A 2-13-84

FILED
SID J. WHITE
JAN 12 1984
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

JOSEPH J. NODAR,

Petitioner,

v.

PATRICIA GALBREATH,

Respondent.

REPLY BRIEF OF PETITIONER

REVIEW OF A DECISION OF THE
FOURTH DISTRICT COURT OF APPEAL
No. 87-721

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ABBREVIATIONS AND REFERENCES

Petitioner was the appellant and defendant in the lower courts and shall be referred to in this brief as ..... "Defendant"

Respondent was the appellee and plaintiff in the lower courts and shall be referred to in this brief as ..... "Plaintiff".

Citations to the Record on Appeal shall be indicated as ..... "[R. at ___]"

Citations to the Initial Brief of Petitioner shall be indicated as ..... "[D. at ___]"

Citations to the Answer Brief of Respondent shall be indicated as ..... "[P. at ___]".

ISSUES PRESENTED FOR REVIEW

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?

II.

WHETHER A PUBLIC SCHOOL TEACHER IS A "PUBLIC OFFICIAL" FOR PURPOSES OF SUSTAINING A DEFAMATION ACTION AGAINST A PARENT WHO SPEAKS AT A PUBLIC MEETING OF THE SCHOOL BOARD ABOUT THE TEACHER'S PERFORMANCE IN HIS SON'S CLASS?

III.

WHETHER A PARENT'S STATEMENTS AT A SCHOOL BOARD MEETING, CONSIDERED IN CONTEXT, THAT HIS SON HAD BEEN "HARASSED", "VERBALLY ABUSED" AND "VICTIMIZED" BY THE BOY'S TEACHER AND THAT THE TEACHER WAS "UNQUALIFIED" ARE EXPRESSIONS OF OPINION?

IV.

WHETHER THE TRIAL JUDGE'S JURY INSTRUCTION DEFINING EXPRESS MALICE SO AS TO PERMIT THE JURY TO FIND MALICE WITHOUT FINDING AN INTENTION TO DEFAME AND INJURE WAS ERRONEOUS?

V.

WHETHER THE TRIAL JUDGE'S ERROR WAS HARMLESS WHEN HE REFUSED TO RULE AS A MATTER OF LAW THAT DEFENDANT'S REMARKS WERE EITHER OPINIONS OR A STATEMENTS OF FACT?

VI.

WHETHER THE TRIAL JUDGE ERRED BY EXCLUDING, AS HEARSAY, DEFENDANT'S TESTIMONY OF WHAT HE HAD BEEN TOLD ABOUT PLAINTIFF'S TEACHING PERFORMANCE WHEN SUCH TESTIMONY WAS OFFERED NOT TO PROVE THE TRUTH OF THE TESTIMONY BUT TO SHOW DEFENDANT'S STATE OF MIND?

VII.

WHETHER THE TRIAL JUDGE ERRED IN REFUSING TO CHARGE THE JURY THAT THERE IS A PRESUMPTION OF GOOD FAITH WHEN DEFAMATORY REMARKS ARE MADE IN A PRIVILEGED CONTEXT?

VIII.

WHETHER THE TRIAL JUDGE SHOULD HAVE DISMISSED THE COMPLAINT FOR PLAINTIFF'S FAILURE TO ALLEGE OR PROVE THAT SHE SUFFERED ANY DAMAGES THAT WERE CAUSED BY DEFENDANT'S STATEMENT TO THE SCHOOL BOARD?

STATEMENT OF FACTS

Defendant takes exception to Plaintiff's Statement of Facts as being misleading, irrelevant, argumentative and in some instances as being supported by erroneous record citations. Defendant wishes to correct the following incorrect or misleading statements:

a) There was no testimony that Defendant received a copy of the protected grading policy and his son testified that he had not received it. [R.at 298].

b) Defendant never tried to have his son's grade changed. (Plaintiff's citations do not support her contention.)

c) Defendant never contacted child advocacy or anyone else outside of the school system. (Plaintiff's citation indicates that Defendant's wife may have contacted child advocacy.)

ARGUMENTS

I. EXPRESS MALICE, NECESSARY TO OVERCOME THE QUALIFIED PRIVILEGE OF AN "INTERESTED PARENT", IS NOT THE SAME AS ACTUAL MALICE, NECESSARY TO OVERCOME THE "PUBLIC OFFICIAL" PRIVILEGE.

Plaintiff concedes that the opinion of the district court in the case below confuses the distinctions between "express" and "actual" malice, but claims that the "inaccuracies do not destroy the opinion of the Fourth District nor do they require reversal". [P. at 7]. Plaintiff proceeds to rewrite the opinion by substituting words and by suggesting that the word "malice" is being used "generically" by the court. Alternatively, Plaintiff proposes that "express malice" is greater than and encompasses "actual malice". Plaintiff offers no authority for this position because there is no authority supporting it.

The method by which Plaintiff seeks to sidestep the acknowledged misstatement of the law, in the opinion below, is to create a hierarchy. The cases cited by Plaintiff to construct her theory do not support the existence of any such hierarchy. The proposal that there are three ascending tiers of defamation, which require increasingly greater efforts to overcome, is not an accurate statement of the law.

Plaintiff's suggestion that, "express malice" is superior to "actual malice", is wrong. The two types of malice are not related and cannot be measured on the same scale. If anything, the Supreme Court intended to create greater protection for those commenting on public officials than is offered by a qualified privilege. New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 2d 745 (1964).

The inaccuracy of Plaintiff's defamation hierarchy theory is evident in Plaintiff's acknowledgment of the greater measure of proof necessary to establish "actual malice" rather than "express malice". Plaintiff fails to incorporate the differing measures of proof in setting up her hierarchy. It would be inconsistent for the Court to establish "clear and convincing proof" as the standard necessary to establish "actual malice" if "actual malice" was inferior to "express malice". Plaintiff's failure to respond to Defendant's contention that the district court's equating "actual malice" and "express malice" denied him the additional protection of the greater quantum of proof needed to prove "actual malice", points out a glaring defect in Plaintiff's position.

Plaintiff attempts to distinguish Russell v Smith, 434 So 2d 342 (Fla. 2d DCA 1983), based upon the use of a general verdict

form in that case as opposed to the use of a special interrogatory verdict form in our case. She asserts that "had a special interrogatory verdict been utilized [in Russell v. Smith], the court would not have been left to speculate as to the basis for the jury's award." [P. at 12]. However, the opinion in Russell does not indicate that the court "speculated as to the basis for the jury's award." In fact, since the jury returned a verdict for the Plaintiff and awarded both compensatory and punitive damages it is clear that it found "express malice", as that term was defined by the trial court in Nodar v. Galbreath, 429 So.2d 715 (Fla. 4th DCA 1983). (Defendant believes that the definition of "express malice" in Nodar is erroneous, as argued in D. at 26.)

II. A PUBLIC SCHOOL TEACHER IS A "PUBLIC OFFICIAL" FOR PURPOSES OF SUSTAINING A DEFAMATION ACTION AGAINST A PARENT WHO SPEAKS AT A PUBLIC MEETING OF THE SCHOOL BOARD ABOUT THE TEACHER'S PERFORMANCE IN HIS SON'S CLASS.

Plaintiff attempts to distinguish the cases cited by Defendant on technical grounds, making distinctions without differences. However, Plaintiff does not dispute the reasoning of the appellate courts of our sister states, which have found the public official standard applicable.

Plaintiff cites three cases for the proposition that a school teacher is not a public official. Defendant has already commented on Franklin v. Lodge, 1108, Benevolent and Protective Order of Elks, 97 Cal. App. 3d 915, 159 Cal. Rptr. 131 (1979). [D. at 13]. Poe v. San Antonio Express-News Corporation, 590 S.W. 2d 537 (Tex. Civ. App. 1979) does not hold that a teacher is not a public official. Rather the court found that there was insufficient evidence for the trial court to rule as a matter of law, on a

motion for summary judgment, that the teacher was or was not a public official. Defendant apologizes to the court for his failure to find McCutcheon v. Moran, 425 N.E. 2d 1130 (Ill. 1st DCA 1981), in his research. This case had not been previously cited by Plaintiff. McCutcheon rejects the reasoning of its sister court in Basarich v. Rodeghero, 321 N.E. 2d 739 (Ill. 3rd DCA 1974), and holds a school teacher is not a public official, yet affirms the dismissal of the suit on other grounds.

Plaintiff contends that the decisions in White v. Fletcher, 90 So. 2d 129 (Fla. 1956); Harrison v. Williams, 430 So.2d 585 (Fla. 4th DCA 1980) and Russell v. Smith, supra, and the other Florida cases cited by Defendant "are not even persuasive authority for this Court." [P. at 22]. White, Harrison and Russell each holds that a policeman is a public official. Plaintiff denies any analogy between policemen and teachers by generalizing about policemen's "day-to-day involvement in governmental affairs" [P. at 23], without explaining what "governmental affairs" policemen are involved that would set them apart from teachers.

Policemen, like teachers, do not make public policy and do not serve at the whim of the electorate. Both are hired by government agencies to carry out policies that are established by others. Both have limited leeway in the day-to-day performance of their duties and are subject to review by their superiors. How both do their job reflects upon the entire system that employs them. Both are paid with public funds and subject to special limitations on their activities because they are public employees. Both are given special protection from harassment by the citizenry to permit them to do their jobs. They each serve to fulfill a basic obligation of

the state; for teachers it is education, and for policemen it is public safety. Defendant believes that the analogy between policemen and teachers is both obvious and compelling.

While Defendant acknowledges that these decisions involving policemen may not be controlling, they are persuasive since the rationale of the courts in those cases is applicable to the instant case and logically should be extended to include public school teachers. It is noteworthy that Plaintiff did not cite any Florida cases where the court held that the plaintiff was not a public official when that point was raised.

Plaintiff contends that parents who make "whimsical, unfounded and spurious attacks on teachers" must be held accountable. [P. at 23]. She further contends that a parent who "has done nothing to obtain the information necessary to support his statements" should be liable. [P. at 24]. Plaintiff's concern appears to be that if a parent is guilty of "actual malice" sufficient to overcome a public official privilege, then he should be held responsible. Defendant agrees with this proposition.

Defendant does not agree that an after-the-fact determination of the nature of the remarks made by a parent about a school teacher would not have a chilling effect on those parents whose remarks were found not to be defamatory. The argument, which Plaintiff makes, disregards the stifling effect that the risk or threat of being sued would have on free speech. The fear of defending a law suit and even the remote possibility of paying money damages stand as an overpowering deterrent to critical comment. A determination, made from hindsight which places any concerned parent, who speaks about a teacher, at risk of having to respond in damages, if it is

subsequently concluded that his remarks were not proper, has an obvious stultifying effect on the free flow of ideas.

III. A PARENT'S STATEMENTS AT A SCHOOL BOARD MEETING, CONSIDERED IN CONTEXT, THAT HIS SON HAD BEEN "HARASSED", "VERBALLY ABUSED" AND "VICTIMIZED" BY THE BOY'S TEACHER AND THAT THE TEACHER WAS "UNQUALIFIED" ARE EXPRESSIONS OF OPINION.

Plaintiff contends that each of the remarks noted in the district court opinion is a statement of fact. Since the jury did not specify the remark or remarks on which it based its verdict, and the appellate court did not pinpoint the remark or remarks on which it sustained the verdict, each of the statements would have to be factual for the verdict to stand. If even one of the remarks is an opinion, then the appellate court could not know that the opinion was not the remark on which the jury based its verdict or the one which the jury felt was the cause of Plaintiff's damage.

Plaintiff concedes that if "unqualified", as used by Defendant, is taken to mean "not fit", then this would be a statement of opinion. However, Plaintiff contends that "unqualified", as used by Defendant, meant "lacking qualifications", which is a statement of fact. Defendant will concede that calling a teacher an "uncertified teacher" would be a factual statement. The question, therefore, becomes, "Did Defendant, when he referred to Plaintiff as an 'unqualified teacher', intend his words to mean 'uncertified' or 'unfit' and was his remark understood by others to mean that Plaintiff was 'uncertified' or 'unfit'?"

The question should be answered by applying the test set out in From v. Tallahassee Democrat, Inc., supra at 57. Applying the From criteria to Defendant's speech shows Defendant, an air conditioning repairman, made a six and one half minute speech at a public

meeting of the school board, with less than one day advance notice and with no prepared text. During his speech Defendant never mentioned names and never addressed either the Plaintiff's or the chemistry teacher's background. He made no personal comments about either teacher and never suggested that sanctions should be taken against them. He commented on his frustration in attempting to resolve the problems his son was having in English and chemistry and about the treatment his son had been receiving from the teachers of those classes. He critiqued the grading procedures in chemistry and the course content in English and how the chemistry teacher failed to follow the guidelines for gifted classes. Examining Plaintiff's speech in its totality and the phrase "unqualified teacher" in context; appreciating the audience to whom the speech was made, the school board, which knew it had no uncertified teachers in its employ and which holds open meetings to allow disgruntled parents to have a forum; and knowing the medium of dissemination was an unrehearsed oral presentation without notes or any other aids; requires a finding that the phrase "unqualified teacher" as used by Defendant meant "unfit teacher".

Defendant testified that when he referred to Plaintiff as an "unqualified teacher" he meant that she was "not fit" to teach the gifted English class. [R. at 261 and 356]. He also testified that he had "assumed she [Plaintiff] had the qualifications or she wouldn't be teaching." [R. at 268]. There is no testimony or evidence that contradicts Defendant as to his intention.

Plaintiff testified that she would not discuss Defendant's accusations with her father, who was a school teacher, because she "believed it would be extremely hurtful to him to know that I was -

had been accused of this, of not being a good teacher . . . ." [R. at 220]. Since none of the remarks made could be construed to accuse Plaintiff of not being a good teacher, other than Defendant's charge that she was an "unqualified teacher", it must be assumed that Plaintiff took that statement to mean that she was an "unfit teacher". Plaintiff didn't tell her brother-in-law, an assistant school superintendent, about Defendant's remarks because she didn't want him to "think less of [her]. . . ." [R. at 220]. Surely she did not mean that her brother-in-law would think less of her because a laymen had accused her of being uncertified. That construction strains credibility. The only logical explanation for Plaintiff's reticence to discuss this incident with her family members was her embarrassment at having been accused of being incompetent. Her concern was that people would believe that "where there's smoke, there's fire". [R. at 135].

Plaintiff's witness, Imogene Todd, an area supervisor for the county school system, when asked on cross examination, if Defendant had called Plaintiff "unqualified", would this mean the same as "uncertified", answered, "The two don't mean the same thing." She also volunteered that there are no uncertified teachers employed by the Broward County school system. [R. at 208].

There was no testimony from any witness, who heard Plaintiff's speech to the school board, that they thought he had accused Plaintiff of being "uncertified". Plaintiff can not even contend that the "unqualified" meant not certified to teach gifted classes because, at the time in question Plaintiff was not certified to teach gifted classes, as such certification was not established by the state until after the 1979 -1980 school year. [R. at 24].

IV. THE TRIAL JUDGE'S JURY INSTRUCTION DEFINING EXPRESS MALICE SO AS TO PERMIT THE JURY TO FIND MALICE WITHOUT FINDING AN INTENTION TO DEFAME AND INJURE WAS ERRONEOUS.

Defendant agrees with Plaintiff's statement that "[i]n a civil proceeding, if a party submits a written request for a jury instruction, and it is rejected by the trial court, it is preserved for appellate review without more." Middelveen v. Sibson Realty, Inc., 417 So.2d 275, at 277 (Fla. 5th DCA 1982). [P. at 31].

Defendant requested that the instruction suggested in Lewis v. Evans, 406 So.2d 489 (Fla. 2d DCA 1981) be given verbatim: "It is malicious to make a false statement concerning another with ill-will, hostility, and an evil intention to defame and injure." [R. at 419] At Plaintiff's request and over Defendant's objection, the trial judge changed Defendant's requested instruction from "and" to "or". [R. at 419 and 515 - 516] Thus, the trial judge rejected Defendant's requested instruction. No further objection was required to preserve the point for review. Middelveen v. Sibson Realty, Inc., supra.

Assuming arguendo that an objection was required, appropriate and sufficient objections were made by Defendant. [R. at 515-6 and 574] It is not necessary to use any specific words in order to voice an objection. It is sufficient to make an argument that brings the error to the attention of the Court and allows the Judge "a fair opportunity to rule upon the contentions". Ruben v. Gonzalez, 166 So.2d 167 (Fla. 3d DCA 1964).

Plaintiff argues that Montgomery v. Knox, 23 Fla. 595, 3 So. 211 (1887), does not stand for the proposition that express malice requires a showing of ill-will, hostility, and an evil intention to defame and injure. [P. at 34-6] However, at trial Plaintiff

requested the instruction that "[e]xpress malice is malice in fact, as distinguished from implied malice and the law of slander contemplates ill-will, hostility, and an evil intention to defame and injure. (emphasis supplied) [R. at 433] Plaintiff's citation of authority for this instruction was Montgomery v. Knox, supra., the case which she now claims does not stand for that proposition. Further, Plaintiff fails to distinguish between the malice necessary to overcome a qualified privilege and the malice necessary to sustain exemplary damages. The two are not the same and Plaintiff's quote from Montgomery v. Knox, supra at 216, on page 35 of her Brief, deals specifically with exemplary damages and is therefore irrelevant.

Plaintiff contends that to overcome a qualified privilege "requires a showing of some form of evilness." [P. at 10] Although the case cited by Plaintiff does not stand for that proposition, Defendant will agree that the quote is a reasonable statement of the law. Plaintiff and Defendant apparently disagree as to whether hostility or ill-will can be equated to "evilness". If it can not, then the jury instruction given by the trial judge defining "express malice" was not accurate and permitted the jury to apply an improper test in reaching its verdict.

V. THE TRIAL JUDGE'S ERROR WAS NOT HARMLESS WHEN HE REFUSED TO RULE AS A MATTER OF LAW AS TO WHETHER DEFENDANT"S REMARKS WERE EITHER OPINIONS OR STATEMENTS OF FACT.

The district court acknowledged that the trial court erred in submitting the characterization of the allegedly defamatory remarks as either fact or opinion to the jury, but decided that the error was harmless. Plaintiff apparently disagrees with the court's

finding of error in submitting the question to the jury and argues that ". . . 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." [P. at 39]. Plaintiff cites From v. Tallahassee Democrat, Inc., 400 So. 2d 52 (Fla. 1st DCA 1981) to support this position. However, From does not hold or suggest that the decision as to whether the remarks are pure opinion or mixed opinion or fact should be left to the jury. It merely finds that statements of pure opinion are not actionable and that statements of mixed opinion and statements of fact are actionable. The decision in either case is to be made by the court.

Plaintiff disdains Defendant's dilemma in the trial court's refusal to rule whether the allegedly defamatory remarks were statements of fact or opinion. Defendant believed that all of the remarks were opinions, which by definition are not susceptible to proof of truth or falsity. If the trial court disagreed and ruled that the remarks were factual, then Defendant would have had the opportunity to try and prove their truth. By having the jury decide after the Defendant had presented his entire case, the trial court made Defendant suffer a disadvantage he should not have had to suffer. This was harmful error.

Defendant invited the Plaintiff to point out cases, where an appellate court had upheld a verdict for a plaintiff based upon a jury's determination that defamatory words were facts and not opinions. [D. at 30]. Plaintiff cited no such cases and, therefore, it can be assumed that she was unable to find any. Any

case where an appellate court found for a defendant would not be relevant, since in those cases there would be no harm.

VI. THE TRIAL JUDGE ERRED BY EXCLUDING, AS HEARSAY, DEFENDANT'S TESTIMONY OF WHAT HE HAD BEEN TOLD ABOUT PLAINTIFF'S TEACHING PERFORMANCE WHEN SUCH TESTIMONY WAS OFFERED NOT TO PROVE THE TRUTH OF THE TESTIMONY BUT TO SHOW DEFENDANT'S STATE OF MIND.

Since Plaintiff does not object to or argue with Defendant's statement of the applicable law regarding the "state of mind" exception to the hearsay rule, it can be implied that she acknowledges its accuracy.

Plaintiff chooses to argue that Defendant failed to try hard enough to introduce the "state of mind" testimony. This position ignores Defendant's argument to the trial judge which is quoted on pages 32-3 of Defendant's Initial Brief. In addition, as the record reflects, the trial judge accused Defendant's counsel of trying to invite error by pressing the introduction of this testimony and Defendant's counsel moved for a mistrial based on the remarks made by the trial judge in admonishing Defendant's counsel about trying to elicit this testimony. [R. at 265].

Plaintiff takes Defendant to task for not making a formal proffer and for not eliciting the testimony from other witnesses. A formal proffer is not required, except for testimony excluded because of a relevancy or materiality objection, where the purpose of the testimony is not obvious. Gard, Spencer A., Florida Evidence, second edition (1980) §21:16 Comment at 305. In the instant case, the purpose for the testimony was both obvious and stated and the objection was not based on relevancy or materiality.

While the testimony as to the Defendant's state of mind should,

in the first instance, come from Defendant, Defendant's counsel did attempt to elicit testimony from both Defendant's son and Defendant's wife as to Defendant's state of mind. However, Plaintiff objected to the introduction of this testimony, and the trial judge sustained her objections. [R. at 300 and 337-8].

Finally, Plaintiff contends that Defendant was attempting to introduce hearsay testimony as to Defendant's state of mind six months prior to the time in question, referring specifically to the question on page 250-1 of the record. When the Court indicated its concern about the hearsay nature of the question, Defendant's counsel stated his purpose for the question as follows: "Your Honor, I am merely trying to establish his frame of mind at this time." (emphasis supplied) Additionally, Defendant's state of mind during the entire course of events would be relevant and within the res gestae, as acknowledged by the trial court. When Plaintiff attempted to introduce testimony as to Defendant's behavior at a meeting months before the incident in question and Defendant objected, the court allowed the testimony, when Plaintiff argued that she was ". . . offering this evidence to prove . . . the malice of Mr. Nodar leading up to and including that meeting on May 15th." [R. at 195].

VII. THE TRIAL JUDGE ERRED IN REFUSING TO CHARGE THE JURY THAT THERE IS A PRESUMPTION OF GOOD FAITH WHEN DEFAMATORY REMARKS ARE MADE IN A PRIVILEGED CONTEXT.

Plaintiff in her Answer Brief states that the transcript of the charge conference does not show that Defendant requested the instruction on the presumption of good faith, [P. at 46], but she does not claim that Defendant failed to request the jury

instruction. Plaintiff apparently hopes that the Court will incorrectly infer from her statements that the instruction was not requested and, therefore, not rejected. In fact, Defendant submitted numerous requests for jury instructions which were rejected by the Court without any discussion being recorded in the transcript. The instruction in question is shown in R. at 431.

Plaintiff contends that the requested instruction is superfluous since she had to prove express malice which was defined as "ill-will, hostility or an evil intention to defame and injure". [R. at 419]. However, this argument fails to recognize that ill-will or hostility could coexist with good faith. The definition of express malice given by the trial judge did not require the jury to find bad faith for the statement of Defendant. Hostility or ill-will was sufficient for the finding of express malice, and neither hostility nor malice is tantamount to bad faith.

Further, the failure to give the instruction that Defendant was entitled to a presumption of good faith denied Defendant the benefit of a presumption, which is different than the neutrality that prevailed, when the instruction was not given to the jury.

VIII. THE TRIAL JUDGE SHOULD HAVE DISMISSED THE COMPLAINT FOR PLAINTIFF'S FAILURE TO ALLEGE OR PROVE THAT SHE SUFFERED ANY DAMAGES THAT WERE CAUSED BY DEFENDANT'S STATEMENT TO THE SCHOOL BOARD.

Plaintiff's initial response to Defendant's final argument is that Defendant never requested dismissal "for Plaintiff's failure to allege special damages" [P. at 47] However, Plaintiff ignores Defendant's Memorandum of Law in Support of Motion to Dismiss which states "Furthermore, the Plaintiff has failed to adequately please (sic) special damages which are a necessary predicate to the

granting of relief. Barry College v. Hull, 353 So.2d 575 (Fla. 3rd DCA 1977)". [R. at 608].

Plaintiff refers the Court to the Record at 134-8 and 219-34 as the transcript of the testimony which shows the damages sustained by Plaintiff as a result of Defendant's May 15, 1980 speech to the Broward County School Board. The testimony beginning on page 134 relates to what Plaintiff had suffered "as a result of the month long dealings - months long dealings with Mr. Nodar and Mrs. Nodar and as a result of the statements made at the school board meeting of May 15, 1980." This line of questioning was objected to since it did not relate solely to the speech made to the school board which was the basis for Plaintiff's suit. This objection was overruled, and Plaintiff testified as to the damage that had been caused her as a result of all of the activities of Defendant and his wife. Plaintiff's failure to differentiate as to cause and effect is fatal to her claim that this testimony shows that the complained of speech was the cause of the alleged damage.

The testimony at R. 219-34 does not deal with mental anguish or personal humiliation and does not reflect any causal relationship between the complained of statement of Defendant and any legally sufficient damage to Plaintiff.

Plaintiff's claim that she presented evidence of her damages without objection by Defendant is inaccurate. [R. at 133]. Further, Plaintiff's reference to her moving for leave to amend the pleadings to conform to the evidence is misleading since she fails to point out that the motion was not argued or ruled upon and, therefore, not granted. [R. at 234].

CONCLUSION

Based upon the briefs of the parties and the Record on Appeal, Defendant requests that this Court reverse the judgment rendered below with instructions to enter a judgment for Defendant, or in the alternative, reverse the judgment with instructions to grant a new trial.

Respectfully submitted,

JACOBSON AND GOTTLIEB

By _____
JAMES CARY JACOBSON

By _____
SCOTT RICHARD GILL

By _____
MICHAEL ELIOT REHR
Of Counsel

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Petitioner has been hand-delivered this 9th day of January, 1984 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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