IN THE
SUPREME COURT OF FLORIDA

CASE NO. 91,236

Court of Appeal Case No. 96-02317 (Fourth District)
Circuit Case No. 92-21079(04) (17th Circuit)

DONALD A. TOBKIN, M.D., ESQ.,
Petitioner,

vs.

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

Respondents' Brief on Jurisdiction

On Appeal from the District Court
of Appeal of Florida, Fourth District

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DEBORAH S. JARBOE, defendant/respondent

LINDA JARBOE, defendant/respondent

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SUMMARY OF ARGUMENT

Point I. The respondents filed complaints with the Florida Bar accusing the petitioner, attorney Donald Tobkin, of substantial malfeasance in his representation of them. Tobkin sued them for libel. The Fourth District affirmed dismissal of the claim, holding Bar complaints are absolutely privileged. Tobkin now argues that that decision conflicts with this Court's order opening Bar complaints to the public. This contention is patently incorrect. Orders amending Bar rule simply are not "decisions" regarding common-law substantive rights and therefore cannot create a conflict of 'decisions." In addition, the Court's order amending the confidentiality rule observed only that the change *could* alter a court's privilege ruling, not that it must.

Point II. The Court cannot invoke its 'all writs" jurisdiction to review this case because this Court neither has jurisdiction over the Fourth District's decision now nor could it ever exercise jurisdiction over that decision in the future. The "all writs" jurisdiction is not an independent basis for exercising jurisdiction, but rather exists solely to protect the Court's ability to exercise the jurisdiction otherwise granted to the Court. The Fourth District's holding that Bar complaints remain privileged does nothing to interfere with this Court's exclusive jurisdiction to admit and discipline lawyers.

ARGUMENT

I.

AN EXPRESS AND DIRECT CONFLICT CANNOT ARISE FROM A RULE-MAKING PROCEEDING

The petitioner asks this Court to create an unprecedented and a legally indefensible extension of this Court's article V, section 3(b)(3) jurisdiction. He claims that the district court's decision

below 'conflicts" with this Court's order in The Florida Bar Re Amendments to Rules Regulating The Florida Bar, 558 So, 2d 1008 (Fla. 1990), an order rendered by this Court in its administrative capacity over the Florida Bar in a non-adversarial proceeding, This Court should decline to broaden 'conflict" jurisdiction in this manner.[1] This Court's order in The Florida Bar is not a "decision" with which the district court decision could conflict for purposes of article V, section 3(b)(3). It is simply an order, pursuant to article V, section 15, approving certain revisions to the Rules Regulating the Florida Bar.

Article V, section 3(b) (3) is not intended to give petitioner a "second appeal" because district courts are not "intermediate courts." Instead, this Court "functions as a supervisory body" *"with review by the district courts in most cases being final and absolute."* Sanchez v. Wimpey, 409 So. 2d 20, 21 (Fla. 1982) (citation omitted, emphasis added).

A narrow exception to this general rule is found in article V, section 3(b)(3) which vests jurisdiction in this Court to review a decision of a district court of appeal that "expressly and directly conflicts with *a decision* of another district court of appeal or of the supreme court on the same question of law." The purpose of the provision 'is to stabilize the law by a review of *decisions* which form patentably irreconcible *precedents."* Florida Power & Light v.

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1. Petitioner fails even to acknowledge this issue. Instead, he assumes this Court will treat its order in Florida Bar as a 'decision" for purposes of article V, section 3(b) (3) and then spends most of his brief arguing the merits of the case. But, "[t]he test of [this Court's conflict] jurisdiction . . . is not , . . the correctness of the Court of Appeal decision." Kyle v. Kyle, 139 So. 2d 885, 887 (Fla. 1962). Instead, this Court must focus entirely on whether a constitutional "conflict" truly exists.

Bell, 113 So. 2d 697, 699 (Fla. 1959).

Consistent with the narrow purpose of the rule, this Court reads narrowly the word "decision" in article V, section 3(b)(3). A 'decision" is not language or expressions found in a dissenting or concurring opinion or in the record, Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986)[2]; nor is it a ruling from the district court when the mandate is withheld because the en banc district court was split on the issue, Boler v. State, 678 So. 2d 319, 320 n.2 (Fla. 1996), nor is it 'conflict of opinions or ***reasons*** that supplies jurisdiction for review by certiorari." Gibson v. Maloney, 231 So. 2d 823, 824 (Fla. 1970) (emphasis in original); see also Jenkins State, 385 So. 2d 1356, 1359 (Fla. 1980) (per curiam affirmance), a statute, Pickman v. State, 164 So. 2d 805, 806 (Fla. 1964) (statute).

Only article V, section 3 of the Florida Constitution creates this Court's jurisdiction to render ***decisions*** in cases. When this Court renders orders not flowing from its appellate jurisdiction pursuant to article V, section 3, but from other sections of the Constitution, it does not render a "decision" that can be in express and direct conflict with a 'decision" of a district court.

This principle is illustrated by cases such as Allstate Insurance Co. v. Langston, 655 So. 2d 91, 93 n.1 (Fla. 1995), which held "[t]his Court does not have jurisdiction based on alleged

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2. This Court's ruling in Reaves, 485 So. 2d at 830, that this Court must examine the "four corners" of the district court's decision to be reviewed, not the record, requires the Court to strike or disregard the first two full paragraphs on page six of petitioner's brief. They concern Florida Bar publications not discussed in the lower court decision.

conflict with a rule of civil procedure."[3] Rules of procedure are enacted by this Court through article V, section 2, not pursuant to its jurisdiction to decide cases pursuant to article V, section 3.

This Court's many decisions adopting jury instructions also are illustrative of the principal that conflicts may arise solely with decisions of this Court rendered pursuant to article V, section 3. When this Court renders proposed jury instructions, pursuant to article 5, section 2 of the Florida Constitution, it "'is not an adjudication on the merits of the form, substance, or correctness of the instructions." In re Standard Jury Instructions (Civil Cases 89-1), 575 So. 2d 194 (1991) (citation omitted). The standard instructions simply 'do not have the effect of law." Id. at 202 (Barkett, J., dissenting).

Similarly, when this Court exercises its power to render an advisory opinion pursuant to a question posed by the Governor, it is acting pursuant to article IV, section 1; it is not rendering a decision pursuant to article V, section 3. Collins v. Horton, 111 So. 2d 746, 751 (Fla. 1st DCA 1959) (advisory opinions 'do not have the force of legal precedent and are not binding on the Court itself"). These cases recognize the difference between a *decision,* which is the resolution of a real controversy through an adversarial process, and an administrative ruling, which cannot have the same precedential effect that could create a conflict of decisions.

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3. See also Boyd v. Becker, 627 So. 2d 481, 484 (Fla. 1993) (because rule of civil procedure 'was not determined in a true adversarial proceeding, the rule of stare decisis does not constrain us in these proceedings"); State v. Lvons, 293 So. 2d 391, 393 (Fla. 2d DCA 1974) (no conflict jurisdiction based upon alleged conflict between criminal rule of procedure and case from this Court).

This Court's order in The Florida Bar, as well as this Court's numerous other orders adopting and amending Bar rules, are the product of a nonadversarial process and, like other orders that are not rendered under article V, section 3, cannot and do not have the same precedential effect as a decision which could create a conflict of decisions. As this Court held, "[C]ourts have inherent power to make rules governing contempt, admission to the bar, and for conduct of the business brought before them, but the courts have no power to effect substantive law or jurisdiction."[4] This Court's orders relating to Bar rules therefore cannot create a conflict of decisions."

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4. In Re Fla. State Bar Ass'n for Promulgation of New Fla. Rules of Civil Procedure, 199 So. 57 (Fla. 1944) (emphasis added); see also In Re Jacksonville Bar Ass'n, 169 So. 674, 675 (Fla. 1936) ("power of the Supreme Court to prescribe rules of conduct for the discipline of attorneys admitted to practice before it," and 'rules of court must be subordinate to law and in cases of conflict the law will prevail"); R.Regulating Fla. Bar preamble ("nothing in the rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such duty") .

5. A rule change may and should be considered by courts, as the Fourth District did, see Tobkin v. Jarboe, 695 So. 2d 1257, 1259 (Fla. 4th DCA 1997) (holding that the rule change did not have any impact on the common law rule), to evaluate whether the common law will continue to recognize a privilege under circumstances to which the rule applies, but a rule change cannot itself alter the law of libel without violating the separation of powers required by article II, section 3, Florida Constitution. The correctness of the Fourth District's evaluation of the impact that the rule change has on the law of libel is not here at issue, but that evaluation is plainly correct because the absolute privilege, recognized first in Stone v. Rosen, 348 So. 2d 387 (Fla. 3d DCA 1977), and subsequently in Feldman v. Glucroft, 522 So. 2d 798, 801 (Fla. 1988); McKenzie v. Ravmond, 519 So. 2d 711, 711 (Fla. 2d DCA 1988)(same); Northwest , 469 So. 2d 893, 899 n.3 (1st DCA), rev. denied, 479 So. 2d 118 (Fla. 1985); and Mueller v. The Fla. Bar, 390 So. 2d 449, 453 (Fla. 4th DCA 1980), never has been dependent on the confidentiality of Bar complaints. See Stone 348 So. 2d at 389 (recognizing that

Significantly, The Florida Bar order at issue would not "conflict" with the the Fourth District's decision below, even if it were treated as a "decision." In amending the Bar rules, this Court did not purport to overturn the holding of Stone v. Rosen, ***348 So.*** 2d 387 (Fla. 3d DCA 1977), that an absolute privilege protects Bar complaints, but rather simply chose not to apply the new rule opening Bar complaints to the public retroactively because "[the publication of the confidential information in [the now nonconfidential] files ***could*** subject a complainant to a possible suit for libel and slander." The Florida Bar, 558 So, 2d at 1011 (emphasis added). The Court did not say that the elimination of confidentiality ***would*** subject a complainant to a suit for libel or even that it ***should*** subject a complainant to such a suit, but rather the Court, properly remaining within its limited role under article V, section 15, simply recognized that its alteration of the confidentiality rule might result in libel claims being filed that otherwise would not have been.[6]

The order in The Florida Bar truly cannot be read on its face as doing anything more than simply declining to create an absolute immunity or privilege ***through the rule-making process*** and, instead, leaving complainants, as the body proposing the rule change had

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complaints could become public but holding absolute protection is justified by strong societal interest in having citizens free to complain to the Bar without fear of a libel suit).

6. The Fourth District's ruling that the absolute privilege is undisturbed by the elimination of confidentiality did not render this Court's decision not to open previously filed complaints unimportant. That decision continues to protect pre-rule change complaintants from the burden of unanticipated ***litigation,*** even though it is unnecessary to protect such complainant's against the burden of unanticipated ***liability.***

advocated, "subject to applicable Florida law," id. at 1009, whatever that might be determined to be later in litigation.[7] Such a ruling cannot create a basis for conflict jurisdiction with a decision, such as the Fourth District's, finding that applicable Florida common law recognizes an absolute privilege.

II.

"ALL WRITS" JURISDICTION CANNOT BE INVOKED TO REVIEW A DECISION OVER WHICH THIS COURT CANNOT OTHERWISE ACQUIRE JURISDICTION

The petitioner argues alternatively that even if express and direct conflict cannot be found, this Court can review the Fourth District's decision pursuant to the "all writs" authority of article V, section 3(b)(7) of the Florida Constitution, and Florida Rule of Procedure 9.030(a)(3).

The all writs power does not, as petitioner contends, allow this Court to review any case 'in which no other remedy seems to fit." (Petitioner's Brief at 7). Rather, the all writs power is "confined to a class of cases over which the Court normally would have some form of original or appellate jurisdiction, but where the full and complete exercise of that jurisdiction seems likely to be curtailed or defeated before the Court could otherwise hear the case." Gerald Kogan & Robert Craig Waters, The Operation and

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7. If the Court's adoption of the Commission's recommendations were read otherwise, as "deciding" that an absolute privilege would not exist after the rule change, that "decision" should be treated as mere obiter dictum because it is unnecessary to the rule change. This Court cannot, of course, find conflict from such language. Cionaoli v. Florida 337 So. 2d 780, 781 (Fla. 1976). And, if the language were not found to be dicta, then this Court should invoke its discretion to decline to exercise conflict jurisdiction. Wainwriaht v. Tavlor, 476 So. 2d 669, 670-71 (Fla. 1985). This would allow the other district courts of appeal time to review this issue in light of The Florida Bar decision.

Jurisdiction of the Florida Supreme Court-, 18 Nova L. Rev. 1151, 1266 (1994). Consistent with this statement of the law, this Court has used its all writs power in each of the 'all writs" cases cited by petitioner solely to protect its authority to exercise jurisdiction under another section of the Florida Constitution.

In Florida Senate v. Graham, 412 So. 2d 360, 361 (Fla. 1982), the Court concluded that the all writs power could be used to decide whether the Governor could limit the length of a special apportionment session, but only because "jurisdiction of the issue of apportionment will vest in this Court with certainty in this year" pursuant 'to article III, section[s] 16(b), (c) and (f)," of the Florida Constitution. This independent source of jurisdictional authority and the certainty that the apportionment matter ultimately would come before the Court pursuant to an independent jurisdictional provision distinguishes Graham from the instant case because the instant case never can come before this Court pursuant to an independent jurisdictional provision.

Similarly, in Couse v. Canal Authority, 209 So. 2d 865 (Fla. 1968), this Court decided that the 'all writs" power could be employed to review an order of taking which the petitioner argued had been entered pursuant to an unconstitutional statute, but only because the Court's failure to use the power would interfere with the Court's independent grant of jurisdiction conferred by what is now article V, section 3(b) (3) to review 'orders or decrees construing the Constitution or passing on the validity of statutes." Id. at 866. The Couse decision emphasized that the "writ remains ancillary in nature, as often stated in previous application of the constitutional writs provision." Id. at 867.

Tobkin's reliance on Mize v. County of Seminole, 229 So. 2d

841 (Fla. 1969), also is misplaced. In that case, this Court held that it could use the 'all writs" power to review a decision of a district court of appeal reversing a declaration that the City of Sanford was the permanent county seat of Seminole County, but only because its failure to do so would frustrate its independent grant of exclusive jurisdiction 'in all proceedings for the validation of bonds and certificates of indebtedness." Id. at 843.

This Court's exclusive jurisdiction over the admission and discipline of lawyers under article v, section 15, cannot supply the missing alternative source of jurisdiction, as Tobkin contends. In State ex rel. Chiles v. Public Employees Relations Commission, **630 So.** 2d 1093 (Fla. 1994), the state petitioned for review of a PERC decision to proceed with certification of a bargaining unit for state-employed attorneys, arguing certification would interfere with the Court's article V, section 15 jurisdiction over lawyers. The Court *denied* the petition, holding the mere fact that lawyers would be affected by the PERC decision could not justify use of the "all writs" power because 'collective bargaining by state employed attorneys does not encroach this Court's jurisdiction over . . . attorneys." Id. at 1095.

Similarly, the Fourth District's decision that a common-law privilege protects the *public's* right to complain about attorneys does not encroach upon this Court's jurisdiction over the admission or discipline of attorneys. Indeed, the decision entirely removes whatever tangential impact the common law of libel might have on the Court's ability to discipline lawyers by immunizing those who complain to the Florida Bar from liability for common-law libel claims.

Moreover, nothing in the Fourth District's decision

conceivably prevents this Court from revisiting the issue of confidentiality of Bar complaints or otherwise constricts this Court's power to amend the Rules Regulating The Florida Bar. The Court therefore has no need to resort to its 'all writs" power to protect its jurisdiction to admit and discipline lawyers. Cases which require invocation of the all writs provision are extraordinary and exceptionally rare. This plainly is not one of them.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 16, 1997, a true and correct copy of Respondents' Brief on Jurisdiction was served by U.S. Mail, postage pre-paid, upon:

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