IN THE SUPREME COURT OF FLORIDA

Case No. 64,904

THE MIAMI HERALD PUBLISHING COMPANY,

Petitioner,

vs.

ROBERT R. FRANK,

Respondent.
_____/

RESPONDENT'S ANSWER BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

The plaintiff, Robert R. Frank, is a private attorney. It was admitted by the Herald below that at all times material to this action Frank was a private figure. In 1969, Frank undertook to represent a corporation in a Chapter 11 reorganization. The proposed reorganization was unsuccessful and the company was ultimately declared bankrupt.

After the company went under, the president, David Balter, sued almost everyone that had been involved in the reorganization efforts, including a bank, private lenders and Bob Frank. The claim against Frank was for legal malpractice in allegedly failing to prepare certain loan papers in proper form and in a timely manner.

Bob Frank was found not guilty. Some of the other defendants were found liable by the jury.* There was nothing sensational or prominent about the trial. Indeed, at the time of the verdict when the Herald published a small news article, it did not consider Frank's involvement significant enough to even mention.

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* The verdict in favor of Bob Frank was affirmed on appeal. Balter v. Frank, 386 So 2d 1227 (Fla. 3rd DCA 1980). A judgment in favor of the bank was likewise affirmed. Balter v. Pan American Bank, 383 So 2d 256 (Fla. 3rd DCA 1980). The verdict in favor of Balter and against other defendants was reversed. Balter v. Ethyl Corp., 386 So 2d 1226 (Fla 3rd DCA 1980).

A Herald writer, Michael Putney, learned of the trial, had visions of a "David and Goliath" story and set out to write the article which is the subject of this action. Although the article only referred to Frank three times, it did so in a totally defamatory manner.

As noted by the Third District below, without consulting Frank, the Herald writer stated as absolute fact that a certain loan, which was necessary to the reorganization, was not obtained because Frank allegedly did not prepare the loan papers in proper form or in a timely manner — that is, that Frank committed malpractice. In fact, the evidence at the trial of this case established that the loan was denied for reasons unrelated to Frank and that the statements about Frank were false and the result of the writer's one-sided, biased presentation.

Indeed, the evidence overwhelmingly established the fault of the Herald. The Herald writer ignored numerous "red flags flying"* consisting of the prior jury verdict, the admitted prejudice of his main source, Balter, the admitted prejudice of Balter's attorney and his express knowledge of Frank's denials. The Herald writer never contacted anyone to get Frank's side of the story, ignored critical documents and testimony in the court file and considered only one side of the testimony. He violated the Herald's own Stylebook as well as the fundamental standards of journalism.

When Frank asked for a retraction, the Herald replied by falsely stating that the article was based on the trial transcript which showed that the article was true. At the trial of this case, it was established that the Balter transcript had not been typed up when the retraction was refused. Following the Herald's refusal to retract, Frank filed this action.

The Jury Instruction

When Putney prepared the article in question he had reviewed the Balter

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*Cape Publications, Inc. v. Adams, 336 So 2d 1197, 1200 (Fla. 4th DCA 1976)

verdict. He had also reviewed the Balter jury instructions. In the article, Putney stated that, in the Balter malpractice trial, Frank had been found not guilty. And, as noted by the Third District below, the verdict itself was admitted without objection.

The Herald sought to call the Balter jurors as witnesses.* Although Putney had not consulted any of them in writing the article, the Herald wanted the Balter jurors to testify that they made a mistake and that they really meant to find Frank guilty. When that request was denied, the Herald then requested the court to instruct the jury that the verdict did "not mean the statements in the article... [were] false". Frank objected on the grounds that such an instruction would be a comment on the evidence, misleading and that the verdict was at least relevant proof on the questions of the Herald's publishing fault as to both liability and punitive damages. After argument, the trial court gave a modified, more neutral instruction.

In a complete surprise at trial, since it had not been revealed in any of the extensive pretrial testimony, Putney testified that when the retraction request was received, he contacted the husband of the jury forewoman. Over Frank's objection, Putney was allowed to testify that the husband told him that his wife said the article was accurate. In this backdoor fashion, the Herald was able to evade the trial court's ruling.

The Decision Below

The Herald accuses the Third District below of failing to conduct an independent review of the record. In its opinion, the Third District specifically stated that its decision was based on "our review of the record". Based on that review, the Third District found that the jury properly concluded that the statements about Frank were false and were negligently published. The Third District also found that there was no legal support for the Herald's complaint about the jury instruction.

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* The husband of the Balter jury forewoman worked for the Herald.

The Herald then requested that the Third District certify this case as passing on a question of great public importance. That request was denied.

ARGUMENT

I.

THE DECISION BELOW AFFIRMING LIABILITY IS NOT IN DIRECT CONFLICT WITH ANY QUALIFIED PRIVILEGE DECISION OF THIS COURT

The Herald contends that the decision below, to the extent that it sanctions recovery for "negligent speech", is in direct conflict with three prior decisions of this Court which recognize a qualified common law privilege that applies here and which was not followed by the District Court below. This position was never raised below and makes no logical sense.

The negligent fault concept for private figure libel liability, which has been overwhelmingly adopted throughout the United States following the Supreme Court decision in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), deals solely with the standard of the publishers liability. The qualified privilege concept is an entirely different matter. It is an affirmative defense which must be plead and proved by the defendant — neither of which occurred here.

It is only conflicts of decisions that supply jurisdiction to invoke certiorari review. The subject of a qualified common law privilege is not mentioned or in any way decided below. As a matter of fact, it was not even raised as a point on appeal by the Herald. Thus, there is no decisional conflict for certiorari jurisdiction. Furthermore, when the cases cited by the Herald are examined, it is clear that there is no conflict in even the results of the decision below and the cases relied on by the Herald. The result below is in complete harmony with the qualified privilege law as previously established by this Court.

The Herald cites first this Court's initial opinion in Firestone v. Time, Inc., 271 So 2d 745 (Fla. 1972).

That decision dealt with whether, because of her involvement in a highly publicized divorce, Mrs. Firestone was involved in a matter of "public or general concern" so that Time could not be held liable for negligently reporting the result of the divorce.* This Court there held that while the Firestone divorce was newsworthy, it was not a matter of real public or general concern. Id. at 752. This Court further noted that neither position nor fame would be allowed to subject private affairs to unbridled public scrutiny in the news media. Id. at 752. Mrs. Firestone's common law liable action thus remained intact. More important, no decisional conflict exists between that decision and the decision below.

This Court's second Firestone decision makes it even clearer that no conflict exists. In the second decision, this Court was reviewing a final judgment that had been subsequently rendered in Mrs. Firestone's favor. Firestone v. Time, Inc., 305 So 2d 172 (1974). There this Court reviewed the evidence of fault and affirmed the verdict on a showing of "erroneous reporting" amounting to "journalistic negligence". Id. at 178. This Court also noted, referring to its first Firestone decision, that judicial proceedings are qualifiedly privileged only if fair, impartial and accurate in regard to all material matters. Id. at 177. The holding in this Court's opinion in Abram v. Odham, 89 So 2d 334 (Fla. 1956) is to the same effect — a communication loses its qualifiedly privileged character if it is false. Id. at 336.

Here the publication has been found to be inaccurate and false. Therefore, the Herald had no privilege to defame Frank and, more important to this

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* At that time in the evolution of libel law, the United States Supreme Court had established that even for private figures, if the published event involved a matter of public or general concern the publisher could not be held liable for a negligently false publication, only for one published with actual malice. Rosenbloom v. Metromedia, 403 U.S. 29 (1971). Subsequently, the United States Supreme Court decided that such a test imposed too high a standard for private figures and it therefore receded from Rosenbloom. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

proceeding, the decision below affirming liability is not in conflict with prior decisions of this Court on the subject of qualified privileges.

The Herald also claims direct conflict with this Court's decision in Gibson v. Maloney, 231 So 2d 823 (Fla. 1970). The facts and decision in Gibson are in no way similar to this case. There, the plaintiff had by choice made himself a public figure by injecting himself into the public scene by instigating an editorial campaign against the defendants. This Court held that the defendants therefore had the right to make fair comment on plaintiff's activities.

Frank did not inject himself into any public issue. He did not create any public issue. He was simply a private attorney representing a client and who was sued by his client. And, there was no fair comment by the Herald — only a false, defamatory publication. As a result, there is nothing in the decision below that conflicts with this Court's decision in Gibson.

The case does, however, vividly illustrate the importance of a negligence standard of liability for private figures as described by this Court in Firestone, as adopted by the Third District Court in Miami Herald Publishing Co. v Ane, 423 So 2d 376 (Fla. 3rd DCA 1982), and as followed here below. Under the Herald's standards it would be free to carelessly defame private figures, even if in violation of its own standards and all other journalistic standards. But as has been repeatedly recognized:

> there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust, and wide-open debate on public issues. New York Times Co. v. Sullivan, 376 U.S. at 270 (1964) (Emphasis added).

See also: Gertz v. Robert Welch, Inc., supra. And, as the United States Supreme Court again noted in Firestone:

> [I]naccurate and defamatory reports of facts [are] matters deserving no First Amendment protection. Time, Inc. v. Firestone, 424 U.S. 451, 457 (1976).

Freedom of the press does not mean freedom to do to private figures as the Herald likes. Freedom without the checks of a negligence standard would be freedom for only the privileged few and would lead to abuse for the remainder.

II

THE DECISION BELOW HOLDING THAT THE TRIAL COURT DID NOT ERR IN THE MANNER IN WHICH IT INSTRUCTED THE JURY IS NOT IN CONFLICT WITH ANY DECISION OF THIS COURT

The Herald argues that the decision below, holding that the trial court did not err in the manner in which it instructed the jury, is in conflict with prior decisions of this Court because (1) the Third District allegedly did not assess the likelihood of confusion and (2) the trial court did not allow the Balter jurors to "explain" their verdict. Neither argument establishes any jurisdictional conflict.

On its first contention, the Herald cites only cases stating general principles for appellate review of jury instructions. There is nothing in the decision below that in any way conflicts with any of those decisions. The alleged failure of the Third District to assess the likelihood of confusion is nothing more than a figment of the mind of Herald's counsel. In fact, the opinion reflects just the contrary. Even were the opinion silent on the point, the presumption would be that the Third District correctly discharged its obligations in reaching its decision.

In an effort to bolster this point of its petition, the Herald argues, relying on the dissent below, that on the merits, the trial court committed prejudicial error. That argument is in direct violation of Florida Appellate Rule 9.120. As stated in the Committee Notes:

> It is not appropriate to argue the merits of the substantive issues involved in the case....

At this level, the focus is supposed to be on the decision of the District Court, not the merits of the trial court's actions. And, in any event, the Herald's reliance on the dissent below is misplaced. The verdict was very relevant on the

issue of liability and punitive damages, a point overlooked by the dissenter. And, as noted by the majority below, there was little support in the record for the dissent's position.

This entire point is somewhat incredible in view of the fact that it was the Herald who requested the jury instruction in the first place. As proposed by the Herald, the instruction was clearly erroneous and misleading. By tying the verdict and article together in their proposal, the Herald was trying to slip in a hidden message that since the prior verdict did not mean the article was false, it could mean that Frank did not do what he was supposed to do and that Frank did cause Balter to lose his business and the article was therefore true. At best that was confusing and probably worse. One rational interpretation of the Balter verdict is that the jury did find that Frank had not committed malpractice and had not caused Balter to lose his business. The Herald has no license to choose from several possible interpretations of a court decision the one most damning to the plaintiff. If they do so, they must be able to prove it was correct. Time, Inc. v. Firestone, 424 U.S. 451, 459 (1976).

Furthermore, that verdict was very relevant on the issue of the Herald's fault. It was one of many "red flags flying" when the article was written. Even had the Herald objected, it would have been properly admitted since it was extremely relevant. And, the trial court was correct in not giving the one-sided, unfair instruction requested by the Herald.

The Herald also complains that, since the verdict below was a general verdict, it cannot be concluded that the jury was not confused. This again is not a proper argument to present on a petition for certiorari since it goes to the merits and does not demonstrate any decisional conflict. Even more important, however, is the fact that the Herald did not request any interrogatory verdict and agreed to a general verdict. It is therefore in no position to complain about a general verdict.

The Herald's second contention concerning the disallowance of testimony from the Balter jurors again violates the requirements of Florida Appellate Rule 9.120, constitutes a non-sequiter and is also legally incorrect. Whether the jurors testified or not has no bearing on the merits of the jury instruction. From the beginning, the Herald's position has been that it was either entitled to an instruction on the verdict or the juror testimony. One is not an alternative for the other. Each had to stand or fall on its own merits. Thus, the fact that the trial court disallowed the juror's testimony does not make the jury instruction either right or wrong. The Herald's approach is simply wrong.

Moreover, the Herald's argument that the trial court erred in not allowing the juror testimony is legally incorrect. The Herald did not want the jurors to "explain" their verdict. It wanted the jurors to "explain away" the verdict. It wanted the jurors to testify four years later that they made a mistake — that Frank really was guilty of malpractice. No case has ever allowed that. The trial court was correct and there is no conflict.

III

THE DECISION BELOW DID NOT CONFLICT WITH DECISIONS REQUIRING AN INDEPENDENT REVIEW OF THE RECORD

As the premise for its last point, the Herald accuses the Third District below of failing to conduct an independent review of the record. This is most perplexing. The decision below expressly states that it is based on "our review of the record". Who does the Herald think reviewed the record? The Herald is not entitled to a de novo retrial of the case. It got the review it was entitled to.

The "independent review" cases simply hold that the appellate court must independently satisfy itself that the record evidence is sufficient to support the verdict — it cannot rely upon summaries of the evidence from a lower court. There is no decision that holds in libel cases the standard of review for the sufficiency of

the evidence is any different from other civil litigation. Indeed, the principle case relied on by the Herald, Cape Publications, Inc. v. Adams, 336 So 2d 1197 (Fla. 4th DCA 1976), held that the "credible evidence" supported the verdict. The "independent review" cases simply require that such a review will be conducted at each level of the appellate review, independent of what was done before.

Here, there was no lower court statement of the facts which anyone was urging on the district court. Here, the district court did review the record to see if there was evidence to support the jury's verdict. That was all that is required and therefore there is no conflict.

CONCLUSION

For the reasons stated, the Respondent respectfully submits that the petition should be denied.

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By _____
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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 19th day of March, 1984, to Sanford L. Bohrer of Thomson Zeder Bohrer Werth Adorno & Razook, 1000 Southeast Bank Building, Miami, Florida 33131, Attorneys for Petitioner, and Richard J. Ovelmen, General Counsel, The Miami Herald Publishing Company, One Herald Plaza, Miami, Florida 33101.

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