IN THE SUPREME COURT
OF FLORIDA

Case No. 64,904

THE MIAMI HERALD PUBLISHING COMPANY,
a division of Knight-Ridder Newspapers, Inc.,
Petitioner,

vs.

ROBERT R. FRANK,
Respondent.

DISCRETIONARY REVIEW OF A DECISION
OF THE THIRD DISTRICT COURT OF APPEAL
OF FLORIDA

REPLY BRIEF OF PETITIONER THE MIAMI HERALD PUBLISHING COMPANY

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases:

Other Authority:

INTRODUCTORY STATEMENT

In his Third District Answer Brief, Frank treated this case as an ordinary tort case, and urged the court to base its decision on facts one would "find" viewing the record in the "light most favorable to the prevailing party." The Third District agreed, and merely looked for any evidence to affirm the jury's conclusion, holding, "if there is any competent evidence to support a verdict, that verdict must be sustained regardless of the District Court's opinion as to its appropriateness." *Miami Herald Publishing Co. v. Frank,* 442 So.2d 982, 983 (Fla. 3d DCA 1983). As is apparent from *Bose Corp. v. Consumers Union of United States, Inc.,* ..... U.S. ....., 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984) and *Miami Herald Publishing Co. v. Ane,* ..... So.2d ....., 9 Fla.L.Wkly. 366 (Fla. Sept. 13, 1984), that holding was error, because "the simple fact is that First Amendment questions of constitutional fact compel this Court's *de novo* review . . . to assure [itself]" that minimum constitutional thresholds have been crossed. *See* 80 L.Ed.2d at 522, n.27.

Bose was decided *months before* Frank's Answer Brief was filed in this Court. Nevertheless, Frank merely restates his "most favorable facts" as asserted below. However, in doing so, Frank avoids explaining how the facts compel an independent appellate conclusion that fault and falsity were proven and persists in simply trying to show at least one competent ground to uphold the verdict, which is insufficient under *Bose* and is fatal to his case. Consequently, as he has done at every stage of this case, Frank ignores his own testimony—in *Balter v. Frank* and the prior bankruptcy proceeding—and never explains why it was negligent for Putney to have relied upon (i) Frank's representations in the 1969 bankruptcy

pleadings, (ii) Frank's affidavits to the bankruptcy court, (iii) Frank's open court testimony, (iv) Frank's federal district court brief, (v) Frank's examination of bank officer Boyd in a 1970 deposition, (vi) 1970 and 1972 depositions of bankruptcy court monitor Hughes, and (vii) Frank's 1970 and 1978 deposition testimony. Except for Frank's memory lapses, those transcripts and documents show attorney Frank responsible for timely and properly preparing the loan document, and that he failed to do so in time for his client to meet the bankruptcy court's funding deadline. Frank also never explains how Putney's failure to interview him would have uncovered new facts, because Frank had sworn less than two months before the Article was published that he could not remember the events of August 5 and 6, 1969, the dates of the events referred to in the Statements, a memory problem which continued until the trial of this case.

Frank avoids these facts because he cannot explain them. He would either have had to lie in this case to contradict his earlier testimony, or admit he had lied in that testimony. During 1969-70, just after the events reported in the Article occurred, Frank

(i) told the bankruptcy court on August 4, 1969 that he and his client had arranged the loan with the bank, and was ordered to deposit the money by August 5 (Tr. 778-93);

(ii) swore to the court that he spent 2-1/2 hours on "8/5/69" and 5 hours on "8/6/69" in conference with "Bank-David Hughes-Dave Balter" (Def. Ex. CC);

(iii) swore in open court in 1969 that *he* had obtained the loan commitment and spoke with

bank officer Boyd and court monitor Hughes (Def. Ex. DD at 18-19);

(iv) told the federal district court in his attorney's fee brief that "negotiations with the bank that eventually provided the excess margin of capital to fund the final plan were carried on *solely by [Frank] and his efforts alone secured the loan*" (Def. Ex. X at 7) (emphasis added);

(v) took bank officer Boyd's deposition in 1970, where Boyd confirmed (without objection by by Frank) that Frank knew the bank's requirements, that Boyd told Frank about them, and that the bank would have funded, had it received the "sealed" loan document on August 6 (Def. Ex. BB); and

(vi) swore in 1970 he told court monitor Hughes the money to fund Balter's plan would "not be out there by 5:00 p.m. on August 6" (Tr. 985-86), which was corroborated by Hughes' sworn testimony in 1970 and 1972 that Frank called him and told him the deadline would not be met because Frank's photocopier had broken (Def. Ex. F at 20).

During the *Balter* trial (when Putney's interview of Frank would have occurred), Frank swore he could not remember whether these sworn statements were true. It was not until the trial of Frank's libel suit against the *Herald*, 12 years after the events took place and three years after the *Balter* trial, that his memory returned and he first (i) denied he spoke with bank officer Boyd before August 6, 1969 (Tr. 814), (ii) denied he had the conversation with court monitor Hughes (Tr. 817), (iii) denied any

knowledge of the bank's loan requirements (Tr. 819), and (iv) despite his responsibility for Pac Craft, denied he had a legal duty to know the bank's loan requirements (Def. Ex. LL at 230-34), a claim his own expert rejected (Tr. 364).

Instead of explaining himself, Frank recites a litany of "overwhelming evidence" of negligence, such as Putney "failing" to go to the courthouse to review the court file when he had already reviewed an identical copy in an attorney's office, and "failing" to interview Circuit Judge Knuck, whose only contact with the matter was presiding at the *Balter* trial. As was shown in the Initial Brief and will be shown below, Frank's case and the Third District's decision cannot survive independent appellate review.

ARGUMENT

I. INDEPENDENT APPELLATE REVIEW OF THE RECORD MANDATES REVERSAL OF THE JUDGMENT BELOW

A. Frank Misstates The Scope Of Appellate Review Required By Bose

Frank erroneously contends that the Third District's review of the record was sufficient under *Bose* because (i) *Bose* applies only in actual malice cases, and (ii) although it deferred to the jury's conclusions regarding fault and falsity, the Third District was "familiar" with the record. First, as this Court recognized in *Ane,* the independent review required by *Bose* must be conducted in this case. Second, there is simply no authority for saying the *Bose* requirement of "*de novo*" review of constitutional facts is satisfied because a court, "familiar" with the record, finds "any competent evidence to support a verdict." *See Frank*, 442 So.2d at 983.

As *Ane* recognized, *Bose* makes clear that the duty of independent appellate review applies in all cases where "the standard governing the decision . . . is provided by the Constitution", and is not limited to "public figure" cases in which "actual malice" is applied. 80 L.Ed.2d at 518. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), held that at a minimum the Constitution requires proof of falsity and fault by all libel plaintiffs. Since *Bose* makes clear that appellate courts must independently review the record to ensure all constitutional minimums are satisfied, compliance with the minimums imposed by *Gertz* must also be independently reviewed. *Accord* RESTATEMENT (SECOND) OF TORTS § 580B, Comment k.

Frank's contention that the Third District's review was sufficient is equally without merit. The question is not whether it was "familiar" with the record; it is whether it satisfied itself that constitutional minimums of protection have been respected. The Third District flatly refused "to re-evaluate the evidence and substitute its judgment for that of the jury . . . regardless of the District Court's opinion as to its appropriateness." 442 So.2d at 983 *quoting Helman v. Seaboard Coast Line Railway,* 349 So.2d 1187, 1189 (Fla. 1977). *Bose,* however, requires exactly the opposite, and states an appellate court "must make an independent examination of the whole record so as to assure [itself] that the judgment does not constitute a forbidden intrusion in the field of free expression." *Bose,* 80 L.Ed.2d at 522 *quoting New York Times v. Sullivan,* 376 U.S. 254, 285 (1964).

B. An Independent Appellate Review Of The Record Shows The Statements Reported The Truth

Frank asserts the record shows the Statements were false, but is forced to alter the Statements to do so (Ans. Br. at 7). The Statements report Frank did not timely prepare a loan document, and that when he did prepare it, he failed to get a court seal on it and the bank refused to make the loan because of the absence of the court seal. In essence, Frank claims these are false because (i) he prepared the loan document on time, (ii) no such seal existed, and (iii) the bank refused the loan for reasons unrelated to Frank.

First, Frank argues he timely prepared the loan document because it was filed with the bankruptcy court by 4:30 p.m. on August 6, 1969, the day Balter had to deposit money to fund the court's plan of arrangement.

But the Article reports that Balter missed his August 6 funding deadline because Frank did not prepare the loan document in time for Balter to obtain the funds. Whether Frank happened to *file* the loan document by 4:30 p.m. is of no consequence, because that filing was only the first of several steps for funding which had to be taken before 5:00 p.m. Thus, while Frank may have filed the loan document with the court in downtown Miami sometime before 4:30 p.m., he cannot explain how that left sufficient time (i) for Frank to deliver the document to Balter in Miami Beach, (ii) for Balter to drive from Miami Beach to the bank in Hialeah, present the documents, and obtain the loan, and (iii) for Balter to drive to court monitor Hughes and give him the money, all before the 5:00 p.m. deadline (*See* Br. at 11). In addition, the uncontradicted testimony in the *Balter* trial showed Frank called Hughes to say the money would not be there August 6 because Frank's photocopier was broken (Tr. 985-86).

Second, Frank's claim that no court seal existed is ludicrous. While the bankruptcy court did not have its own seal, it used the seal of the federal district court of which it was a part (Tr. 193), and Frank's own expert from the *Balter* trial testified in this case that not only did the seal exist, but that he had obtained it himself "many many times" (Tr. 366).

Third, Frank claims the Statements are false because the loan was refused for reasons unrelated to Frank. Specifically, he states the bank's loan committee had only approved the loan that day (August 6) and, according to a letter from a bank vice president two weeks later, had required three "impossible conditions" which "may have" prevented funding. The record showed the loan committee's August approval was in time to make the

loan, but bank president Boyd refused to fund because the loan document prepared by Frank was presented in a form unacceptable to Boyd, although Frank and Boyd had previously discussed the bank's terms, and Frank claimed sole responsibility for negotiating the loan (Tr. 1019; Def. Ex. CC, DD, X).

Moreover, the "impossible" conditions were not impossible at all, since (i) bankruptcy law does not prevent a bank from requiring a court monitor's signature (neither Frank nor his expert testified to the contrary at the *Balter* trial), (ii) Frank himself testified subordination was possible (Tr. 820), as did John Britton, a bankruptcy attorney called by Frank (Tr. 177), and (iii) bankruptcy law expressly empowers a court to retain jurisdiction over a debtor (*See* Br. at 34-35, n.8).[1]

The verdict cannot withstand independent appellate review, because Frank failed to show the Statements to be false.

C. Even Assuming Falsity, There Was No Negligence

Under a negligence standard, there must be a "but/for" causal relationship between the alleged falsity and the alleged negligence. *See, e.g., Beisel v. Lazenby,* 444

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1. To bolster his "impossibility" argument, Frank "embellishes" on the record. Thus, citing to Tr. 294, he contends that "Bankruptcy Judge Houston flatly testified [in the *Balter* trial] he would not have authorized [court monitor] Hughes to sign the certificate." (Ans. Br. 31). However, Frank has never seen fit to place this "significant" testimony in the record before this Court: the cited transcript page is no more than Frank's counsel's question at trial to reporter Putney, over objection, if Putney "was aware" that the bankruptcy judge "had testified he wasn't going to allow Hughes to sign the certificates" (Tr. 294). Frank also claims the Article "blames" Frank for Pac Craft's bankruptcy. The Article, however, only reports Frank as causing Balter to miss a funding deadline and makes clear that Balter's deadline subsequently was extended.

So.2d 953 (Fla. 1984). This means there must be sufficient evidence to conclude both the Statements were false and that the reporter "should have known better, given the information he had before him." *Miami Herald Publishing Co. v. Ane,* 423 So.2d 376, 390 (Fla. 3d DCA 1982). In this case, Frank cannot identify the information Putney had before him or could have had before him which would have prevented the alleged falsity. He never explains how Frank's own sworn testimony, and that of Hughes and Boyd, which supports the truth of the Statements, was other than the most reliable information available, especially since Frank himself, as of the 1978 *Balter* trial, could not remember the events of August 5 and 6, 1969. Instead, Frank relies on a laundry list of "negligent" acts, most of which border on the frivolous (*See* Br. at 25-28).

Frank lists numerous purported negligent acts, yet makes no attempt to show how any of them caused any falsity (*See* Ans. Br. at 29-30). Specifically, Frank

(i) complains Putney used a "David and Goliath" angle, yet never explains how the "angle", which placed Frank on the side of "David", resulted in an alleged falsity;

(ii) charges Putney with relying on testimony excluded from evidence in the *Balter* trial, yet never explains why that *sworn* testimony was unreliable for Putney's use in the Article;

(iii) argues that Putney relied on "biased" sources without seeking information from the other side, yet fails even to hypothesize what Putney would have learned had he consulted "unbiased" sources, and ignores Putney's reliance on Frank's, Boyd's and Hughes' sworn testimony;

(iv) contends Putney should have reviewed the "all important" August 19 letter from the bank's vice president, yet fails to explain why Putney was not entitled to rely upon the testimony of bank president Boyd who was the one who refused to make the loan on August 6, because he was not furnished with a "sealed" document;

(v) charges Putney "acted as a judge" and "departed from pure fact", but never explains how this "negligence" caused the Statements about Frank's acts during August 5 and 6 to be other than true;

(vi) complains Putney did not consult with Frank's witnesses, yet does not show that any such witnesses could testify that Frank *did* timely and properly prepare the loan document;

(vii) contends Putney ignored the bank's "practical" inability to loan the money on August 6 and the bank's desire to "get out" of the loan, but does not dispute the testimony of Boyd who said the reason for the bank's denial of the loan was because of the failure to furnish the loan document on time and in the form he and Frank negotiated;

(viii) charges Putney made unsupported assertions against Frank, yet never even suggests how Frank's own prior sworn testimony is insufficient "support";

(ix) contends Putney ignored Balter's confusion as to what type of seal was required, yet never disputes the bank required some type of certificate, which Frank never provided;

(x) complains Putney never informed the reader that he was reporting "conclusions", but again never shows how that was negligent;

(xi) contends Putney "admits he did not have all the facts since he didn't read Bankruptcy Judge Houston's testimony" or "contact Houston" despite no such admission existing in the record (*See* n.1, *supra*);

(xii) charges Putney negligently failed physically to go to the circuit courthouse to look at its file, but never explains how Putney's review of an attorney's identical copy was negligent (*See* Tr. 391); and

(xiii) charges Putney did not examine the bankruptcy court file, yet the record shows Putney *had* viewed Frank's pleadings and sworn submissions to the bankruptcy court where he admitted being responsible for the timely and proper preparation of the loan document, which responsibility he now denies.[2]

There is *no* evidence of negligence.

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2. For the balance of Frank's "evidence" of negligence, he again needs to "embellish". Thus, Frank contends Putney had "admitted" presenting only Balter's side of the story (*See* Ans. Br. 10-11, citing Tr. 389). The cited transcript page reads:

> Q. Did you put anything in about Mr. Frank's side of the story?
>
> A. Certainly did . . . I went on to say that Mr. Frank had been found not guilty of the charges that Mr. Balter had brought against him (Tr. 389).

Also, Putney's testimony flatly contradicted Frank's assertion that "Putney admitted that he understood . . . the jury found that the accusations [against Frank] in the lawsuit were without foundation" (Ans. Br. 11, citing Tr. 219). At page 218, Putney testified:

> Q. And to you [the not guilty verdict] meant that the accusations that were made against Bob Frank were without foundation, correct?
>
> A. No, that is not what I understood it to mean (Tr. 218).

II. THE TRIAL COURT'S ERRONEOUS JURY INSTRUCTION REGARDING THE BALTER VERDICT AND FAILURE TO PERMIT EXPLANATORY TESTIMONY FROM THE BALTER JURORS WAS REVERSIBLE ERROR

A. The Trial Court Erred In Instructing The Jury That It May Consider The Balter v. Frank Malpractice Verdict As Evidence Of Falsity Of The Statements

None of Frank's three "reasons" is grounds for approving the trial court's instruction to the jury regarding the *Balter* malpractice verdict. First, Frank contends the *Herald* did not preserve its objection. The *Herald,* however, made a pretrial motion for a special instruction, which was argued prior to trial (Tr. 19-35) and the trial court permitted further argument after the jury was selected so that the parties could make their appellate record (Tr. 35). As the Third District noted, "the record reflects [the Herald] preserved its objection to the jury charge concerning the [*Balter* malpractice] verdict." 442 So.2d at 984, n.3.

Second, apparently forgetting there is a record of proceedings below, Frank claims he never contended at trial that the *Balter* verdict was evidence of the Statements' falsity. The truth is Frank's trial counsel *shamelessly and repeatedly* used the verdict to argue just that, despite his actual knowledge that the *Balter* jurors believed the Statements were true.

Trial counsel for Frank referred to the malpractice "not guilty" verdict no less than fifteen times. For example, he told this jury during opening statement that:

> the Judge told [the *Balter*] jury . . . if [Frank] failed to do these things, that Mr. Balter . . . was entitled to a verdict against [Frank] . . . [The jury] heard all the evidence . . . and found Bob Frank not guilty.

(Tr. 71-72; *See also* Tr. 91). Moreover, during the trial, besides challenging Putney with the verdict five times (Tr. 218, 219, 227, 228, 232), Frank's counsel asked his expert to assume that the *Balter* jury was instructed in a way which would force the jury in this case to conclude that a verdict for Frank meant the Statements were false. Specifically, Frank's expert was asked to assume that the *Balter* jury

> was instructed that if Frank failed to do these things, . . . that the jury should return a verdict in favor of Balter, but on the other hand, if the jury found that *Frank did not fail to do these things, it should return a verdict in favor of Frank.*

(Tr. 637) (Emphasis added).

Finally, Frank quotes the Third District majority's statement that the challenged instruction was merely a "more neutral" version of that requested by the *Herald.* However, the trial court did not instruct the jury that the *Balter* general "not guilty" verdict *does not mean* the Statements were false, meaning the jury verdict cannot be relied on to establish falsity. Instead, it told the jury that the verdict "does not *necessarily* mean" the Statements were false, which improperly permitted the jury to find falsity from the verdict. The *Balter* jury verdict was not probative at all—either of fault or falsity—and the trial court's instruction misstated the law and misled the jury.

B. Once It Permitted The Jury To Consider The Balter v. Frank Malpractice Verdict As Evidence Of Falsity, The Trial Court Erred In Excluding Explanatory Testimony From The Balter Jurors

Having determined it was proper for the jurors to guess at what the *Balter* general verdict meant, and use that as a basis for their verdict here, the trial court should have admitted the testimony from the only persons who could conclusively say what the verdict meant: the *Balter* jurors. Frank contends the trial court's exclusion of testimony from the *Balter* jurors was not reversible error for three reasons: (i) no proffer was made, (ii) the *Herald* really sought to "avoid" the verdict, and (iii) it was harmless error. First, a proper proffer was made. Before trial, once it became evident that Frank would "go behind" the *Balter* jury verdict, the *Herald* attempted to place the *Balter* jurors' views into the record, but Frank successfully obtained an order which precluded the *Herald* from introducing the testimony (R. 1071). The *Herald* made all reasonable efforts to change this result, including an Emergency Petition for Common Law Certiorari to the Third District, and such were sufficient to preserve the issue.

Second, the *Herald* seeks not to "avoid" the verdict, but to explain its meaning. Throughout the proceedings, the *Herald* acknowledged the verdict's existence and had reported its result twice in the Article. It never sought to change the result. However, once Frank attributed an improper probative effect to the verdict, the *Herald* should have been permitted to introduce *explanatory* testimony. *See State v. Ramirez*, 73 So.2d 218 (Fla. 1954). Accordingly, while the jurors might not have had personal knowledge about the actual truth of the Statements,

they certainly were competent to testify that their verdict did not mean they believed Frank had acted other than as reported.

Finally, Frank suggests the *Herald* presented explanatory testimony through the "back door" by virtue of Putney's reference to the views of Mrs. Smith, the *Balter* jury foreperson, resulting in harmless error. The record compels a different conclusion. While the trial court admitted Putney's testimony of Mrs. Smith's belief in the truth of the Article, it instructed the jury specifically that Putney's conversation regarding Mrs. Smith's views:

> is not to be considered by you in any way on the issue of whether the article in question is true or false. Likewise, you are not to consider the contents of the conversation as approving any fact in issue on the question of accuracy of the article.

(Tr. 462).

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Third District Court of Appeal, with instructions to enter judgment for the *Herald.*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Petitioner The Miami Herald Publishing Company was served by mail this 22nd day of October, 1984 upon:

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