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CLERK, SUPREME COURT
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Chief Deputy Clerk

THE SUPREME COURT OF FLORIDA

4TH DCA CASE NO: 96-02317
CIRCUIT CASE NO: 92-21079 (04)

DONALD TOBKIN, M.D., ESQ.,

Petitioner,

FLA BAR NO.: 257389

v.

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

Respondent.

_____/

BRIEF ON JURISDICTION

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CERTIFICATE OF INTERESTED PERSONS

Counsel for Petitioner, Donald Tobkin, M.D., Esq., certifies that the following persons and entities have or may have an interest in the outcome of this case.

1. Richard A. Barnett, Esquire
   Counsel for Petitioner

2. Donald A. Tobkin, Esquire
   Co-Counsel for Petitioner

3. Glenn Mednick, Esquire
   Counsel for Respondents

4. Thomas Julin, Esquire
   Counsel for Respondents

5. Kimberly L. Jarboe
   Respondent

6. Deborah S. Jarboe
   Respondent

7. Linda Jarboe
   Respondent

8. The Estate of Ryan Jarboe
   Respondent

9. The Honorable Patricia Cocalis
   Circuit Judge in the 17th Circuit
   Trial Judge

CITATIONS OF AUTHORITY

CASES PAGE(S)

CONSTITUTION

Florida Rules of Appellate Procedure

SUMMARY OF ARGUMENT

Tobkin seeks the Supreme Courts jurisdiction on the two alternative bases as follows:

1. Express and direct conflict with a decision of the Supreme Court on the same question of law Florida Rules of Appellate Procedure 9.030 (a)(2) A (iv) and/or

2. Under the Supreme Court power to issue all Writs necessary to complete the exercise of its jurisdiction.

First, the inferior Appellate Court's decision in Tobkin v. Jarboe 22 FLW D1308 (Fla 4th DCA 1997) expressly and directly conflicts with the Supreme Court on the same question of law on whether after 1990, an individual who filed a Bar Grievance against an attorney no longer enjoyed the privilege of absolute immunity for defamation arising from said filed grievance The Florida Bar Re: Amendments To The Rules Reuulating the Florida Bar 558 So.2d 1008, 1014 (Fla 1990).

In 1997, the Fourth District Jarboe panel contended Florida Bar Grievance complainants continue to enjoy absolute immunity, not withstanding this Court's conflicting decision from seven years earlier In re: The Florida Bar Re: Amendments To The Rules Regulating the Florida Bar 558 So.2d 1008, 1014 (Fla 1990). In that 1990 Supreme Court decision, this Court expressly and directly decided Florida Bar Grievance complainants would no longer enjoy absolute immunity for defaming a lawyer in connection with the grievance process. In parenthetically, in this appellate jargon

context "decision" is given to mean the published position/opinion of an Appellate Court.

Second, the Supreme Court is empowered to issue all Writs necessary to the complete exercise of its jurisdiction. unquestionably, the Supreme Court is the ultimate power source and authority regarding regulation of all Florida lawyers including judges. This Court has jurisdiction to mobilize its all Writs power over an inferior tribunal who misapprehends or misapplies the law on Bar Grievance matters.

At bar is matter that the Supreme Court is urged to exercise its all Writs necessary powers in order to inform all lawyers and non lawyers involved in the bar Grievance process ~~rather~~ that whether after the year 1990, complainants continued to enjoy absolute immunity from defamation.

GROUNDS FOR JURISDICTION

This case concerns allegations of defamatory statements against your Petitioner in the context of a grievance proceeding. The Fourth District Court of Appeals upheld the trial court dismissal of the case relying on Stone v. Rosen, 348 So.2d 387 (Fla 3rd DCA 1977) which held that an attorney may not sue a grievance complainant for defamation. Tobkin v. Jarboe 22 FLW D1308 (Fla 4th DCA 1997)

Those decisions conflict with this Courts Order in The Florida Bar Re: Amendments To The Rules Regulating the Florida Bar 558

So.2d 1008, 1014 (Fla 1990) (Exhibit 2) allowing an attorney to sue a grievance complainant for defamation. Const. Article V § 3(b)(3).

The Fourth District in Tobkin stated that the Supreme Court's decision in The Florida Bar Re: Amendments did not affect the conclusion in stone Id. (Exhibit 3) which remained sound and enhanced lawyer professionalism.

In the event that this court were to determine that it doesn't have jurisdiction under Const. Article V Section 3(b)(3), Petitioner contends the court has jurisdiction under Const. Article V Section 3(b)(7) which provides that this court may issue all "Writs necessary to the complete exercise of its jurisdiction."

This court has jurisdiction under the "All Writs" clause in order to enforce its ultimate jurisdiction to establish the Disciplinary Rules of the Florida Bar. Two District Courts of Appeal have reached conclusions diametrically opposed to the disciplinary rule making authority of this court. The "All Writs" jurisdiction was intended to complete the exercise of this Court's jurisdiction in this case to establish uniform Disciplinary Rules.

1. CONSTITUTION ARTICLE V §3(b)(3)

This Court's Order in The Florida Bar Re: Amendments, 558 So.2d 1008 (Fla 1990) directly conflicts with the Fourth District opinion in this case and Third District opinion in Stone.

The essence of the conflict is presented in the Stone decision which relies upon an opinion by Justice William Brennen in Toft V.

Ketchum, 13 A2d 671 N.J. (1955), cert. denied, 350 U.S. 887. Justice Brennen 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.

In 1977, the Third District Court of Appeals in Stone adopted that analysis and denied any common law action for defamation to an attorney who was wrongfully accused in a grievance proceeding.

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

However; this was not the situation in Florida at the time of the opinion in Stone. On the contrary, grievance proceedings were confidential and therefore the countervailing interest that Justice Brennen considered in Stone 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.

Subsequently, this Court in The Florida Bar Re: Amendments 558 So.2d 1008 (Fla 1990) adopted extensive rule changes to, among other subjects, grievance proceedings, which were opened to the public.

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 Rules Regulating the Florida Bar and in connection with the appointment of a Disciplinary Review Commission.

This Court adopted all amendments proposed by the Board of Governors except certain recommendations of the Commission that the Gag Rule be abolished and the Complainant not be given immunity or privilege from civil liability 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)

Finally, the Court stated that the provisions allowing public access to disciplinary records shall apply to only 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 Id made logical sense under a system in which the attorney could not be harmed by non-public grievances. However, once grievances became public the argument in Stone is no

longer persuasive in that an attorney would have no mechanism by which to vindicate himself against a baseless public grievance.

In order to implement the ruling of the Florida Supreme Court, the Florida Bar has issued a Florida Bar Inquiry/Complaint form (Exhibit 4). 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 5) states:

> "because inquiries and complaints are no longer confidential, you do not have absolute immunity from suit for filing your inquiry." The aeneral 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 affected not just two parties but the relationship between the Florida Bar and the public.

It is respectfully submitted that Tobkin Id., and Stone Id. conflict with the Order of this Court in The Florida Bar Re: Amendments 558 So.2d 1008, 1014 (Fla 1990). The nature of this conflict is such that a resolution of this problem is needed 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 resolved for the proper administration of justice.

2. CONSTITUTION ARTICLE V §3(b)(7)

Assuming arquendo that there is no jurisdiction under Article V §3(b)(3), this Court has jurisdiction under Article V § (3)(b)(7) to enforce its ultimate jurisdiction to promulgate Disciplinary Rules.

In Florida Senate v. Graham 412 So.2d 360 (Fla 1982), the Court entertained a Petition pursuant to the "All Writs" power designed to test whether the Governor could call the legislature

into session for a period shorter than thirty days for the purpose of reapportioning itself. The issuance of the decision under the "All Writs" provision was held to be within the Courts constitutional power, notwithstanding that there was no matter before the Court to which the Writ petitioned for would be ancillary. Graham Id. at 361.

The Court's decision was based upon Couse v. Canal Authority. 209 So.2d 865 (Fla 1968) which held that the "All Writs" power of the Supreme Court of Florida extends to ultimate jurisdiction as distinguished from already acquired jurisdiction.

In Couse Id., a landowner challenged the constitutionality of a statute that permitted the quick taking of his land. Couse's Motion to Dismiss was denied. He sought a Writ of Common Law Certiorari in the Supreme Court. The Court determined it did not have jurisdiction, referred the case to the District Court, who certified the question back to the Supreme Court.

The court observed that although Certiorari may apply to review a decision certified by the District Court of Appeal to be of a great public interest, there was no District Court decision here. Recognizing that this matter was one in which the clear intent of the Constitution contemplated Supreme Court resolution of constitutional validity, the Court reasoned that it had improvidently transferred the case to the District Court of Appeal, that that court had wisely refrained from deciding it and that the power to issue Certiorari, or any Writ, for that matter in an

appropriate case was vested in the Supreme Court under the "All Writs" provision.

Constitution Article V Section 3(b)(7) does not limit "All Writs" jurisdiction only to cases before the court on another jurisdictional basis. Couse and Graham suggest that the broad scope of constitutional power has relevance to particular cases in which no other remedy seems to fit and in which the correctness result can not be disputed. G. Onoprienko, Cases and Materials on Florida Appellate Practice and Procedure, 806-08 (1982).

The language of the Constitution itself authorizing the Supreme Court to issue constitutional Writs does not limit "All Writs" to those necessary to protect its jurisdiction but extends the issuance of such writs as may be proper "to the complete exercise of jurisdiction."

In Mize v. County of Seminole, 229 So.2d 841 (Fla 1969) the issue was whether Sanford was the county seat of Seminole County. The issue arose in regard to a bond proceeding to finance a courthouse. The Circuit Court decided Sanford had been properly designated the county seat and thus the bonds were valid. The Appeal properly went directly to the Supreme Court but an accompanying Declaratory Judgment count went to the District Court of Appeal. The Supreme Court, having exclusive jurisdiction for validation of bonds would be frustrated in the necessary and complete exercise of it jurisdiction unless it could review the decision of the District Court which enjoined the issuance of the bonds. Mize Id at 843.

At bar, this court has exclusive jurisdiction to promulgate Disciplinary Rules regulating the Florida **Bar. That power would be Completely** frustrated in the **necessary and proper exercise of its** jurisdiction, if it could not review the District Court rulings which undermine that jurisdiction.

As the Court stated in Mize, and equally applicable at bar, the ultimate disposition of this case is not only necessary and proper but essential to effectuate the complete exercise of the Courts jurisdiction, in this case, to promulgate statewide Disciplinary Rules.

In Couse, Mize and Graham where the remedy sought was undeniably appropriate and no specific Writ sufficed, the power of the Supreme Court is clear. The constitutional limitation on the All Writ power is simply this: "Is it necessary to a complete exercise of the court's jurisdiction? All Courts agree with the proposition in Couse that the "All Writs" power extends to cases within the ulitimate jurisdiction of the Supreme Court to review. This case is one of them.

RELIEF REQUESTED

Petitioner respectfully requests that this Court take jurisdiction of this case pursuant to Const. Article V §3(b)(3) or 3(b)(7).

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail on this 29th day of August, 1996 to; Glenn M. Mednick, Esquire, 5200 Town Center Circle, Suite 301, Boca Raton, Florida 33486 and Thomas Julin, Esquire, 200 S. Biscayne Blvd., Miami, Florida 33131-2398.

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