IN THE DISTRICT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT, P.O. BOX 3315 WEST PALM BEACH, FL 33402

CAREY BOCK

Appellant.

Case No 4D07-3283
L.T. No.: 03-22837-18

VS

SUSAN SCHEFF, ETC.,ET AL.

Appellee(s)

_____/

APPELLANT'S INITIAL BRIEF

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ATTORNEY FOR APPELLANT

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STATUES

RULES OF CIVIL PROCEDURES

TREATISE

ISSUES ON APPEAL

1) Whether the Court abused its discretion in not reversing itself on the striking of the Appellee's pleadings.

2) Whether the Court abused its discretion in banning evidence of meritorious defense and in so doing abused its discretion in rendering its final order.

3) Whether the Court improperly delegated its decision making responsibility to the lawyers who were advocating their respective positions.

4) Whether the totality of circumstances mandates reversal of the Order to Avoid a gross miscarriage of justice.

STATEMENT OF THE CASE

On September 26, 2007 final judgment awarding Susan Scheff $6,425, 000,00 in damages and punitive damages against Carey Bock See Appendix A) and another final judgment awarding Pure, Inc. $4,925,000.00 In damages and punitive damages for defamation against Carey Bock. Appendix B.

These judgments were awarded after the jury was given instructions by the court which stated as a matter of law the issue of liability had been already determined. Appendix C. The reason liability was never considered by the jury was on August 31,2007, the court struck all of Carey Bock's pleadings. Appendix D.

Carey Bock first learned of the existence of these judgments in October of 2007 when she received an e mail from a third party about them . Appendix E Trial Transcript Part I page 40 ll 2-4. She immediately contacted attorney Phil Elberg, Esq., who turn contacted the undersigned to represent her Appendix E. P. 43 ll 2-5. By the time the undersigned was engaged, it was too late to file a Rule 1.530 Motion for a New Trial and the 30 Days to appeal had also run. To further complicate matters, within days of the engagement, Ms. Bock's son, who had just returned from Iraq, was in a serious auto accident on a Military base in the

United States, and she had to tend to him at the hospital for a period of several weeks, thus slowing the process of putting together the Rule 1.540 Motion which was filed in November of 2007. Appendix F.

This motion was heard in two phases. The first on February 2, 2007 Appendix E supra. The second phase of the hearing was held on June 7, 2007. Trial Transcript Part II Appendix G. In all the Court took live testimony from The Appellant, the Appellee (who is also the Principal owner of PURE), a former paralegal in the Appellee's counsel's office and Appellee's counsel himself. The Court also took into evidence telephone records and the deposition of Dr. Edward Shwery.

Carey Bock testified that about a year before this case came to trial she was living near New Orleans, Louisiana. She had recently sold her home and had moved into a rental unit that was destroyed by Hurricane Katrina, after which she was forced to move to Texas, where her parents live. Appendix E p. 25. By May of 2006, her trial attorney in this case had withdrawn, she was unemployed, she had spent all the proceeds of the sale of the home, she was broke, was trying to tend to her ailing father, and was self medicating with benedryl and Ambien to fight off depression. At that time she had one son serving in Iraq and another stationed in Europe. She also recalls speaking to the Appellee's lawyer on one

occasion and remembers that he told her he was not sure what his client wanted to do, and became hostile to her. See Appendix E PP. 31-42. She says no mediation date was coordinated with her, however she does recall getting notice of mediation, and that she sent an e mail to the mediator saying she could not attend it in South Florida. Exhibit E p 33 l 12- 21. At the end of May, her long time fiancé came to Texas, helped her pack up a U Haul and moved her back to Louisiana. They flew to Las Vegas for a weekend where they were married. She then returned to Louisiana. Appendix E PP 36 37 38.

Before she moved from Texas, the Appellee filled out a change of address form and putting it in her mailbox. Appendix E p 32 Ll 6-14. Nevertheless, she never heard from Appellant's counsel again. She never knew her pleadings were stricken, she never knew the date of the trial, and as stated earlier she did not learn of the verdict until the month following the entry of the final judgment. Appendix E p 39-4-19.

Also testifying for the Appellant was Dr. Edward Shwery, a psychologist who was called as an expert for the Appellant. This expert testimony was entered into evidence in deposition format, but not read into the record. Pursuant to the instructions of the Court, each counsel was to make notations as to which questions and answers should not go into evidence, however that copy remains

with the Trial Court. At no time has the Trial Court indicated which portions of the testimony it considered or deemed inadmissible. The entire deposition without these objection is filed herewith as Appendix H. Dr. Shwery testified that he performed a battery of tests on Ms. Bock, and he agreed that the totality of her circumstances had rendered her from May of 2006, through the time he examined her (after the 1.540 Motion was filed) she was in a severe depressive state of "mental deterioration." Appendix G-p 18 L 22- p19 ll 1-22. Looking at the totality of Appendix G, it is clear that the Appellee had simply shut down during the pendency of this case, and only now after ongoing therapy is able to function.

A former paralegal in Appellee's counsel's firm, testified that she had made several calls to the Appellant and that she had also send mail to her Texas address. This was supported later by the testimony of the Appellant's lawyer, however it is worth to note that the mail they were sending to Texas started being returned, however that did not deter them from continuing to send her mail, and waiting until the end of August to have her pleadings stricken. In his testimony, the Appellee's counsel went so far was to tell the Court that he had undertaken to go well beyond simply continuing to send mail to the Appellant's last known address. He states he called her former lawyer, to see if she moved and he used a computer program called " postage stamps.com" to

locate her. Still, even though this case was about defamation over the internet, and even through the mediator had Appellant's e mail address, neither Appellee's counsel, nor his paralegal ever made any effort whatsoever to learn of the Appellant's e mail address let alone try to contact her by e mail. See Appendix G- p 104-105 and Appendix E -p 19 & 20.

The Appellant was forbidden by the Trial Court to raise the issue of whether or not she had a meritorious defense. See, Colloquy among counsel and the Court, Appendix G- p 80-90. The Court apparent reasoning was this case was not a "normal default." That the outcome of this case resulted in unwarranted and total evisceration of the Appellant's First Amendment rights was thus never heard.

During a lunch break and at the conclusion of the trial, the Court pressed the parties to find a resolution to this case on their own, and then without making a single finding of fact or law instructed the attorneys to ... "Submit proposed Orders within the next say, 20 days, and I'll have a chance to look at those and study over the case." Appendix G P 157 and P 158 lines 1-10. His only admonition to the lawyers was to keep their proposed orders down to four pages, and "Don't go crazy (with argument in the proposed orders)." Thereafter, the Court extended the time frame for the filing of the proposed orders as an accommodation to one of the lawyers' schedules, and the hearing ended.

Each party filed proposed Orders. The Appellant's is attached as Appendix H, and the Appellee's is attached as Appendix I. The Court adopted, with minor modification the proposed order submitted by the Appellee. Appendix J. It is from this Order the Appellant Appeals.

ARGUMENT

I

FLORIDA LAW DISFAVORS FORM OVER SUBSTANCE

It must be said at the beginning of this argument that the filing of the 1.540(b) motion placed the Trial Court in the position of confronting the fact that it struck the Appellant's pleadings for failure to attend various hearings pre-trial conferences and a mediation when it did not have all the facts before it. In other words, while the Court may have assumed the Appellant was callously disregarding its orders , and the Rules of Civil Procedure, the evidence adduced in the post trial hearings shows something very different. Put another way, the Court was placed in the position of having to decide the correctness of its actions from the perspective of "If I knew then what I know now." Regrettably this did not happen, and the 1.540 motion was denied.

The Appellant contends that the effect of having her pleadings stricken as they were resulted in a *de facto* default judgment, but the Court's refusal to listen to the evidence of a meritorious defense was error.

A bedrock principle of Florida's jurisprudence is that form should never take precedence over substance. It is well known, for instance, that the Appellate Courts in this state disfavor the entry of summary judgments even where the

evidence overwhelmingly weighs for one side over another. Likewise, where defaults occur, there is a strong preference for lawsuits to be determined on their merits, and that Courts should liberally set them aside whenever so much as a reasonable doubt about the correctness of the default is present. See, *Net One LLC v. Christian Telecom Network LLC,* 901 So. 2d 417 (Fla. 4th DCA 2005) at 418; *Sanchez v. Harrell,* 660 So. 2d 366,67 (Fla. 4th DCA 1995); *North Shore Hospital, Inc. V. Barber,* 143 So 2nd 849,853 (Fla 3d DCA 1996).

The jury trial of this case was done as if a default had been entered. The jury was instructed that liability was a settled issue, and that all it had to do was find damages. This is the identical charge that would be made in the damages phase of any default. The Appellant presented clear and convincing evidence that must demonstrate that her neglect was excusable, and that she acted with due diligence to get the Judgment set aside once she learned of it. See, *Net One LLC* supra. See also *Geer v. Jacobsen,* 880 So. 2d 717 (Fla 2d DCA 2004). She never got to prove the merits of this aspect of her case.

Even where none of the aforesaid elements to set aside a default can be proven, but where something the party obtaining the default did was inappropriate, a default judgment cannot stand. See, *Schwartz v. Business Cards Tomorrow, Inc.,* 644 So. 2d 611 (Fla 4th DCA 1994) (Party seeking to set aside failed to prove all

requisite elements necessary to set the default aside, but because the other party, despite extraordinary efforts to contact the other side foiled, the default untimely the default was set aside) .With this strong presumption in favor of the moving party established, this analysis now turns to the elements necessary to show why this *de facto* default judgment should not stand.

APPELLANTS II

THE DEFENDANT'S NEGLECT WAS EXCUSABLE

Where inaction is the result of "[A]ny other of the foibles to which human nature is heir, then upon timely application accompanied by a reasonable and credible explanation the matter should be permitted to be tried on the merits." Lexstat 2-23 Florida Civil Procedure Section 2-23 "Vacating Defaults."

In this case there are a panoply of issues which render Ms. Bock's inaction excusable. The problems she was experiencing, as listed above are overwhelming to any person of reasonable sensibilities. Despite her limitations, she filled out and placed in her mailbox a change of address form, she spoke with the Plaintiff's lawyer, who she says told her the Plaintiff was unsure of the direction of the case; she e mailed the mediator saying she was unable to appear, yet after May 31, 2006, she never received any notification of anything from the Plaintiff. If the Plaintiff continued to send mail to the Texas address she had left, and if that mail

was being returned, it is clear that the Plaintiff, unlike the party which unsuccessfully defended a default in *Schwartz* supra. did nothing extraordinary to try to contact the Appellant even though her email address was possibly available to Appellee's counsel, and definitely in the hands of the mediator.

The circumstances here can be framed by two cases in which one default was upheld, and the other was denied. In *John Mills Jr. v. Shirley Lawhon,* 448 So. 2d 1162 (Fla 1st DCA 1984) the party against whom a default was entered told the Court the reason he did not timely answer a complaint filed against him was because he was "going through some changes." Kindly calling this excuse a "meager showing" the First District Court of Appeal correctly held that such a laughable attempt at avoiding the responsibility to answer a complaint was insufficient. The other case is *Andrade v. Adrade,* 720 So. 2d 551,552 (Fla. 4th DCA 1998). In that divorce proceeding, the husband alleged that his wife suffered from mental illness, was not taking her medications, and ultimately removed her from the home and got sole permanent custody of the children by default. The wife then sought to set the default aside, and the Trial Court granted the motion holding that excusable neglect was satisfied, by her showing that she was in a process of mental deterioration during the operative time period. This holding was affirmed.

These circumstances fall within the ambit of *Andrade* supra. Unless this Court could not, in light of the testimony of Dr. Shwery have had no reasonable doubt that the Defendant was not in a state of "mental deterioration," the very words used in *Andrade,* and in Dr. Shwery's deposition.

III

THERE IS A MERITORIOUS DEFENSE

Unlike other tort cases, defamation cases are mingled with the most fundamental right we have: freedom of speech.

Here, the jury instructions ignored the fact that the Appellee was a limited purpose public figure, i.e. Anyone who "injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." *Gertz v. Welch,* 418 U.S. 323, 351, 41 L.Ed. Ed 789, 94 S. Ct. 2997 (1974); *Arnold et al. v. Taco Properties et al.* , 427 So. 2d 216 (Fla. 1st DCA 1983 *).* As such she cannot be defamed unless she shows actual malice on the part of the Plaintiff. *New York Times v. Sullivan,* 376 U.S. 254, 11 L.Ed 2d 686, 84 S. Ct.710 (1964). No such showing was made at trial nor was any actual malice standard proffered to the court nor given to the jury.

These constitutional issues also spill over to the other claims that went to the jury. As for Intentional Infliction of Emotional Distress, the United States

Supreme Court has held that a public figure is not be entitled to recover any damages for Intentional Infliction of Emotional Distress , See *Hustler Magazine et al v. Falwell,* 485 U.S. 46 , 108 S. Ct. 876, 99 L.Ed.2d 41 (1988) (as a matter of law public figures cannot recover damages for intentional infliction of emotional distress unless actual malice is shown) Moreover the actual malice standard would also have applied to the invasion of privacy claim. See *Man v. Warner Brothers,* 317 F. Supp. 50 (S.D.N.Y. 1970).

Furthermore, the Defendant's speech was protected speech under the doctrines of "rhetorical hyperbole," " fair comment" and rendition of opinion. In *Milkovich v. Lorain Journal Co.,* 497 U.S. 1, 111 L.Ed.2d 1, 110 S. Ct. 2695 (1990) a high school wrestling coach sued a newspaper for writing that he had committed perjury in testimony before an athletic association meeting. Although this individual did not actually commit the crime of perjury, the *Milkovich* court recognized that the newspaper's technical misstatement of fact, was protected speech because the First Amendment's guarantee of free speech covers statements that cannot reasonably be interpreted as stating actual facts about an individual [to assure that] public debate will not suffer for the lack of 'imaginative expression' *Milkovich* supra. at 110 S.Ct. 2706. An excellent analysis of how rhetorical hyperbole is protected speech where public figures (hence limited purpose public

figures) are concerned is found in *Pullum v. MacJohnson et al.,* 647 So 2d 254 (Fla 1st DCA 1994) which discusses the fact that all speech must be taken within the context of where it is published. That is salient here because the speech complained of all took place on the internet in message postings laden with harsh rhetoric, spirited debate, and name calling. The *Pullum Court's* analysis that calling someone a "drug pusher" when he wasn't, was protected speech, and in analyzing other cases involving rhetorical hyperbole noted that accusing others of of "blackmail," of being a "scab" and of being a "traitor" were all, when taken in context with the circumstances protected speech. Likewise in *Sullivan v. Barrett,* 510 So 2d 982 (Fla 4th DCA 1987) the use of the terms "raving maniac" "raving idiot" and "incompetent" when used against a physician was deemed protected speech because such speech could not be determined to be statements of fact or statements of opinion and therefore had to be decided not by a jury but as a matter of law.

The Appellee was obligated to inform the Court of legal authority that inured to its detriment, but on this basic First Amendment issue, it elected not to, and a horrific jury instruction on defamation was given

More regrettable is that the Court would not hear this defense which was raised in the initial post trial pleadings, and which should have borne on its

decision to set aside this flawed final judgment. This erroneous ruling runs contrary to the standards of proof to set aside judgments under Rule 1.540(b) as this Court found in *Halpern v. Romano, et al.* 949 So 2d 1155(Fla 4th DCA 2007).

IV

THE DEFENDANT ACTED WITH DUE DILIGENCE

The Defendant, who knew nothing of the systematic stripping of her defenses nor of the trial date learned of the judgment and acted immediately. She contacted and retained the undersigned after she learned about what had happened. This contact was made after she had made inquiries with other counsel, including Phil Elberg, Esq., who was at one time involved in this case. The issue of due diligence is determined by the circumstances of the case in question, so here, we are talking about two or three weeks at the most. The delay in getting this motion filed is the result of a combination of the Defendant's having to drop everything and tend to her injured son. There is no bright line test for what constitutes due diligence. There are cases that say three months is too long, but in *Franklin v. Franklin,* 573 So. 2d 401 (Fla 3rd DCA 1991) a seven month delay was considered due diligence under the circumstances.

With all she was going through, this was a reasonable time, and unless this court believed beyond a reasonable doubt that she did not act diligently it

should have ruled in her favor.

V

THE COURT DID NOT DECIDE THIS CASE

The Court instructed the lawyers for each side to write a final judgment, and that it would pick one or the other and sign it. In fact this happened, except the Court crossed out a few sentences and changed some working to the Appellee's proposed judgment with a pen.

The leading case in Florida on this point is *Perlow v. Berg-Perlow et al.*, 875 So 2d 383 (Fla 2004). That case and its progeny do not prohibit a Trial Court from asking the lawyers for proposed final judgments, and in this case, there was opportunity for both sides to read each other's proposed judgments and make objections (neither side made any objection). What offended the *Perlow* Court was not that both sides sent in their proposed orders, but that the Trial Court gave no guidance to either side by announcing findings of fact or conclusions of law at the end of the case. This omission violates the holding in *Perlow* because it was possible for the Court to make such findings, but it failed to. Instead, it allowed two attorneys, whose job it is to advocate, not adjudicate, to prepare two entirely different sets of findings of fact and law on their own without guidance from the Court. This is nothing less than the "appearance that the Trial Judge did not independently make factual findings and legal conclusions, i.e. an appearance of

impropriety." *Perlow* supra. At 389.

This abdication is especially odious in cases where the Appellate standard is abuse of discretion, as it is here. In her concurring opinion in *Perlow*, Justice Barbara Pariente focuses on the notion that where an abuse of discretion standard applies, and where two different attorneys can make reasoned findings of law and fact, there is in effect nothing the appellate court can review, and a reward is necessary. While Justice Pariente's focus was on predictability in family law cases, her reasoning can be extended to this First Amendment case.

The few scribbled notes and deletions of language that was more advocacy than adjudicatory does not relieve the court of its duty to decide its cases, or at least to provide the officers of the court the guidance they need to assist in the rendition of lengthy orders. It also does not show any significant involvement by the Court in the decision-making process.

VI

THIS RESULT SHOULD BE SET ASIDE PURSUANT TO 59.041 Fla Stat.

We are not dealing here with a stray jury instruction, or some harmless error where a piece of hearsay evidence made its way into the jury's ears, but instead we are dealing with a judicial calamity in which the Appellant had no idea what was happening to her as this case progressed, through no fault of her own.

The trial proceedings for which there is no record are of no help, however the jury instructions, which ignored the "public figure" standard of proof, the evidentiary rulings at the 1.540 hearing barring the "meritorious defense" issue, and the mere size of the verdicts in a defamation case demonstrate clearly that if this judgment is to stand a gross miscarriage of justice will occur.

Because this is an appeal from a non-final Order, this Court does not have the opportunity to look at the entire record, but instead must rely upon the appendices provided. Appellant maintains this is enough to overturn the Trial Court's ruling.

While it is the appellant's belief that this Order should be set aside with instructions that the Final Judgment be set aside and the case be retried on any one of the arguments made here, the totality of the circumstances after an examination of the entire case demonstrate that to allow this Judgment to stand would result in a gross miscarriage of justice as contemplated by Chapter 59.041 Fla. Stat. For this Court to do otherwise would allow a manifest injustice to stand.

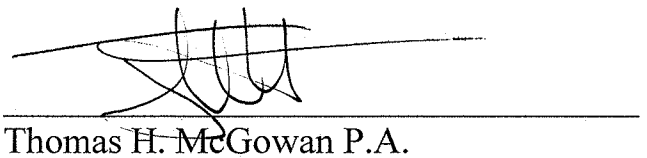
CONCLUSION

For the foregoing reasons the denial of the Appellant's 1.540 motion should be reversed because of the abuse of the Trial Court's discretion and because of the manifest injustice any other result would leave.

Respectfully Submitted.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT a true and correct copy of the foregoing has been sent via electronic mail to: David Pollack, Esq, 540 Brickell Key Dr., Suite C-1, Miami, Florida 33131,DavidHPollack@aol.com this 18 day of October, 2007.



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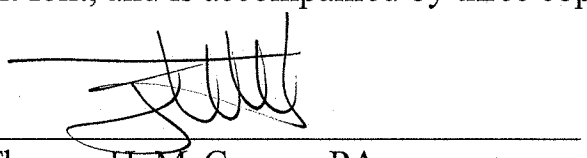
CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Initial Brief satisfies the requirements of the Florida Rules of Appellate Procedure 9.100 and is being submitted in Times New Roman 14-point font, and is accompanied by three copies.



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