

IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA
CASE NO. 66,999
DCA CASE NO. AZ-83

JAMES R. BURNS,

Petitioner,

vs.

GCC BEVERAGES, INC., a Florida
corporation, d/b/a PEPSI-COLA
BOTTLERS OF JACKSONVILLE,

Respondent.

REPLY BRIEF OF PETITIONER

FILED

SID J. WHITE

JUL 18 1985

CLERK, SUPREME COURT

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PRELIMINARY STATEMENT

In this brief, the parties will generally be referred to as follows: Petitioner, James R. Burns, as James R. Burns, or Petitioner; Respondent, GCC Beverages, Inc., as GCC Beverages, Pepsi-Cola, Pepsi, or Respondent throughout the brief.

REPLY TO RESPONDENT'S STATEMENT OF THE FACTS

WHETHER THE FIRST DISTRICT COURT OF APPEAL'S ABBREVIATED SUMMARY IS THE SOLE RECORD BEFORE THE SUPREME COURT?

At page 6 of its Answer Brief, GCC Beverages states:

"Pursuant to Rule 9.210(c), Florida Rules of Appellate Procedure, GCC Beverages disagrees with all of that portion of Burns' Statement of the Case and Facts that discusses the 'facts' of the instant case. Burns goes into great detail in his presentation to cite to the record before the trial court to establish the factual predicate of the district court opinion under review. However, Burns' 'facts,' for the most part, lie outside the permissible record before this court and hence are improper. As stated in **Commerce National Bank in Lake Worth v. Safeco Insurance Co.**, 284 So.2d 205, 207 (Fla. 1973), '{w}hen facts and testimony are set forth in a majority opinion, they are assumed to be an accurate presentation upon which the judgment of the court is based.'"

Respondent's foregoing excerpt does not recognize that Petitioner's Statement of the Facts followed the dictates of Rule 9.210(b)(3), which requires the following in the initial brief:

"A statement of the case and of the facts, which shall include the nature of the case, the course of the proceedings, and the disposition in the lower tribunal. References to the appropriate pages of the record of transcript **shall** be made."

Petitioner has appealed from a summary judgment which never should have been entered since there are disputed facts. The synopsis set forth in the en banc opinion of the lower tribunal failed to address the disputed factual issues in the record. Petitioner properly cited to this Court facts based on the entire record. However, Respondent failed to respond to Petitioner's Statement of the Facts in the manner provided by Rule 9.210(c),

following pertinent language in that rule:

"Contents of Answer Brief. The answer brief shall be prepared in the same manner as the initial brief; provided that the statement of the case and of the facts shall be omitted unless there are areas of disagreement, which should be clearly specified."

According to the above rule, Respondent should clearly specify the areas of factual disagreement between the parties. James R. Burns stands by his Statement of the Facts since there is a basis in the record for every factual point proffered in his Initial Brief. The Respondent has yet to contradict Petitioner's version of the facts. Respondent's brief and the lower appellate tribunal have ignored the affidavit of Officer W. J. Stevenson, of the Jacksonville Sheriff's Office, that Marie Smith, Assistant Controller of Pepsi, reported to him that:

"{a} former employee of Pepsi-Cola, a white male approximately 6'3" and weighing 135 lbs. with sandy blonde hair and blue eyes whose name is James Robert Burns did accept cash payment for the delivery of soda drinks and did not turn in said payment to his employer, Pepsi-Cola Bottlers' Inc...."(R-11).

Even though James R. Burns has specifically referred to Officer Stevenson's affidavit in his initial brief, Respondent wants to sweep this affidavit - and its implications - under the rug. For if this affidavit is considered, it would mean that GCC Beverages' employees did not simply relay information concerning a suspected criminal offense to law enforcement authorities. This affidavit contradicts the Respondent's theory that its employees left it up to the authorities to conduct further investigation of the matter and to determine whether or not criminal charges should be filed. This affidavit provides the basis upon which to

should be filed. This affidavit provides the basis upon which to conclude that Respondent's employees maliciously and improperly provided misleading information to the authorities to procure the filing of criminal charges.

The record evidence relied on by James R. Burns in his initial brief indicates that Pepsi-Cola's customer was on a charge basis, Pepsi had reason to believe that the customer was delinquent in paying its account, that the customer made several misstatements of fact to Pepsi's agents about the status of this account, Pepsi's records indicated no evidence that James R. Burns was guilty of misappropriating its revenues, but Pepsi reported to the police that James R. Burns took the cash anyway. Because the facts on the probable cause issue are in dispute, a jury must determine whether Pepsi acted without probable cause. **Priest v. Groover**, 289 So.2d 767 (Fla. 2d DCA 1974); **Liabos v. Harman**, 215 So.2d 487 (Fla. 2d DCA 1968).

Even though the Respondent would like to rely only on the abbreviated summary of facts contained in the lower appellate court's decision, the **Commerce National Bank in Lake Worth** decision which Respondent cites correctly points out that the entire record is transmitted to the Supreme Court - after certiorari is granted. Respondent's suggestion that this Court ignore the record evidence not referred to in the lower court's opinion is erroneous. Even though a presumption of correctness attaches to an order of a trial court, the appellate court must draw every possible inference in favor of the party against whom a motion for summary judgment is made. **Wills v. Sears, Roebuck &**

Company, 351 So.2d 29, 32 (Fla. 1977)

PETITIONER'S REPLY TO RESPONDENT'S
ISSUE II AND ISSUE III

THIS COURT SHOULD REVIEW THE CERTIFIED QUESTION BECAUSE
IT IS OF GREAT PUBLIC IMPORTANCE OR NEW LAW WAS FORMULATED
BY THE LOWER APPELLATE COURT IN THE AREA OF MALICIOUS
PROSECUTION BASED UPON AN IMPROPER FOUNDATION.

At page 22 of its answer brief, Respondent states: "This court should deny jurisdiction of this matter and dismiss the petition for review because Burns appears to be attempting to 'bootstrap' a fifth review of the trial court's order in the guise of a review of a certified question." Contrary to Respondent's assertion, this Court should review the lower court's decision because the certified question is of great public importance. Otherwise, new law will be formulated in the area of malicious prosecution which is based on an improper foundation. The certified question submitted by the lower appellate court applies law from **Gallucci v. Milavic**, 100 So.2d 375 (Fla. 1958), a directed verdict case, to a summary judgment proceeding. This misapplication of law shifts the obligation of the parties herein. Therefore the Petitioner appeals (1) the conflict created by applying **Gallucci** to the standards set forth in **Holl v. Talcott**, 191 So.2d 40 (Fla. 1966), and, (2) because had the law of Florida concerning summary judgment been properly followed based on the entire record, the lower courts would have found material issues to be in dispute.

Respondent's complaint that James R. Burns should not have the privilege of a review by this Court is ironic since Respondent's first Motion for Summary Judgment was denied when the

trial judge found genuine issues of material fact. Nevertheless, GCC's second Motion for Summary Judgment was granted in one count while the second count mysteriously remained intact.

The First District Court of Appeal, realizing the potential magnitude of its decision in this case, certified the question herein as one of great public importance. A review of the lower appellate court's decision is necessary since the status of summary judgment law in the State of Florida as well as the law in malicious prosecution actions will be materially altered. If the lower court's decision stands, it will become necessary for others in James R. Burns' position to meet a burden of proof that is too harsh at the summary judgment stage - but that would not be too harsh at the directed verdict stage of civil litigation.

The many instances of disputed fact contained within the embryonic stage of this litigation are sufficient to have defeated Respondent's Motion for Summary Judgment. In contrast, the directed verdict standard enunciated in **Gallucci v. Milavic** would be appropriate after a more complete gestation of the Plaintiff's case - following the presentation of its case-in-chief at trial. If the lower appellate court's opinion remains intact, future plaintiffs in Petitioner's position will be required to present their case-in-chief at the summary judgment stage.

In this case, the only appropriate burden that Petitioner had at the second summary judgment hearing was to point out genuine issues of material fact. This was done, and the Motion

for Summary Judgment was properly denied the first time around. The Motion for Summary Judgment should have been denied subsequently. For the First District Court of Appeal to misapply the **Gallucci v. Milavic** standard in this summary judgment case, the First District Court of Appeal had to be a trier-of-fact, weigh the evidence, and ignore record evidence relied upon by the Petitioner.

Given the foregoing, it is no wonder that the Respondent - having moved to dispense with oral argument in such an important case - wishes to shy away from the Supreme Court's review of the complete factual record herein.

REPLY TO RESPONDENTS ISSUES I, IV AND V

THE LOWER COURT ERRED BY REQUIRING THE PETITIONER TO PROVE FRAUD OR OTHER CORRUPT MEANS IN RESPONSE TO A MOTION FOR SUMMARY JUDGMENT THUS CREATING AN OBVIOUS EXPRESS AND DIRECT CONFLICT.

It is obvious conflict was created when the First District Court of Appeal ruled against the Petitioner, James R. Burns, and certified the following question:

IN A SUIT FOR MALICIOUS PROSECUTION, DOES A PRESUMPTION OF THE EXISTENCE OF PROBABLE CAUSE ARISE FROM A MAGISTRATE'S FINDING OF PROBABLE CAUSE FOR AN ARREST WARRANT, THAT PRESUMPTION BEING CONCLUSIVE ABSENT PROOF OF FRAUD OR OTHER CORRUPT MEANS EMPLOYED BY THE PERSON INITIATING THE PROSECUTION?

With this question, the court created a conflict with **Holl v. Talcott**, 191 So.2d 40 (Fla. 1966) and the ruling set forth in **Gallucci v. Milavic**, 100 So.2d 375 (Fla. 1958).

The First District Court of Appeal erroneously ruled that the non-moving party, the Petitioner, had the equivalent burden of proof one has to have at the end of the presentation of their case in chief. This is an appropriate burden in response to a defendant's motion for a directed verdict.

Never before has the non-moving party had the burden of showing any more than the genuine issue of material fact in response to a Motion for Summary Judgment. **Holl v. Talcott** states that the party moving for summary judgment must conclusively show the "non-existence of a genuine issue of material fact." By applying **Gallucci v. Milavic**, the lower courts have shifted this burden of proof to the non-moving party (the Petitioner).

A careful reading of the Initial Brief of the Petitioner reveals that the First District Court of Appeal's opinion

conflicts with the law of summary judgment in Florida. This is because a person has been deprived an opportunity to advance his case to trial by a ruling which evolved from a directed verdict.

Respondent argues at page 15 of its answer brief that "the instant opinion conforms to **Gallucci** and applies the **Gallucci** rule in a manner wholly consistent with both the intent as well as the holding of that case. **Gallucci** provides that once a Plaintiff fails to prove absence of probable cause he loses his case. 100 So.2d at 378". Respondent has yet to cite an authority or a consistent case showing that the **Gallucci** holding applies to a summary judgment proceeding. This is the opportunity for this Court to address that issue since the First District Court's question presents confusion.

If **Gallucci** is applied to a summary judgment proceeding, then conflict exists. This is tantamount to saying that the law of summary judgment as it presently exists in the State of Florida does not apply in malicious prosecution cases.

Gallucci had the opportunity to (1) have a non adversarial probable cause hearing and then (2) have evidence presented at the trial of his civil complaint on malicious prosecution. James R. Burns has not had the opportunity to present any evidence at any hearing and the probable cause was presumed from the signing of an arrest warrant - not a hearing, adversarial or otherwise.

The record is overflowing with many inconsistencies concerning GCC Beverages commencement of James R. Burns' arrest and prosecution for theft. There are many instances showing that GCC Beverages employees knew at the time of this commencement that

the Petitioner was not guilty of theft, and the criminal complaint was based on other factors.

Only upon the Respondent's second Motion for Summary Judgment (wherein GCC Beverages relied on the deposition of the Respondent's employees whose testimony is inconsistent with the affidavit for arrest of James R. Burns and to their previous testimony adduced in the criminal depositions and of the criminal trial of the Petitioner a year and half earlier) did the trial judge grant the Motion for Summary Judgment.

GCC Beverages has yet to cite one case on appeal which stands for the proposition that the **Gallucci** rule has been upheld in a proceeding for summary judgment. Each and every case exhaustively analyzed by the Respondent in its Answer Brief in this area is consistently the result of a directed verdict appeal.

GCC then suggested that:

**"THIS COURT SHOULD DENY JURISDICTION
OF THIS MATTER AND DISMISS THE PETITION
FOR REVIEW BECAUSE THE CERTIFIED QUESTION
HAS ALREADY BEEN ANSWERED PREVIOUSLY BY
THIS COURT IN THE AFFIRMATIVE."**

The Respondent maintains that "after this Court announced the **Gallucci** rule in 1958 it had the opportunity on at least two subsequent occasions to discuss **Gallucci**. In both instances, this Court affirmed the rule that a committal order gives rise to a presumption of probable cause, which may be rebutted by proof that the complainant secured the order by fraud or other improper means." At page 32, GCC Beverages continues that "in **Rogers v. W. T. Grant Co.**, 341 So.2d 511 (Fla. 1976), a malicious

prosecution suit arising out of a Jacksonville case, this Court had a question certified to it by the First District as one of great public importance..... This Court then declined to consider the **Gallucci** rule (because it held the unique facts of the case were not governed by **Gallucci**). **Gallucci**, of course, remained good law." James R. Burns agrees entirely that **Gallucci** is good law but because of his unique facts and in this case, and being a summary judgment, **Gallucci** is not controlling. Wouldn't it seem reasonable that probable cause would become conclusive only after the plaintiff rests and not before? Why then does Respondent suggest that **Rogers v. W. T. Grant Co.** is law which would shield James R. Burns from the Supreme Court's review of the lower appellate court's certified question?

Then Respondent, at page 33 of its Answer Brief cites **Colonial Stores, Inc. v. Scarbrough**, 355 So.2d 1181 (Fla. 1978) for the proposition that this Court answered the certified question herein affirmatively. Respondent needs to read **Colonial Stores, Inc.** at page 1183, which states:

".....After the trial court's denial of petitioners' motion for a directed verdict with respect to both the false imprisonment and malicious prosecution counts the case went to the jury. The trial court instructed the jury that the filing of an information against respondent gave rise to a presumption of probable cause. The jury returned a general verdict in favor of respondent and a final judgment was entered by the court. Petitioner appealed to the District Court of Appeal, First District, arguing that the trial court erred in failing to direct a verdict in their favor with respect to the malicious prosecution count."

Respondent, Doyle Wayne Scarbrough, was the Plaintiff and

won at trial. The Petitioner, **Colonial Stores, Inc.**, appealed on the grounds that they were denied a directed verdict. In no way does this decision support an affirmative answer to the certified question presently before the Supreme Court at this juncture. Instead, **Colonial Stores, Inc.** supports the Petitioner's proposition that **Gallucci** doesn't apply to a malicious prosecution action prior to a motion for directed verdict. In **Colonial Stores, Inc.** the motion for directed verdict was denied even with the full application of the **Gallucci** rule. The Respondent is arguing that a case which the Supreme Court ruled in favor of the Plaintiff at the trial level (Respondent Scarbrough) is sufficient reason to refuse to review a misapplication of the burden in a summary judgment proceeding.

The Supreme Court should therefore answer the certified question in the negative to be consistent with the law of summary judgment and the seminal case of **Gallucci v. Milavic**.

CONCLUSION

The certified question raised by the First District Court of Appeal should be answered in the negative when applied to a motion for summary judgment. The First District Court of Appeal's opinion should be quashed and the summary judgment entered by the trial court should be reversed. Petitioner prays that this Honorable Court remand this cause for trial.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been furnished to Floyd L. Matthews, Jr., Esquire, and Jerry J. Waxman, Esquire, 1500 American Heritage Life Building, Jacksonville, Florida 32202, by U.S. Mail this 16th day of July, 1985.


Attorney