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IN THE FLORIDA SUPREME COURT

CASE NO. 77,555

ANTHONY STEVEN FRIDOVICH,)
)
Petitioner,)
)
v.)
)
EDWARD FRIDOVICH,)
)
Respondent.)

PETITIONER'S REPLY BRIEF

Respectfully Submitted,

Jeffrey D. Fisher
Florida Bar No. 326941
Counsel for petitioner
175 Bradley Place
Palm Beach, Florida 33480
(407) 659-5311

and

Scott Trell
Florida Bar No. 838799
Co-counsel for petitioner
1440 Amerifirst Building
Miami, Florida 33131
(305) 358-0050

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INTRODUCTION

Edward Fridovich's answer brief never explains why this court should allow him to bring a civil action for damages against those individuals who were responsible for bringing him to justice. Neither legal precedent nor logic supports respondent's assertion that he should be allowed to pursue a civil suit against petitioner and the other defendants below unless they can establish their actions were taken in good faith -- a factual issue to be resolved at trial. As petitioner emphasized in his initial brief, most, if not all, of the cases in this area of the law, arise once a criminal defendant has been acquitted. Application of an absolute privilege is particularly appropriate where, as here, a jury found the potential plaintiff guilty beyond a reasonable doubt, of killing his father.

I. The Court Should Apply The Absolute Privilege Doctrine To The Facts Of This Case

Respondent asserts that the brief district court decisions in Anderson v. Shands, 570 So.2d 1121 (Fla. 1st DCA 1990) and Ridge v. Rademacher, 402 So.2d 1312 (Fla. 3d DCA 1980) control this appeal. The fourth district did not agree. This court's precedent dictates otherwise.

In both Robertson v. Industrial Insurance Co., 75 So.2d 198 (Fla. 1954) and Ange v. State, 98 Fla. 538, 123 So. 916 (1929), this court applied an absolute privilege to statements made preliminary to a quasi-judicial and a judicial proceeding, respectively. Notwithstanding these decisions, respondent claims that Robertson and Ange are inapposite. Respondent's distinctions are illusory. Respondent's only answer to Robertson is that "the case did not address whether unsworn statements made to the police to induce an investigation are absolutely privileged." Respondent wholly fails to address the reasoning in Robertson -- the decision the fourth district found to be most similar to the present case. In fact, the Robertson rationale perfectly applies to bar Edward Fridovich's attempt to relitigate his criminal conviction.

The Robertson court refused to allow defamatory statements contained in a letter to the insurance commissioner requesting a hearing, to support a civil cause of action. Robertson rested on sound public policy considerations. The court protected persons bringing relevant facts to the attention of governmental agencies, from lawsuits brought by aggrieved

individuals. The court properly noted that to allow such suits would "result in a circuitry of action . . ." 75 So.2d at 200.

The respondent here seeks to relitigate the facts underlying his criminal conviction. The entire thrust of Robertson is to prohibit such attempts to ensnare citizens into defending lawsuits as a result of their civic activities. Ultimately, respondent's cursory treatment of Robertson reveals his fundamental misunderstanding of the issues presented by this appeal.

Likewise, respondent attempts in one sentence to distinguish Ange v. State. Respondent claims that Ange only involves "statements made in 'proceedings before a competent court or magistrate in the due course of law or the administration of justice . . .'." This contention ignores the facts of that case. At issue in Ange was whether statements made preliminary to obtaining a warrant were absolutely privileged. The court held that these statements, made before any proceedings were pending against the ultimate subject of the prosecution, were cloaked with an absolute privilege. Ange, given its facts, should control this appeal.

After respondent's underwhelming treatment of this court's decisions, one would expect him to mount a better defense of Anderson and Ridge, the two decided cases that support his position. Since the first district followed Ridge without any analysis, its precedential value is only as good as the third district's decisions on this issue. As will be seen below, the third district's cases do not uniformly support the Ridge holding.

It should be noted first that respondent is simply wrong when he asserts Ridge controls Buchanan because it was later decided. In Florida, only the district court, sitting en banc, can overrule one of its prior panel decisions. In re: Rule 9.331, 416 So.2d 1127 (Fla. 1982).

Nor is respondent's argument on the merits of Buchanan compelling. Respondent asserts that "the allegedly defamatory statements were made under oath to a grand jury." Respondent's purported distinction might have substance if the defendants in Buchanan were the witnesses before the grand jury. The Miami Herald, and the reporter who allegedly procured the false testimony, never appeared before the grand jury. Thus, the third district's application of an absolute privilege for soliciting of allegedly false testimony, before the commencement of any official proceeding, undercuts Ridge.

Respondent's attempt to distinguish Garcia v. Walder Electronics, Inc., 563 So.2d 723 (Fla. 3d DCA 1990) requires him to omit the sentence immediately preceding the sentence quoted in his brief, which sentence states "as to Walder and its employees, we think the responses were absolutely privileged." Id. at 725. The statements referred to, of course, were statements made to the Metro-Dade police about the potential past criminal conduct of a Metro-Dade police trainee. Once again, these statements were made prior to the commencement of any proceeding against Garcia.

In short, respondent's brief fails to address this court's decisions in any meaningful way. Respondent further fails

to show why Ridge or the minority of courts that have opted for a qualified privilege, correctly resolved this issue. There are extensive public policy reasons, discussed in petitioner's initial brief, for applying the absolute privilege doctrine to this case. In view of this court's precedent and the scholarly commentary supporting application of an absolute privilege, petitioner respectfully requests that this court affirm the fourth district's holding by answering the certified question in the affirmative.

II. The Court Should Apply An Absolute Privilege to Respondent's Intentional Infliction Claim

Respondent cites one California decision to support his argument that the intentional infliction of emotional distress claim alleged in the third amended complaint, was outside the scope of the privilege. Unfortunately for respondent, this argument, which was not made in the appellate court below, is based on a case devoid of precedential value.

The California Rules of Court provide that an appellate court may partially publish one of its opinions. See Rule 976.1, Cal.R.Ct. When that occurs, the portion of the opinion identified as unpublished may "not be cited or relied on by a court or a party . . ." Rule 977, Cal.R.Ct.

An examination of Durant Software v. Herman, 257 Cal.Rptr. 200 (Cal. 2d Dist. 1989) reveals that the portions relied on by respondent are unpublished. The second district's subsequent opinion, Abraham v. Lancaster Community Hosp., 266 Cal.Rptr. 360

(Cal. 2d Dist. 1990) more accurately reflects California law. In Abraham, the court recognized that "[b]road application of the absolute privilege is [necessary] . . . in promoting free access to the courts . . ." Id. at 370. The Abraham court reiterates all of the policy reasons set out in petitioner's initial brief for application of an absolute privilege to intentional infliction claims. Petitioner believes Abraham to be persuasive on these issues.

CONCLUSION

Edward Fridovich has been twice tried and convicted of killing his father. The credibility of those who reported his conduct to the authorities has been decided. Edward should not be allowed to relitigate in a civil case, the motivation of petitioner, and the other defendants below, in reporting Edward's crime to the authorities.

Without an absolute privilege, citizen involvement in reporting suspected crimes to law enforcement authorities will certainly be chilled. Accordingly, the fourth district's opinion should be affirmed to the extent it finds an absolute privilege protects statements made to investigating authorities prior to the filing of criminal charges. The fourth district's opinion should

be reversed to the extent it permits respondent to pursue a claim for intentional infliction of emotional distress.

Respectfully Submitted,

Jeffrey D. Fisher
Florida Bar No. 326941
175 Bradley Place
Palm Beach, Florida 33480
(407) 659-5311

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing was sent Federal Express this 20 day of June, 1991 to the Clerk of Court, Florida Supreme Court, 500 South Duval Street, Tallahassee, Florida 32399 and mailed to LINDA JULIN McNAMARA, Esquire, Glenn, Rasmussen, Fogarty, Merryday & Russo, counsel for respondent, P.O. Box 3333, Tampa, Florida 33601.

Jeffrey D. Fisher

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