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THE SUPREME COURT OF FLORIDA

4TH DCA CASE NO: 96-02317
CIRCUIT CASE NO: 92-21070 (04)

DONALD TOBKIN, M.D., ESQ.,

Petitioner,

v.

KIMBERLY L. JARBOE, DEBORAH S. JARBOE, LINDA JARBOE, and ESTATE OF RYAN JARBOE,

Respondents.

PETITIONER'S BRIEF ON MERITS

RICHARD A. BARNETT, P.A.
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CERTIFICATE OF INTERESTED PERSONS

Counsel for the Appellant, RICHARD A. BARNETT, ESQ. certified that the following persons and entities have or may have an interest in the outcome of this case.

1. Donald A. Tobkin, M.D., Esquire
   (petitioner)
2. Richard A. Barnett, Esquire
   (counsel for petitioner)
3. Glenn M. Mednick, Esquire
   (counsel for respondents)
4. Linda Jarboe
   (respondent)
5. Kimberly L. Jarboe
   (respondent)
6. Deborah S. Jarboe
   (respondent)
7. Estate of Ryan Jarboe
   (respondent)
8. Honorable Patricia W. Cocalis
   In the Circuit Court of the 17th Judicial Circuit, in and for Broward County, Florida

CITATIONS OF AUTHORITY

STATEMENT OF CASE AND FACTS

This case arises from the Dismissal with Prejudice of the Fourth Amended Complaint by Donald A. Tobkin, M.D., Esquire, Plaintiff against Kimberly L. Jarboe and Linda Jarboe, Defendants (R.1573-1576).

This Fourth Amended Complaint consists of two counts of defamation, one each against Kimberly L. Jarboe and Linda Jarboe. They arose out of an attorney-client relationship between Donald A. Tobkin, M.D., Esquire and the Jarboes in connection with the handling of a Pennsylvania Estate to which the Jarboes were beneficiaries.

The substantive allegations of the written defamatory remarks by each defendant are contained in Paragraphs 19 and 37 of the Fourth Amended Complaint. (See Appendix "A" attached).

Kimberly Jarboe wrote a letter to the Florida Bar in connection with a Bar Complaint dated February 25, 1992 which stated that Tobkin had taken advantage of their family's inexperience, misled them on his qualifications, implied that the estate lawyer was conspiring to steal millions of dollars, requested that large sums of money be transferred from the estate without a receipt, all of which behavior was a disgrace to the legal profession.

The Defamation by Linda Jarboe against Tobkin was in the form of a writing which Tobkin did not possess but was in possession of the Florida Bar. (See Exhibit "I" to the Fourth Amended Complaint). The allegations were similar to those of Kimberly

Jarboe. Linda Jarboe affirmed them verbally and in writing to a Florida Bar Grievance Committee.

The Motion to Dismiss the Fourth Amended Complaint was argued on March 25, 1996. The Court dismissed the Complaint with prejudice for lack of personal jurisdiction predicated upon Tobkin's failure to provide pre-suit notice to the Jarboes' as prescribed by Florida Statute 770.01 (1993). Plaintiff had contended that Florida Statute 770.01 (1993) did not apply to non-media defendants. The Motion for Rehearing with was denied. (R. 1584).

Tobkin then appealed to the Fourth District Court of Appeals reiterating his argument that F.S. §770.01 (1993) did not apply to non-media defendants.

The Fourth District agreed with Tobkin but affirmed the dismissal on a legal ground that was not argued on appeal. The Court held the Jarboes were immune from any liability resulting from defamation in the context of a Florida Bar Disciplinary Proceeding. See Tobkin v. Jarboe 695 So.2d 1257 (Fla 4th DCA 1997) (Appendix "B" attached).

Tobkin sought discretionary review in this Court based on express and direct conflict between the Fourth District decision and cases relied on therein with this Court's decision in The Fla. Bar Re: Amendments 558 So.2d 1008, 1014 (Fla 1990) which adopted the rule that a complainant (Jarboe) may be sued for defamation.

Plaintiffs further sought jurisdiction under the "All Writs" power of the Court.

On November 6, 1997 this Court accepted jurisdiction.

POINT ON APPEAL

The Appellate Court erred in concluding that an attorney subject to an unsuccessful Bar complaint did not have the right to sue the complainant for defamation.

SUMMARY OF ARGUMENT

This Court has held that an attorney subject to an unsuccessful Bar complaint may sue for defamation. That decision occurred at the same time the Court held that grievance proceedings were public. The Florida Bar Re: Amendments 558 So.2d 1008, 1014 (Fla 1990)

Notwithstanding the unequivocal statement of this Court and the practice of the Florida Bar that Bar grievance complainants are subject to suit for invalid claims, the Fourth District Court of Appeal rejected that position in this case on precisely the same issue relying on Stone v. Rosen 348 So.2d 387 (Fla 3rd DCA 1997).

In its opinion permitting attorneys to sue for false grievance claims, this Court stated:

> "public respect and confidence in the primarily self operated lawyer disciplinary system can best be gained in allowing the public to determine for itself that the grievance system works efficiently, fairly and accurately."

Furthermore, an examination of the power of openness reveals that the ultimate goal stated in Stone v. Rosen of maintaining a high standard of lawyer conduct, even if attorneys wrongly accused cannot redress that wrong, are now more effectively achieved by a system in which the public knows which attorneys are subject to claims which has a deterrent effect upon attorney behavior.

What previously had to be achieved in secrecy by encouraging valid claims is now achieved by the very fact of public knowledge which deters a great deal of substandard lawyering before it happens.

Since the claim mechanism is tremendously enhanced by the openness of the process in terms of deterrence, allowing attorneys to sue for wrongful claims, even if there is a marginal decrease of valid claims of which there is no evidence, does not compromise the overall effect on the level of attorney behavior.

Notwithstanding the foregoing, this Court has already decided this issue. For whatever reason, the intermediate Appellate Courts are not following this Court as exemplified by this case. Therefore, as a matter of the administration of justice and so that attorneys and complainants alike are operating under the same ground rules, a decision is needed by this Court overruling Stone v. Rosen and its progency.

ARGUMENT

The question presented is whether this Court, having declared that grievance hearings are public, now permits attorneys falsely accused of wrongdoing to sue grievance Complainants for defamation.

Until the opinion of this Court in The Florida Bar Re: Amendments 558 So.2d 1008 (Fla 1990) determined that grievance procedures would be public and seemingly permitted wrongfully accused attorneys to sue a complainant for defamation, the Florida Law was stated by the Third District in Stone v. Rosen 348 So.2d 387 (Fla 3rd DCA 1977).

The Stone decision was issued in the context of private grievance procedures. It relied upon an opinion by Justice William Brennen in Toft v. Ketchum 13 A2d 671 (N.J. 1955) cert. denied 350 US 887, in which he concluded that it was more important for citizens to freely file grievances without fear of defamation suits than for attorneys to suffer the hardship of being falsely accused to the detriment of their reputation and possibly their living.

Implicit in Justice Brennen's reasoning was the assumption that if a grievance became public knowledge both reputation and earning power may be injured.

Since, at the time of the Stone opinion, grievance proceedings were confidential, the countervailing interest in protecting attorneys from being wrongfully accused to the detriment of reputation and earnings was absent. Since Floridians would not know of a grievance against an attorney, there would be no basis for an attorney to seek damages in a defamation action.

The actual ratio descendendi of Stone was not the concern of Justice Brennen in Toft supra, since hearings were private but rather in the oft-quoted statement cited in the Fourth District opinion from which this case arises. Since lawyers enjoy a certain status and benefits as members of the legal profession they must forego rights to sue an unsuccessful complainant as the price to be paid to maintain the high standards of the profession and to discipline lawyers who violate the Cannons of Ethics.

The assumption is that if lawyers were allowed to sue complainants for false claims this would have a chilling effect on those with valid claims thus decrease the number of lawyers disciplined for wrongdoing and thereby reduce the standards for the profession.

The question raised by such reasoning is whether, in the context of public grievances, by which an attorney's reputation and ability to earn a living can be damaged by a wrongful complaint, would the right of an attorney to sue for false claims decrease the number of valid claims and are there other countervailing advantages of public grievances which would outweigh any marginal reduction in valid claims.

These were some of the issues that the Florida Bar, The Disciplinary Review Commission and this Court considered which resulted in The Florida Bar Re: Amendments 558 So.2d 1008 (Fla 1990) in which grievance proceedings were deemed public information.

This action was taken by the Court as a result of a Petition by the Board of Governors of the Florida Bar pursuant to Rule 1-12.1 of the Rules Regulating the Florida Bar in connection with the recommendation of a Disciplinary Review Commission.

This Court adopted all amendments proposed by the Board of Governors of the Florida Bar except certain recommendations of the Commission that the Gag Rule be abolished and the Complainant not be given immunity from civil liability for false claims but be subject to applicable Florida law.

This Court commented on the Gag Rule and the related issue of defamation actions:

> "While we believe that the amendments removing the Gag Rule should be applied retroactively, we decline to retroactively apply those provisions opening disciplinary files to public inspections for several reasons. First, in many cases information contained in the file was given under the belief that the information would remain confidential and that the Complaint would have absolute immunity. See,e.g., Stone v. Rosen 348 So.2d 387 (Fla 3rd DCA 1977)(Complainant has absolute immunity from liability arising out of making a grievance complaint). It would be unfair now to change the rules after the fact and open those records to the public. The publication of the confidential information in those records could subject a complainant to a possible suit for libel and slander. (Italics added)

This Court stated that the provisions allowing public access to disciplinary records shall apply only to those actions for which a disciplinary file is opened on or after the effective date.

There can be no doubt that on and after March 17, 1990, it was the specified intention of this court that the grievance process would be open to the public and that attorneys who were wrongly grieved against could file defamation suits.

The decision in Stone made logical sense under a system in which the attorney could not be harmed by a private grievance. However, once a grievance became public the argument in stone is no longer persuasive in that an attorney would have no mechanism by which to protect his reputation against a baseless public grievance.

Under a private system, the public did not know which lawyers were the subject of repeated Bar complaints and which lawyers had, on many occasions, not fulfilled their duties.

Under a public system, such knowledge is available.

Under a private system, the public would not learn of either individual or respective claims, therefore, it was more important to encourage claims since the maintenance of high professional standards was solely dependent on complainants bringing claims.

Under a public system, public knowledge of practitioners who are repeatedly accused of wrongdoing act as a market force, if you will, to raise practice standards.

Since such is the case, to the extent that an attorney **may** sue a complainant for a false claim, although it will discourage false claims and, on the margin some valid ones, this concern is dwarfed by the salutary effect of public grievances on the general behavior of attorneys.

An attorney, based upon the very considerations enunciated by Justice Brennen, will think long and hard about violating a client's rights if he knows that he may not only be subject to a grievance but that his actions will be public knowledge.

Since bad publicity may not only deter bad practice but ruin a good one it only stands to reason that an attorney who has been publicly wronged ought to be able to vindicate himself.

By the same token, complainants who persist in bringing false claims will also be subject to the light of day.

Because of the power of public grievances to deter, even if some valid claims are discouraged by attorney defamation suits, the goals stated in Stone are more effectively achieved than by a system solely dependent upon each claim to raise the level of practice.

In order to implement the ruling of the Florida Supreme Court, the Florida Bar has issued a Florida Bar Inquiry/Complaint form (Exhibit 3). This form states in pertinent part as follows:

> "False statements made in bad faith or with malice may subject you to civil or criminal liability. Further information may be found in the pamphlet "Complaint against a Florida Lawyer?" (Italics added)

" Complaint against a Florida Lawyer" (Exhibit 4) states:

> "because inquiries and complaints are no longer confidential, you do not have absolute immunity from suit for filing your inquiry." The general law of libel and slander applies. Italics added.

Based on this Court's abolition of immunity for citizen grievances after March 17, 1990, The Florida Bar has sent Inquiry/Complaint forms and "Complaint against a Florida Lawyer" pamphlets to thousands of perspective complainants, both of which state there is no immunity from a defamation action for grievance complainants.

Plaintiff would urge the Court to reject the argument that its opinion in The Florida Bar Re: Amendments 558 So.2d 1008 (Fla 1990) did not concern a controversy between or among parties and therefore is not within Constitutional Article 5 Section (3)(b)(3) which states:

> "The Supreme Court may review any decision of a District Court of Appeal that expressly and directly conflicts with the decision of another District Court of Appeal or of the Supreme Court on the same question of law."

The term decision is not limited to decisions resolving controversies between two parties. There is no question that the Supreme Court's opinion in The Florida Bar Re: Amendments To The Rules 558 So.2d 1008 (Fla 1990) is a decision. It is a decision that affects not just two parties but the relationship between the Florida Bar and the public.

Finally, this Court is asked to clarify the situation since thousands of Bar members and citizens are operating under the notion that they can sue or be sued for defamation yet the intermediate appellate courts are deciding just the opposite. Expectations of both attorneys and the public need to be clarified for the proper administration of justice.

CONCLUSION

It is respectfully requested that this Court overrule Stone v. Rosen, reiterate its position that an attorney may sue a Bar complainant for a false claim and remand this case to the Circuit Court for further proceedings consistent with its ruling.

Respectfully submitted.

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