IN THE SUPREME COURT OF THE STATE OF FLORIDA

RICHARD S. ROSS,	)	
	)	
Appellant/Petitioner,	)	
	)	S. CT. CASE NO.:
v.	)	LOWER CASE NO.: 04D06-2712
	)	
DR. DIANE BLANK,	)	
	)	
Appellee/Respondent.	)	
_____)		

PETITIONER'S BRIEF ON JURISDICTION

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

POINT INVOLVED ON PETITION

WHETHER A CLASS FLA. STAT. §39.201 REPORTER IS CLOAKED WITH QUALIFIED IMMUNITY ONLY IF THE REPORT IS MADE IN "GOOD FAITH" UNDER FLA. STAT. §39.203(1)(a), AND NOT BASED UPON THE "REASONABLE CAUSE" STANDARD APPLIED BELOW WHICH EXPRESSLY AND DIRECTLY CONFLICTS WITH FLORIDA STATUTORY LAW, THE FLORIDA SUPREME COURT AND THE OTHER DISTRICT COURTS OF APPEAL.

STATEMENT OF THE FACTS

Petitioner, Richard S. Ross ("petitioner"), is a sole practitioner attorney and has been a member in good standing of the bar of this state continuously for more than twenty two years. Petitioner was born and raised in South Florida, and has practiced the entirety of his legal career in South Florida. Petitioner seeks review of the lower court's decision granting Dr. Diane Blank ("Blank"), a practicing psychologist, absolute immunity from suit for defamation in connection with her reporting petitioner to the Department of Children and Families Services ("DCF") for suspected child abuse of petitioner's children. Blank admitted to the DCF investigator that she did not suspect the children were abused two days after falsely reporting the abuse, an admission which the lower court erroneously did not consider necessary in determining whether Blank actually suspected abuse. As a result of the defamatory statement, which made its way to members of the legal community who know petitioner, and also to a client of the petitioner who is now a former client, petitioner has suffered a devastating blow to his professional reputation and his continued ability to earn a living practicing law.

This case originates from the dissolution of petitioner's marriage. In March, 2002, Petitioner's wife met with Blank, a non-court appointed psychologist,

in connection with the divorce proceeding. The wife alleged to Blank that petitioner was sexually abusing the couple's two daughters. Blank met with older daughter and the wife who initiated a conversation with the daughter to suggest that petitioner was acting in an sexually inappropriate way with the child. The petitioner was unaware of the allegations raised by his wife or the session the older daughter had with Blank. When petitioner found out about the session, he contacted Blank to learn what transpired. In May, 2002, petitioner, his wife, and the older daughter met with Blank, and petitioner was informed of the allegation. Immediately thereafter, the petitioner met privately with Blank. He denied the allegation, and explained to Blank how the wife had mischaracterized the alleged conduct. At no time did Blank state a belief that she thought the petitioner was sexually abusing his children.

Unbeknownst to petitioner, Blank and the wife continued their relationship. From March, 2002 until June 10, 2002, Blank was aware of her immediate obligation under Fla. Stat. §39.201 to report petitioner to DCF if she suspected he was sexually abusing his children, and Blank did not file any report during this time period. On June 11, 2002, the divorce court judge banned Blank from further counseling the petitioner's children because Blank was disclosing confidences learned from the children to the divorce attorney for the wife. Within hours after the ban order, Blank reported petitioner to DCF for suspicion of child

sexual abuse. Two days later, on June 13, 2002, Blank was interviewed by the DCF investigator and admitted at that she did not suspect the children were being sexually abused. The investigator documented the admission in the DCF report.

The petitioner asked the trial court to conduct an *in camera* inspection of the DCF report, and Blank's admission of no suspicion contained in it, to consider it as objective evidence that supported petitioner's case that Blank did not have a good faith basis to make the report. The trial court refused, and the lower court affirmed, concluding that the admission was not necessary for the determination whether Blank had reasonable cause to report. *See* Appendix, p. 5.

DISPOSITION BELOW

In 2003, petitioner brought a jury-demanded action against Blank alleging violation of Florida Statutes § 39.206 for Blank's knowing and willful filing of a false report of child abuse against petitioner with DCF; for defamation *per se* arising from Blank's publication to DCF; and for negligence. Petitioner first alleged that Blank had no reasonable cause to suspect abuse given her admission that she did not suspect abuse contained in the DCF report, and due to her decision not to report petitioner immediately from March to June, 2002 despite knowing of her duty to so report. Second, petitioner also alleged that Blank did not act in good faith and that she reported to DCF in retaliation for the ban order issued by the divorce

court.

Petitioner's statutory claim was dismissed without prejudice on April 20, 2004. The trial court granted summary judgment for Blank on the defamation claim concluding that her motive was irrelevant to whether a triable issue existed, and denied summary judgment for negligence on April 28, 2005. On October 11, 2005, the trial court sanctioned petitioner under Fla. Stat. §57.105 for filing the defamation action, concluding that sanctions were appropriate for the same reason it was appropriate to grant Blank summary judgment for defamation.[1] Finally, the trial court refused to conduct the *in camera* inspection of the DCF report containing Blanks' admission. Without being able to utilize that admission in the prosecution of his negligence claim, petitioner, on June 13, 2006, voluntarily dismissed that claim and timely appealed. On May 2, 2007, the lower court affirmed on all substantive issues,[2] issuing a five page written opinion. *See* Appendix, pp. 1-5. Petitioner filed a timely motion for rehearing which was denied

[1]Blank's motion for sanctions asserted that her defamatory remarks were qualifiedly privileged in her publication to DCF; subject to litigation privilege in her publication to the guardian *ad litem* and a court-appointed psychologist (not Blank) in the family court proceeding; and were not made to a third party Dr. William Samek. In connection with the sanction issue, petitioner limited his appeal to the trial court's abuse of discretion as it related to the publication to DCF only.

[2]The lower court dismissed the sanction order as not ripe in that it had not yet been quantified. *See* Appendix, pp. 4-5.

on June 28, 2007. *See* Appendix, p. 6.

SUMMARY OF THE ARGUMENT

In the proceeding below, Blank conceded that her report to DCF was cloaked with qualified immunity under a good faith standard pursuant to the authority of *Nodar v. Galbreath*, 462 So.2d 803 (Fla. 1984) and *Dahly v. Department of Children and Family Services*, 876 So.2d 1245, 1248 (Fla. 2d DCA 2004). She then presented supplemental authority of *Urquhart v. Helmich*, 947 So. 2d 539 (Fla. 1st DCA 2006) for the proposition that a member of the class of Fla. Stat. §39.201 reporters needs only to have reasonable cause to suspect child abuse before reporting, irrespective of any good faith belief. The lower court recognized the statutory requirement of good faith even for a §39.201 reporter, but then receded from it by applying the divergent "reasonable cause" test identified in *Urquhart*.

Florida statutory law is clear that a mandatory reporter to DCF can only be immune from suit if acting in good faith in accord with *Nodar* and *Dahly*, and contrary to *Urquhart* and the decision below. The decision, therefore, expressly and directly conflicts with the statute, *Nodar* and *Dahly*.

Moreover, because Blank admitted to DCF that she did not suspect

abuse, even the reasonable-cause-to-suspect standard should not have insulated her from immunity. Thus, the result of the trial court's refusal to conduct an *in camera* inspection of the report, affirmed by the lower court, is that in the Fourth District, a health care provider who reports to DCF now enjoys absolute immunity from suit because there can be no fact more probative of no reasonable cause to suspect abuse than the reporter's admission of no such suspicion. Accordingly, the Fourth District's application of absolute immunity expressly and directly conflicts with all courts of this state.

ARGUMENT

A CLASS FLA. STAT. §39.201 REPORTER IS CLOAKED WITH QUALIFIED IMMUNITY ONLY IF THE REPORT IS MADE IN "GOOD FAITH" UNDER FLA. STAT. §39.203(1)(a); THE "REASONABLE CAUSE" STANDARD APPLIED BELOW EXPRESSLY AND DIRECTLY CONFLICTS WITH FLORIDA STATUTORY LAW, THE SUPREME COURT AND OTHER DISTRICT COURTS OF APPEAL.

The present decision of the Fourth District Court of Appeal is precedent that provides absolute immunity for any mandatory reporter who reports abuse even when she admits to having had no suspicion of abuse. This precedent expressly and directly conflicts with Florida statutory law, and the *Nodar* and *Dahly* decisions in which a report made to DCF is cloaked with qualified immunity

only if premised upon good faith.

Florida Statute §39.201 (2002) details the reporting mandate relating to suspected child abuse that is required of certain professionals, including a healthcare provider. One "who knows, or has reasonable cause to suspect, that a child is abused, abandoned, or neglected by a parent, legal custodian, caregiver, or other person responsible for the child's welfare shall report such knowledge or suspicion to the department...." The lower court acknowledged that mandatory reporters are immune from liability under §39.203(1)(a), Fla. Stat. (2002), which states:

> **Any person**, official, or institution **participating in good faith** in any act authorized **or required by this chapter, or reporting in good faith any instance of child abuse**, abandonment, or neglect to the department or any law enforcement agency, shall be immune from any civil or criminal liability which might otherwise result by reason of such action.

(Emphasis Added).

The statute is clear that if any person, including one who is required to report, reports an instance of child abuse in good faith, that person is immune from civil liability. This law is in accord with *Nodar* in which "[a] communication made in good faith on any subject matter by one having an interest therein, **or in reference to which he has a duty**, is privileged if made to a person having a

corresponding interest or duty, even though it contains matter which would otherwise be actionable...." *Nodar v. Galbreath*, 462 So. 2d at 809. (Emphasis Added)(citation omitted). Further, in the context of reporting to the DCF, the same good faith standard was applied to a report made by a mandatory reporter by the Second District Court of Appeal in which "all of the statements at issue were qualifiedly privileged communications under the test set forth in [*Nodar*]." *Dahly v. Department of Children and Family Services*, 876 So. 2d at 1249.

Notwithstanding, the First District Court of Appeal in *Urquhart* diverged from this body of law and created a two-pronged test for determining qualified immunity available to a mandatory reporter. This test first applies "reasonable cause" under an objective evidence standard, and if reasonable cause is lacking, then a second test of immunity is analyzed pursuant to the good faith standard.

> [T]here are two ways in which a doctor can be immune from civil liability for making an incorrect report of child abuse. Immunity exists as a matter of law if the doctor has reasonable cause to suspect that the child has been abused and makes a report of abuse as required by law. **In that event, there is no need to determine whether the doctor acted in good faith**....However, the absence of reasonable cause does not prove liability; it merely removes the immunity that would otherwise apply as a matter of law. If the objective evidence does not support a conclusion that the doctor had reasonable cause to make the report, the doctor may nevertheless claim immunity from civil liability by showing that the report was made in good faith.

Urquhart v. Helmich, 947 So. 2d at 542. (Emphasis Added).

The decision below from the Fourth District further feeds the conflict between the First District on the one hand, and the Second District and the supreme court on the other, by acknowledging under §39.203(1)(a) the good faith standard and how it applies to "any person" who is "required" to report. Notwithstanding the statutory language quoted by the lower court, it then receded from it and applied the divergent *Urquhart* two-pronged analysis of reasonable cause first, and then good faith. *See* Appendix, pp. 3-4.

Moreover, the express and direct conflict between the courts is more pronounced due to Blank's admission to DCF that she did not suspect abuse,[3] and thus could not possibly have met the First District's "reasonable cause" test. Section 39.202(f), Fla. Stat. (2005), allows a trial court to review a DCF report *in camera* "upon its finding that access to such records may be necessary for the determination of an issue before the court." The trial court failed to conclude that Blank's proffered admission of no suspected abuse presented an issue related to her suspicion of abuse. The lower court affirmed. *See* Appendix, p. 5.[4] As a

[3]A fact not present in *Urquhart*.

[4]The lower court explained that there was no issue to be determined by examining the report because Blank was required to report despite her motive. However, this reasoning confuses petitioner's second argument relative to motive, with his non-motive argument, and a basis for filing the action, namely, that Blank admitted that

result, immunity afforded a health care provider who reports to DCF in the Fourth District is absolute, for there can be no set of facts more determinative of the issue of reasonable cause to suspect abuse than an admission by the reporter that she did not suspect abuse. This absolute immunity conflicts with all courts of the state.

CONCLUSION

The false publication made by Blank against petitioner has been terribly destructive to his professional career. No court, other than the Fourth District, permits one who admits to having no suspicion of abuse absolute immunity from suit for the recklessness caused by her defamatory reporting. The decision below expressly and directly conflicts with Florida statutory law, decisions of other district courts of appeal and the supreme court on the same question of law. Petitioner respectfully requests this court exercise its discretion and accept jurisdiction to unify the interpretation of the cited statutes and case law.

Respectfully submitted,

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she actually never suspected abuse.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by United States First Class mail, postage-prepaid, and addressed to counsel for Appellee/Respondent this ___day of July, 2007.

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_____
Richard S. Ross

CERTIFICATE OF COMPLIANCE

_____I HEREBY CERTIFY that the foregoing was prepared using Times New Roman 14, in compliance with the font requirements set forth in Rule 9.210(a)(2).

_____
Richard S. Ross