No.

IN THE

SUPREME COURT OF THE UNITED STATES

NICHOLAS SCHIANO, BARMITZVAHS.COM, INC.
AND M&M ENTERTAINMENT, INC.,

Petitioners,

v.

MATT FRIEDMAN AND SCALE MEDIA, INC.,

Respondents.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented for Review

Whether substantial truth is a complete defense to defamation under the First Amendment, regardless of the motives of the speaker?

Parties to the Proceedings

The parties to the proceedings before this Court are as follows:

Nicholas Schiano, et. al., Petitioners

Matt Freidman, et. al., Respondents

Table of Contents

APPENDICES

TABLE OF AUTHORITIES

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The Petitioner respectfully requests that a Writ of Certiorari issue to review the Denial of his appeal by the United States Court of Appeals for the Eleventh Circuit on June 7, 2019.

BASIS FOR JURISDICTION IN THIS COURT

The August 14, 2019 Order of the United States Court of Appeals for the Eleventh Circuit denying Schiano's Petition for enc banc review, which decision is herein sought to be reviewed was not published. The June 7, 2019, Opinion of the Panel of the United States Court of Appeals for the Eleventh Circuit was unpublished, but can be found at *Schiano v. Friedman*, 2019 U.S. App. LEXIS 17105 (11th Cir. 2019). The September 26, 2017, Opinion of the United States District Court for the Southern District of Florida was unpublished, but can be found at *Friedman v. Schiano*, No. 16-cv-81975-BB, 2017 U.S. Dist. LEXIS 159584 (S.D. Fla. January 6, 2017).

The statutory provision believed to confer on this Court jurisdiction to review on a writ of certiorari the judgment or order in question is 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED

Rule 60(B) states:

Relief from a Judgment or Order (a) CORRECTIONS BASED ON CLERICAL MISTAKES; OVERSIGHTS AND OMISSIONS. The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected

only with the appellate court's leave. (b) GROUNDS FOR RELIEF FROM A FINAL JUDGMENT, ORDER, OR PROCEEDING. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief. (c) TIMING AND EFFECT OF THE MOTION. (1) Timing. A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding. (2) Effect on Finality. The motion does not affect the judgment's finality or suspend its operation. (d) OTHER POWERS TO GRANT RELIEF. This rule does not limit a court's power to: (1) entertain an independent action to relieve a party from a judgment, order, or proceeding; (2) grant relief under 28 U.S.C. § 1655 to a defendant who was not personally notified of the action; or (3) set aside a judgment for fraud on the court.

STATEMENT OF THE CASE

This Petition brings a challenge to the District Court's refusal to vacate a $1.3 million default judgment in a defamation action. The Petition's central argument is that the Eleventh Circuit applied the incorrect law when it affirmed the District Court's position that truth is not always an absolute defense to defamation. In order to avoid liability, a "good motive"

must also be shown. Schiano requests this Court grant Certiorari so the Court may address novel and important questions of Constitutional law that arise in this case, namely, whether substantial truth is a complete defense to defamation under the First Amendment, regardless of the motives of the speaker.

A. Factual Basis for the Writ.

Schiano owned Hotwiremedia.com, a "party vendor directory" that sold listing space and banner advertisements on its website to service companies that catered to the party planning industry. A few months after Schiano trained Freidman to maintain Hotwiremedia.com's database and to sell vendor listings, Freidman represented to clients of HotWireMedia.com that Hotwiremedia.com was purchased by Friedman and Freidman's Planningforevents.com company. Thereafter, Appellee Freidman charged Hotwiremedia.com clients' credit cards for Freidman's commissions and for banner ad upgrades. Schiano reported Friedman's actions to the local Police Department and then started a webpage on the Hotwiremedia.com website documenting Appellee Freidman's fraud. Thereafter, Appellee Freidman accused Appellant Schiano online of being, among other things, a child molester and rapist. Schiano's business did not survive Freidman's accusations, and he was forced to leave his home, opting to rent the property due to the loss of business. Schiano was forced to move from his home at 3840 Northwest 17th Avenue, Oakland Park, Florida 33334 to 400 NW 53rd Court, Oakland Park, Florida, 33309. As of December 12, 2016, Schiano's

usual place of abode was the property at 400 NW 53rd Street.

On December 8, 2016, Freidman and his company Scale Media, Inc. filed a lawsuit in the United States District Court, Southern District of Florida against Schiano alleging Defamation *Per Se* (Count I) and Violation of Florida's Unfair and Deceptive Trade Practices Act, Chapter 501, Florida Statutes (Count II). On December 12, 2016, Appellee Freidman attempted to serve process on the Appellants at the 3840 NE 17th Avenue, Oakland Park, Florida 33334 address by substitute service on renter, Ms. Katya Skripova. Schiano had no personal relationship with Ms. Skripova. Ms. Skripova was from Russia and spoke only broken English. Ms. Skripova never advised Appellant Schiano that she was served with a complaint or legal papers.

On January 5, 2017, the Appellees filed a Motion for Clerk's Entry of Default against the Appellants. On January 5, 2017, Friedman filed a Motion for Preliminary Injunction seeking to take down Schiano's websites. On January 6, 2017, the Clerk of the District Court entered Clerk's Entry of Default against the Appellants. On January 6, 2017, the Appellees filed a Motion for Default Judgement. On that same date, the trial court entered an Order granting Appellees' Motion for Preliminary Injunction. On January 17, 2017, the trial court entered a Final Default Judgment and Permanent Injunction against the Appellants.

Circa February 2017, Schiano first learned of the existence of the underlying civil action when the Schiano's websites and e-mail servers stopped working

secondary to the trial court's injunctions. Schiano went to the federal courthouse in Fort Lauderdale and attempted to file a motion. The courthouse staff told Schiano he could not file a motion for the corporate defendants. Likewise, the clerk of the courthouse staff told Schiano that he could not even represent himself.

B. Schiano's Letter to the District Court and Motion to Vacate Default Judgment.

After Schiano visited the Federal Courthouse, he researched the lawsuit, found the assigned judge, researched how to mail the judge's chambers, typed a letter, and mailed the letter to advise the judge regarding Schiano's situation.

On March 23, 2017, Schiano sent a letter or e-mail to the Judge. In the e-mail, Schiano stated, "I am requesting an appearance in Court…I would like to submit documents and make verbal argument why I have a need and right to defend myself... I can also provide witnesses . . ."

The e-mail set forth truth as a meritorious defense to Friedman's defamation-based claims; and recited concrete facts describing how Freidman committed credit card fraud against Schiano's customers.

The "letter" advised the trial court that, among other things, Schiano did not receive notice of the lawsuit; that Schiano does not live at the home of record; that he was experiencing extreme financial hardship and was unable to afford a lawyer; that the documents that Schiano posted online were real, true, factual,

and legitimate; and that the Friedman was suing Schiano in retaliation for the factual and truthful Hotwiremedia.com Matthew Friedman Fraud webpage. As such, in the letter, Appellant Schiano asked the trial court for an appearance in court to submit documents, verbal arguments, and witnesses.

C. Order Denying Schiano's Motion to Vacate Default Judgment.

On November 14, 2017, the District Court denied Schiano's motion to vacate. On Footnote 3 of the trial court's Order Denying Motion to Vacate Default Judgment the trial court characterizes the Appellants letters as follows:

> [Schiano emailed the court on March 23, 2017 and] emailed the Court again on two other occasions: March 24, 2017, and April 27, 2017. In his emails, Schiano detailed his issues with the injunctions and why he could not comply with them, refuted the Plaintiffs' allegations, and presented arguments and evidence of the Plaintiffs' "slander" against him.

Except for finally mentioning the Appellants' letter in the Order on Motion to Vacate, the trial court took no action on or acknowledged Schiano's letters. On April 28, 2018, after receiving three letters from Schiano, the trial court entered a Default Final Judgment entering a $1,310,535.08 judgment against Schiano and a final injunction permanently shutting down Schiano's business websites.

D. Schiano Retains Counsel to file a Motion to Vacate Default Judgment.

On May 18, 2017, twenty days after the trial court issued the Final Default Judgment with damages, Schiano filed a Motion to Vacate Final Judgment and Related Orders setting forth grounds for excusable neglect, due diligence, and, among other defenses, truth as a meritorious defense to alleged defamation.

On October 5, 2017, the Schiano filed a Proposed Answer to Verified Complaint setting forth, among other affirmative defenses, truth as an affirmative defense to defamation.

On November 11, 2017, the District Court entered an Order Denying Motion to Vacate Final Default Judgment. On November 27, 2017, Schiano filed a Motion to Alter or Amend Judgment. On February 16, 2016, the District Court entered an Order denying Schiano's Motion to Alter or Amend Judgement.

On February 23, 2018, the Schiano filed a Notice of Appeal.

E. Schiano's Appeal to the Eleventh Circuit.

On appeal, Schiano argued that Friedman failed to effectuate service of process at Schiano's usual place of abode. Rather, Friedman attempted substitute service on Schiano's rental tenant while Schiano lived at a different property. As such, Schiano contended that the trial court's Final Default Judgment is void for lack of personal jurisdiction and the

trial court had no discretion but to set aside the Final Default Judgment.

Next, Schiano contended that his March 23, 2017 letter was substantively a *pro se* Motion to Vacate the Default Judgment that predated the trial court's April 28, 2017 Final Default Judgment with damages. Schiano argued that the District Court acted in a manner inconsistent with due process by ignoring the Schiano's letters and therefore the District Court's judgment is void.

Last, notwithstanding the forgoing, because Schiano's March 23, 2017 letter was substantively a *pro* se Motion to Vacate that predated the trial court's April 28, 2017 Final Default Judgment with damages, the District Court erroneously applied the more rigorous excusable neglect standard under Rule 60(b) instead of the more liberal good cause standard under Rule 55(c). In any regard, even under Rule 60(b), the court erred as public policy dictates that relief from default judgments be liberally granted. Schiano added that it is undisputed that the trial court received Schiano's March 23, 2017 e-mail well before the trial court issued its April 28, 2017 final order (Doc. 57). Therefore, Schiano's contended that his March 23, 2017 email was a *pro se* motion to set aside the default.

Schiano added that the District Court erroneously failed to recognize Schiano's truth defense as a complete defense to allegations of defamation and failed to properly consider the economic burden imposed on Schiano by the $1,310,535.08 judgment and

injunctions that permanently shut down Schiano's business websites.

The Appellate Court recognized a conflict in the District Court decision but failed to resolve the issue stating:

> The parties argue over whether truth is an absolute defense to defamation under Florida law. Florida's Constitution provides, "In all criminal prosecutions and civil actions for defamation the truth may be given in evidence. If the matter charged as defamatory is true *and* was published with good motives, the party shall be acquitted or exonerated." Fla. Const. art. 1 § 4 (emphasis added). Florida courts, as we have previously noted, have interpreted this provision to mean that truth is not an absolute defense in a defamation action; "good motives" are also required. *Finch v. City of Vernon*, 877 F.2d 1497, 1504 (11th Cir. 1989) ("In Florida, truth is not always an absolute defense to defamation. In order to avoid liability, a 'good motive' must also be shown." (quoting *Lewis v. Evans*, 406 So.2d 489, 492 n.2 (Fla. 2d DCA 1981)); *see also id.* ("Armstrong does not assert that the evidence was insufficient for the jury to conclude he acted with ill will."). Schiano responds pointing to an unpublished federal district court case in which the court opined that "[s]ubstantial truth is a complete defense to defamation, regardless of the motives of the defamer. It is a common tenet of First Amendment law that true statements are inactionable." *Carroll*

> *v. TheStreet.com, Inc.*, No. 11-CV-81173, 2014 U.S. Dist. LEXIS 156499, 2014 WL 5474061, at *11 (S.D. Fla. July 10, 2014). In light of *Finch*, the *Carroll* court incorrectly remarked that the "good motive" requirement "is not recognized" by the federal courts. Nevertheless, we need not resolve this potential constitutional conflict. We simply note that the district court found Schiano's "defamation of Plaintiffs was malicious and committed with the specific intent of causing harm to Plaintiffs."

This Petition for Writ of Certiorari followed.

REASONS TO GRANT THIS PETITION

I. THE DECISION OF THE UNITED STATES COURT OF APPEALS CONFLICTS WITH FEDERAL LAW ON THE SUBSTANITAL TRUTH DOCTRINE.

This Court should accept this Petition because the Eleventh Circuit's decision below incorrectly construed and applied the Substantial Truth Doctrine giving rise to an important issue of uniform national law. As it stands, Substantial Truth provides a basis for federal courts to set aside a default judgment, regardless of the motives of the speaker. The Eleventh Circuit's decision creates a rift in the uniform national application of Substantial Truth and leaves open an interpretation of the doctrine that violates the First Amendment.

A. The Substantial Truth Doctrine Must Be Uniformly Applied Across the Federal Courts in Light of First Amendment Concerns.

Under both the First Amendment and the common law, the central question of the Substantial Truth Doctrine is whether the statement challenged as defamatory conveys just that, the "substantial truth." *Masson v. New Yorker Magazine*, 501 U.S. 496, 516 (1991). The majority of jurisdictions hold that the statement in question need not be entirely accurate. That is to say, "absolute truth" is not required. Instead, as this Court has explained, inaccuracies "do not amount to falsity so long as 'the substance, the gist, the sting of the libelous charge be justified.'" *Id.* at 517 (emphasis added). "Put another way, the statement is not considered false unless it 'would have a different effect on the mind of the reader from that which the pleaded truth would have produced.'" Id. (quoting R. Sack, LIBEL, SLANDER AND RELATED PROBLEMS 138 (1980)); see also Nelson, 667 F.Supp. at 1477 ("A workable test is whether the libel as published would have a different effect on the mind of the reader from that which the pleaded truth would have produced."). "According to the U.S. Supreme Court and Florida case law, falsity exists only if the publication is substantially and materially false, not just if it is technically false." *Smith v. Cuban American Nat'l Found.*, 731 So.2d 702, 707 (Fla. 3d DCA 1999) (quoting *Masson* and Sack, *supra*).

Accordingly, it is well accepted that the doctrine precludes recovery for defamation where the challenged statement conveys the "substantial truth," meaning "the gist, the sting of the libelous charge" is the same as the truth. *Masson,* 501 U.S. at 517 (quoting *Heuer v. Kee*, 59 P.2d 1063, 1064 (1936)). At early common law, falsity was presumed; however, the allocation of the burden of proving falsity of the challenged statements is now shifted to the plaintiff. *See Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986).[1]

B. The Eleventh Circuit Failed to Resolve the Conflict in Law Regarding Whether Substantial Truth is a Defense to Defamation Regardless of the Motives of the Speaker.

In the proceedings below, the court erroneously relied on *In re Worldwide Web Systems, Inc.*, 328 F.3d 1291 (11th Cir. 2003), to determine that an assertion of substantial truth was inadequate as a defense to defamation. Instead, the court placed the additional burden on Schiano to make an "affirmative showing of a defense that is likely to be successful" to prevail on his motion under Rule 55(c). App. A at *. The court then rebuked Schiano's assertion of substantial truth by saying that he could not establish a

[1] In the context of a media defendant and public figure or a private figure, whether non-media or media defendant, Florida's standard jury instructions also include substantial truth language. *Cuban Am. Nat'l Found.*, 731 So. 2d at 7

meritorious defense "simply by pointing to factual evidence already considered and rejected by the district court." *Id.* at *.

The court below based its findings on a presumption disfavored by the majority of jurisdictions: that truth alone is not sufficient as a defense to defamation. Pointing to Eleventh Circuit and Florida state court decisions, both the court of appeals and the district court found that a defendant in a defamation action is required to show both truth and "good motives" to prevail under the Florida Constitution. *Id.* at * n.16. (citing *Finch v. City of Vernon*, 877 F.2d 1497, 1504 (11th Cir. 1989); *Lewis v. Evans*, 406 So.2d 489, 492 n.2 (Fla. 2d DCA 1981)). Therein lies the conflict.

The Southern District of Florida, the trial court district in this case, sided with the majority rule in *Carroll v. TheStreet.com, Inc.*, Case No.: 11-CV-81173, (S.D. Fla. July 7, 2014), to recognize that substantial truth alone stands as a defense to defamation. The court in *Carroll* held:

> "Substantial truth ***is a complete defense*** to defamation, ***regardless of the motives*** of the defamer. It is a common tenet of First Amendment law that true statements are unactionable. [The] argument that substantial truth is only a complete defense if coupled with good motives is a relic of the days when libel could be a criminal defense… It is no surprise that the 'good motive' requirement does not appear in Florida's Standard Jury Instructions and is not recognized by the Federal and Florida Supreme

> Courts… [t]he Constitution provides a sanctuary for truth… To hold otherwise would subject a person to liability for defamation for speaking the gospel truth."

Id. (emphasis added) (internal citations omitted); *Jews for Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1106 (Fla. 2008). Even if Florida law requires good motive by the alleged defamer, here, the only record evidence on this issue is Schiano's Letter, which sought to inform the public of Freidman's conduct in relation to his company. Accordingly, given the public's interest in awareness of fraud and unethical business practices in the marketplace, Schiano's publication of the true statements of Friedman's actions were fueled by good motives, i.e. consumer protection.

The circuit courts have held assertion of substantial truth to be sufficient for purposes of a motion for relief from judgment.[2] On such motion, the facts

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[2] *See American Metals Service Export Co. v. Ahrens Aircraft, Inc.*, 666 F.2d 718, 721 (1st Cir. 1981) (requiring merely facts sufficient, if believed, to support a meritorious claim); *Falk v. Allen*, 739 F.2d 461, 464 (9th Cir. 1984) ("On a Rule 60(b) motion, this court will accept the allegations of the movant's factual statement."); *White v. Cassey*, 30 F.3d 142, (10th Cir. 1994) (unpublished opinion) (holding that review of the merits is "limited to ascertaining not the truth of the movant's factual allegations, but assuming them to be true, simply whether they state a valid claim or defense.").

as asserted are assumed and assessed only to determine whether a potentially meritorious defense is present. *See id.* As the Tenth Circuit explained:

> "The parties do not litigate the truth of the claimed defense in the [Rule 60(b)] motion hearing. Rather, the court examines the allegations contained in the moving papers to determine whether the movant's version of the factual circumstances surrounding the dispute, ***if true***, would constitute a defense to the action. For purposes of this part of the motion [meritorious defense examination], the movant's version of the facts and circumstances supporting his defense ***will be deemed to be true***."

In re Stone, 588 F.2d 1316, 1319 (10th Cir. 1978) (emphasis added) (internal citation omitted).

In this case, the district court committed a glaring abuse of its discretion by first grossly mischaracterizing Schiano's March 23, 2017 *pro se* motion and then incorrectly finding that Schiano must prove the truth of his meritorious defenses in a Rule 60(b) proceeding.

The trial court erroneously held:

> "Defendants…have not provided ***specific facts or evidence*** to support their defenses. In support of their contention that the defamatory statements are true, the Motion only points to Schiano's March 23, 2017 email to the Court where he states that one of the webpages the Court ordered to be taken down was a 'true and

> factual account of a cybercrime [credit card fraud] conspiracy committed by [Plaintiff] Matthew Friedman."

App. C at *.

The court was plain wrong. As in *In re Stone*, the defendant in a Rule 60(b) proceeding is not required to provide "evidence" of its defense, but rather provide facts in support of a meritorious claim. 588 F.3d. at 1319. With respect to facts, notwithstanding that the March 23, 2017 e-mail incorporates by reference to the Plaintiff's exhibits dozens, if not hundreds, of facts to support a truth defense, it ***directly*** states specific facts to support a truth defense.

The Letter stated:

> "As a HotWireMedia.com employee Matthew Friedman committed credit card fraud by ***stealing*** my clients (sic) ***credit card details and charging those credit cards*** using a fraudulent 'copycat' business called WorldVendorDirectory.com & PlanningForEvents.com… New York detectives… concluded Mathew Freidman did commit credit card fraud, and victimized HotWireMedia.com clients and my company."

App. B at *.

The trial court glaringly abused its discretion by ignoring this part of the March 23, 2017 e-mail in its entirety. Clearly, "***if true***, [the Letter] would certainly constitute facts to support a substantial truth

defense to the [defamation-based] action." *In re Stone,* 588 F.2d at 1319.

The examples of Friedman's conduct cited by Schiano's Letter both indicate and implicate substantial truth as a valid defense. Therefore, Freidman did not and could not meet his burden as a matter of law to establish the requisite element of falsity as to the Defamation Count of the Complaint. *See Jews for Jesus, Inc.* v. *Rapp*, 997 So.2d 1098, 1106 (Fla.2008), *Jeter v. McKeithen*, 2014 U.S. Dist. LEXIS 142857, 2014 WL 4996247, *l-2 (N.D. Fla., Oct. 7, 2014). Accordingly, the Petitioner requests this Honorable Court grant this Petition.

CONCLUSION

For the foregoing reasons, this Petition for a writ of certiorari should be granted.

Respectfully submitted,

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