IN THE SUPREME COURT OF FLORIDA

Case No. 64,904

THE MIAMI HERALD PUBLISHING COMPANY,

Petitioner,

vs.

ROBERT R. FRANK,

Respondent.

Discretionary Review of a Decision
of The Third District Court of Appeal of Florida

JURISDICTIONAL BRIEF OF PETITIONER THE MIAMI HERALD PUBLISHING COMPANY

THOMSON ZEDER BOHRER WERTH
ADORNO & RAZOOK
Sanford L. Bohrer
1000 Southeast Bank Building
Miami, Florida 33131
(305) 350-1100

RICHARD J. OVELMEN
General Counsel
The Miami Herald Publishing Company
One Herald Plaza
Miami, Florida 33101
(305) 350-2204

Attorneys for Petitioner
The Miami Herald Publishing Company

TABLE OF CONTENTS

TABLE OF CITATIONS

PRELIMINARY STATEMENT

This Court may constitutionally exercise its discretionary jurisdiction where a decision of a district court of appeal directly conflicts with a decision of this Court or of another court of appeal. Conflict exists with the decision below on three issues:

First, this case was tried on a negligence instruction even though the news report at issue involved a matter of "real public or general concern." The decision of the majority below affirming this instruction conflicts with prior decisions of this Court requiring a higher standard of fault. The District Court's affirmance was based on Miami Herald Publishing Co. v. Ane ("Ane"), 423 So.2d 376 (Fla. 3d DCA 1982) (crime report), and Tribune Co. v. Levin ("Levin"), 426 So.2d 45 (Fla. 2d DCA 1982) (bankruptcy report), both of which were certified to this Court on just this issue and are pending decision on the merits. If this Court reverses these cases, the decision below also must be reversed.

Second, the majority below held, over vigorous dissent, that the trial court's admittedly unclear instruction to the jury did not constitute reversible error. This is in direct conflict with decisions of this Court and of other district courts of appeal holding that a misleading jury instruction constitutes reversible error.

Third, the majority opinion explicitly held that only a very deferential review of the trial record was appropriate. This holding is in direct conflict with decisions of other

district courts of appeal (as well as numerous controlling decisions of the United States Supreme Court) requiring a searching and independent review of the record in libel actions because freedom of expression is at stake.

Because these holdings so seriously undermine the protections traditionally guaranteed speech in Florida, this Court should exercise its discretionary jurisdiction.

STATEMENT OF THE CASE AND FACTS

The Article

On May 21, 1978, The Miami Herald published an article entitled "The Saga of David and Ethyl" by Michael Putney in Tropic, its Sunday magazine (the "Article"). The Article was about David Balter, whose company, Pac Craft, went bankrupt, and reported in detail Balter's suit against Ethyl Corporation for its alleged conspiracy to take over his company. The lengthy (about 4000 words) article mentions Respondent Robert Frank, Balter's lawyer during the bankruptcy proceedings, only three times. It reports Balter sued Frank for malpractice, it identifies the actions of Frank which gave rise to the suit, and it notes -- twice -- the general jury verdict in Frank's favor. All references to Frank in the Article are to his role as an actor in a matter of public or general concern -- the public judicial proceedings relating to the bankruptcy and takeover of Pac Craft and subsequent suit for damages.

Frank's Claims

On June 30, 1978, Frank sued The Miami Herald alleging that the following references to him which appeared in the Article were false and defamatory:

> It [the hiring of Frank] was a decision Balter was to rue.
>
> "Nobody would have been in [Bankruptcy] Court if [Frank] had done his job."
>
> * * *
>
> Frank failed to draw up the necessary loan document before the close of the business day.
>
> Frank also failed to get the clerk of the court's seal.

Although Frank initially sought damages for all four statements, he later abandoned his claim regarding the first two. Frank also waived his claim of injury to reputation, and sought damages solely for pain and suffering and harm to his law practice.

The Jury Instructions

At trial, Frank argued that the general jury verdict in his favor on the malpractice claim against him must mean the statements regarding his specific actions in the bankruptcy proceedings were false. The Miami Herald argued in opposition that the general verdict had no specific meaning and that in any event the verdict could not be regarded as evidence the statements were false in this action between The Miami Herald and Frank. The Herald further offered to call as witnesses the jurors who had rendered the malpractice verdict because they were prepared to swear the statements concerning Frank in the Article were true. Over the objection of The

Miami Herald, the trial court admitted the verdict into evidence and excluded the testimony of the jurors.

The Miami Herald, recognizing the potentially devastating effect of the improper use of the jury's verdict in the Balter trial, requested the following special instructions to the jury:

> The parties agree that David Balter sued Plaintiff Robert R. Frank for legal malpractice. The parties also agree that the jury in Balter's suit returned a verdict finding Mr. Frank "not guilty" of legal malpractice. So that there will be no confusion, this is to advise you the jury verdict for Mr. Frank against Mr. Balter does not mean the statements in the article on which this suit is based are false. Moreover, the article reported both the malpractice charge and the verdict.

(emphasis added). The trial court instead instructed the jury that they could find the jury verdict in the Balter trial meant the statements in the Article were false:

> You are advised that such a verdict in and of itself does not mean that the statements in the article on which this case is based are necessarily false. However, you may consider the verdict, in that case, along with the other evidence in this case in arriving at your verdict in this case.

(emphasis added).

Also over The Herald's objection, the court instructed the jury that Frank need prove only negligent publication of a defamatory falsehood to recover.

The Decision Below

On appeal, the Third District, in a split per curiam decision, affirmed the jury's verdict and the rulings of the trial court discussed above. Miami Herald Publishing Co. v. Frank, 442 So.2d 982 (Fla. 3d DCA 1983). It is with respect to these rulings that The Miami Herald now invokes the discretionary jurisdiction of this Court.

ARGUMENT

I. THE DECISION BELOW DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT RECOGNIZING A QUALIFIED COMMON LAW PRIVILEGE FOR STATEMENTS REGARDING PRIVATE FIGURES INVOLVED IN MATTERS OF REAL PUBLIC OR GENERAL CONCERN.

As has been thoroughly argued to this Court, see e.g., The Miami Herald's briefs in Ane, the adoption of a negligence standard for libel suits predicated on reports of matters of "real public or general concern" is in conflict with this Court's opinions in Firestone v. Time, Inc., 271 So.2d 745 (Fla. 1972), and Gibson v. Maloney, 231 So.2d 823 (Fla. 1970). Moreover, it is in conflict with the long line of Florida decisions which have afforded news reports of matters of public concern the heightened protection provided by common law qualified privilege. See, e.g., Abram v. Odham, 89 So.2d 334 (Fla. 1956).

In allowing Frank to recover for "negligent speech", the Third District relied exclusively on Levin and Ane. Both Levin and Ane were certified by the district courts to this Court for its determination of whether negligence or some higher standard of fault is correct in libel actions brought by private figures involved in matters of general public concern. Argued January 10, 1984, both cases await disposition.

This Court has already recognized the importance of the fault standard issue and the need for a definitive ruling on it from this, the state's highest court. The Court should exercise its discretionary jurisdiction, as it did in Ane and Levin, to resolve the issue in this case.

II. THE DECISION BELOW DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT HOLDING THAT MISLEADING JURY INSTRUCTIONS AND ERRONEOUS EVIDENTIARY RULINGS CONSTITUTE REVERSIBLE ERROR.

Instructions which tend to "confuse rather than enlighten" a jury are cause for reversal if they "may have misled the jury and caused them to arrive at a conclusion that otherwise they would not have reached." Allstate Insurance Co. v. Vanater, 297 So.2d 293, 295 (Fla. 1974). To warrant a reversal, it is not necessary that the court be satisfied that the jury was in fact misled, it is only necessary that the instructions appear to have been "reasonably calculated to confuse or mislead." Florida Power & Light Co. v. McCollum, 140 So.2d 569, 569 (Fla. 1962). The misleading character of the challenged instructions must be assessed in light of "all the other instructions given, and the pleadings and evidence in the case." Yacker v. Teitch, 330 So.2d 828, 830 (Fla. 3d DCA 1976).

Thus, in order to decide whether the trial court's instruction concerning the malpractice verdict was sufficiently misleading to warrant reversal, the court below was required to determine how likely the instruction was to confuse the jury given the record in the case. But the Third District conducted no such review. In express conflict with the aforementioned decisions of this Court, the Third District held only that despite the "somewhat unclear" instruction given the jury concerning the legal effect of the malpractice verdict, no reversal was warranted. 442 So.2d at 984. The court failed to consider the circumstances that rendered the

instruction particularly prejudicial. First, the instruction was completely erroneous. As the dissent below noted:

> the general verdict in the prior malpractice action is not relevant to or probative of the alleged falsity of the statements. The general malpractice verdict was probative only of the issue of "whether Robert Frank was negligent in the performance of his contractual relationship with David Balter and [whether] such negligence was a legal cause of damage to David Balter", a fact that was reported in the Herald article and is not at issue here and, therefore, is not relevant.

442 So.2d at 984 (Jorgenson, J., dissenting). The conclusions that may be drawn from a general jury verdict are very limited and do not include the conclusion the trial court's instruction suggested. See, e.g., City of Anna Maria v. Miller, 91 So.2d 333, 334 (Fla. 1956) (collateral estoppel effect of verdict limited to findings actually rendered). Interrogatory verdicts exist precisely to provide the clear picture of jury determinations of specific issues not provided by general verdicts.

Second, the trial court improperly refused to allow the jurors who rendered the malpractice verdict to explain that their verdict did not mean Frank had not done what the Article reported. See State v. Ramirez, 73 So.2d 218 (Fla. 1954) (juror testimony is proper to explain verdict, but not to impeach it). In disallowing the jurors' testimony, the trial court effectively barred the only evidence that could have rebutted the simple existence of the verdict, an action which this Court has held in and of itself to constitute reversible error. McArthur v. Cook, 99 So.2d 565, 567 (Fla. 1957). Thus, in holding that the mistaken instruction and evidentiary errors of the trial court did not constitute

reversible error, the Third District acted in direct and express conflict with decisions of this and other Florida courts which hold reversal proper on the basis of instructions alone, Allstate, supra, on the basis of evidentiary rulings alone, McArthur, and on the basis of the "compounding effect" of multiple errors, each of which may not alone be enough to warrant reversal, but the end result of which is "to invidiously infect the verdict." Allett v. Hill, 422 So.2d 1047, 1050 (Fla. 4th DCA 1982).

III. THE DECISION BELOW DIRECTLY CONFLICTS WITH DECISIONS OF OTHER DISTRICT COURTS OF APPEAL HOLDING THAT APPELLATE COURTS MUST CONDUCT AN INDEPENDENT REVIEW OF THE ENTIRE RECORD WHEN QUESTIONS OF CONSTITUTIONAL FACT ARE RAISED.

When the United States Supreme Court first announced the constitutional fault requirement in libel in New York Times v. Sullivan, 376 U.S. 254 (1964), it also announced both an evidentiary standard of proof and an appellate standard of review designed to assure that the fault standard would be properly applied. The Court stated:

> In cases where ["the line between speech unconditionally guaranteed and speech which may legitimately be regulated"] must be drawn, the rule is that we "examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect." We must "make an independent examination of the whole record," so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression. (citations omitted)

Id. at 285. Since the Court's ruling in New York Times v. Sullivan, supra, reviewing courts have consistently engaged

in an independent review of the factfinder's finding of fault in libel cases. This rule is consistent with the general constitutional doctrine requiring independent appellate review of "constitutional facts," particularly where a free speech claim is involved. Jacobellis v. Ohio, 378 U.S. 184, 190 (1964) (obscenity); Pennekamp v. Florida, 328 U.S. 331 (1946) (punishment of expression by contempt); Niemotko v. Maryland, 340 U.S. 268 (1951) (disorderly conduct); Edwards v. South Carolina, 372 U.S. 229, 235 (1963) (breach of the peace).

Florida courts have adopted the federal constitutional standard of appellate review. They have applied it in libel actions, see, e.g., Cape Publications, Inc. v. Adams, 336 So.2d 1197, 1199 (Fla. 4th DCA 1976); Gibson v. Maloney, 263 So.2d 632, 636 (Fla. 1st DCA 1972), and in other cases raising constitutional issues, see e.g., Eagle v. State, 249 So.2d 460, 465 (Fla. 1st DCA 1971). As the First District explicitly recognized, "a matter of constitutional fact" "must be decided through an examination of the entire record." Id.

The Third District however, did not "reevaluate the evidence" submitted to the jury nor did it examine the record to determine whether the fault determination was supported by "clear and convincing proof." Instead, in

direct and express conflict with an uninterrupted line of decisions, the court simply deferred to the trial court's interpretation of the record and required only that there be "competent evidence" to support the jury's verdict.

CONCLUSION

For these reasons, this Court should exercise its discretionary jurisdiction and hear and determine this case on the merits.

THOMSON ZEDER BOHRER WERTH
ADORNO & RAZOOK

Sanford L. Bohrer
1000 Southeast Bank Building
Miami, Florida 33131
(305) 350-1100

Richard J. Ovelmen
General Counsel
The Miami Herald Publishing Company
One Herald Plaza
Miami, Florida 33101
(305) 350-2204

Attorneys for Petitioner
The Miami Herald Publishing Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Jurisdictional Brief of Petitioner The Miami Herald Publishing Company was served by mail this 6th day of March, 1984 upon:

Mr. Larry S. Stewart
Floyd, Pearson, Stewart, Richman,
Greer and Weil, P.A.
25th Floor
One Biscayne Tower
Miami, Florida 33131

888-F