IN THE SUPREME COURT OF FLORIDA

64,086

JEFFREY K. SMITH,

Appellant,

vs.

APPEAL NO. 82-1478

GEORGE P. RUSSELL,

Appellee.
_____/

JURISDICTIONAL BRIEF OF APPELLEE
GEORGE P. RUSSELL

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PRELIMINARY STATEMENT

The appellee will refer to the parties and to the record on appeal in the same manner as was done by appellant in his brief:

Appellant (appellee below): plaintiff or appellant
Appellee (appellant below): defendant or appellee

Record on appeal: "R"

STATEMENT OF THE CASE

The plaintiff, Jeffrey K. Smith, was appellee before the Second District Court of Appeal and is now petitioner before this court.

The District Court decision was filed July 15, 1983. (Appellant's brief, appendix) The appellant served his Notice of Appeal on August 8, 1983, and on August 12, 1983 he served his "Petition for Discretionary Review (previously filed as Notice of Appeal)".

STATEMENT OF THE FACTS

The opinion of the district court sets forth an extensive recitation of the factual setting below. (Appellant's brief, appendix) For the purposes of the issue presented in this cause, portions of the District Court's opinion are repeated here:

> "Russell was arrested by plaintiff, Jeffrey K. Smith, a City of St. Petersburg Beach police officer, and charged with DWI. At the time of his arrest, Russell complained about the arrest procedures and Smith's conduct. Russell repeated those complaints to the traffic court judge when Russell pleaded nolo contendere in court. Both Smith and the judge suggested that Russell register a complaint with the chief of police.
>
> Russell then wrote three letters detailing his complaints about Smith. Among other things, these letters accused Smith of being a sadist and a liar and of using unnecessary force. Copies of one or more of these letters were sent to the chief of police, the traffic court judge, another judge who was a friend of Russell, Russell's attorney, and Smith. The statements made in the letters were the bases of Smith's suit against Russell for defamation.
>
> At trial Russell requested that the court instruct the jury that Russell had a qualified privilege to criticize Smith because Smith was a police officer and was, therefore, a public official. Russell argued that a showing of actual malice on the part of Russell was necessary to overcome the qualified privilege and sustain a verdict for Smith. The trial court did not give the requested instruction but did instruct on the so-called "business privilege" or "common interest doctrine." The court instructed the jury to consider the defendant's claim that the statements were made by a person with an interest or duty in the subject matter to another person with an interest or duty in the subject matter and were, therefore, conditionally privileged. The jury returned a verdict for Smith, awarding $4,500 in compensatory damages and $5,500 in punitive damages."

POINT AT ISSUE

WHETHER THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL IN RUSSELL VS. SMITH, CASE NO. 82-1478 EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN NODAR VS. GALBREATH, 429 So. 2d 715 (4th DCA 1983), SO AS TO INVOKE THE DISCRETIONARY JURISDICTION OF THE SUPREME COURT OF THE STATE OF FLORIDA

ARGUMENT

The petitioner complains that the decision of the district court in the instant case is in direct conflict with the decision of the District Court of Appeal for the Fourth District in Nodar vs. Galbreath, 429 So. 2d 715. in Nodar the defendant had urged that the trial court erred in failing to declare the defendant to be a public official subject to the privilege of fair comment by the defendant as a citizen. Specific questions had been submitted to the jury, which had concluded that a qualified privilege did exist (a parent's privilege to speak publicly before a school board regarding the teacher who instructs his children).

In Nodar, the district court had held that,

> "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."

The district court had concluded that,

> "There was simply no need to find a 'public official privilege' since defendant already had an 'interested parent privilege'."

In the instant case, the Second District Court of Appeal distinguished the Nodar case, pointing out that the giving of the "common interest" instruction to the jury in this case could not render harmless the failure to give the "public official" instruction requested by the defendant. Nowhere in the court below had there been a determination that the defendant had a qualified privilege; the trial court had merely "instructed the jury to consider the defendant's claim" that the statements in question were made by a person with an interest or duty in the subject matter to another person with an interest or duty in the subject matter. As the district court said,

> "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 ."

The district court in the instant case, then, had carefully harmonized its opinion with that of the Nodar court.

Furthermore, both the Nodar court and the district court in the instant case recognized the difference between criticism of a school teacher and criticism of official misconduct. In Nodar, the court said,

> "Obviously, defendant was not speaking as a citizen critic of official misconduct and it would have been unrealistic to characterize the privilege as such. Defendant was, instead, speaking to the superiors of the teacher of his child about whom he had complaints." (429 So. 2d 715, 717)

The district court in the instant case, in rejecting the plaintiff's argument that the trial court's error was harmless, cited New York Times Co. vs. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 2d 686 (1964), and Coursey vs. Greater Niles Township Publishing Corp., 40 Ill. 2d 257, 239 N.E. 2d 837, 841 (1968). The court said that to accept the plaintiff's argument would require it to "disregard constitutional safeguards of freedom of speech contained in" the New York Times vs. Sullivan case. It quoted the Coursey court, as follows:

> "The abuse of a patrolman's office can have great potentiality for social harm; hence, public discussion and public criticism directed towards the performance of that office cannot constitutionally be inhibited by threat of prosecution under state libel laws."

And it pointed out that,

> "The very fact that police officers perform functions so essential to the effective operation of our democratic form of government and are entitled to honor and respect also means that they must bear the burdens of their commissions, one of which is to be subject to certain criticism by members of the public." (Appellant's brief, appendix p. 4)

And so the district court in the instant case had distinguished the Nodar case, not only for the reason that in Nodar there was harmless error, and in the instant case there was none; but also on the facts of the case - Nodar dealt only with qualified privilege in criticism of a school teacher, whether he be a public official or not; the instant case was concerned with criticism of a police officer, the abuse of whose office "can have great potentiality for social harm," and who

must, therefore, be subject to public discussion and public criticism without inhibition by threat of prosecution under state libel laws.

In holding the plaintiff below to have been a public official "subject to fair comment and criticism from any member of the public...", the district court in the instant case was also in perfect harmony with the decision of this Honorable Court in White vs. Fletcher, 90 So. 2d 129, 131 (Fla. 1956). See also Harrison vs. Williams, 430 So. 2d 585 (Fla. 4th DCA 1983).

[The appellant in his brief on jurisdiction (page 7), has stated, "it should be noted that the parties in Nodar have also petitioned this court for discretionary review of the conflicting District Courts of Appeal decisions." It would appear that only one of the parties in Nodar (the defendant) has petitioned this court for any discretionary review, and that the review sought involved alleged conflicts with other district court decisions. The questions of law involved in that petition for discretionary review bear no resemblance whatever to the point involved in the instant case.]

CONCLUSION

The decision of the Second District Court of Appeal, reversing the trial court and remanding the case for a new trial, and holding that the trial court had erred in failing to give the "public official" instruction requested by the defendant was in complete harmony with the decisions of this court in White vs. Fletcher, and of the Fourth District Court of Appeal in the Nodar case, and the petition for certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by regular U.S. Mail to Robert L. Paver, Esq. and Joseph M. Ciarciaglino, Jr., Esq., 433 Fourth Street North, St. Petersburg, Florida 33701 this 31st day of August, 1983.

Elihu H. Berman