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Anti-SLAPP Advocates Positive Despite Nixed Appeal In Fla.

By **Nathan Hale**

Law360 (November 5, 2019, 10:42 PM EST) -- First Amendment rights advocates were encouraged by a decision from Florida's Fourth District on a state statute that's designed to prevent lawsuits aimed at hindering the exercise of free-speech rights, even though the court rejected an appeal that relied on that law.

The issue arose from a case in which former West Palm Beach city commissioner Sharon "Shannon" Materio sued a marketing firm, its principal and an electioneering group for publishing a mailer that suggested she received improper property tax breaks and a federally funded grant intended for low income residents, according to the appellate opinion. Materio contends the mailer, sent to voters just before the 2018 City Commission election, defamed her.

An attorney for several groups representing grassroots activists and most of the major media outlets in the state said that while the Fourth District panel found that case law prevented it from hearing the defendants' appeal, the court's certification of a conflict with the state's Second District and other elements of its decision last week provide opportunities to ultimately strengthen the law's protections.

"These individuals and groups are the most vulnerable to lawsuits intended to chill or silence them. The jurisdictional issue is easily remediable," said GrayRobinson PA partner Frank A. Shepherd, who is representing Americans for Prosperity, the Public Participation Project and First Amendment Foundation as amicus curiae supporting the defendants.

Shepherd also pointed to "strong support" for the defendants — Cornerstone Solutions Florida LLC, its principal Pradeep "Rick" Asnani and WPB Residents for Integrity in Government Inc. — in a concurring opinion penned by District Judge Robert M. Gross. The judge said that Materio's suit qualifies as the kind of meritless bullying action known as a "Strategic Lawsuit Against Public Participation" that the anti-SLAPP law is meant to cover and also found that the statute covers political mailers, like the one at issue.

"I would not be celebrating if I were Ms. Materio," Shepherd said.

Asnani and Cornerstone were working for opposing candidate Christina Lambert, who defeated the incumbent Materio but was not named in Materio's lawsuit.

The trial court denied the defendants' motions to dismiss the case and for summary judgment, in which they argued that the political speech in their mailer was protected under the anti-SLAPP statute.

They petitioned the Fourth District for certiorari review, but in the majority opinion, the panel found it lacked jurisdiction because the defendants failed to make the requisite showing that they would suffer irreparable harm if the case proceeded.

The panel reached this conclusion despite including a statement similar to one in the Second District's conflicting decision earlier this year in which it found that denial of an anti-SLAPP motion is immediately reviewable on the grounds that improper denial would result in "precisely the harm that

the anti-SLAPP statute seeks to prevent — unnecessary litigation."

Rather than district courts expanding certiorari jurisdiction as the Second District did, the proper course of action would be for the Florida Supreme Court to amend the rule on non-final appeals to cover the anti-SLAPP statute, the Fourth District said.

Frank Shepherd said the Florida Bar's Appellate Courts Committee and Media and Communication Law Committee are very active and he expects they will take a look at the issue.

But in his concurring opinion, Judge Gross, said he felt that if an interlocutory appeal were available, the defendants would have succeeded in overturning the trial court's order.

The lower court erred, Judge Gross said, by construing the anti-SLAPP law narrowly and not finding the political mailer to be covered by the law's broad reference to "other similar work" in its list of protected items. The judge also said that Materio failed to establish that her defamation claim is meritorious and that it qualifies as a SLAPP.

"We have a very strong opinion out of the Fourth District Court of Appeal by Judge Gross that well analyzes the issues and concludes that this is a SLAPP suit by Mrs. Materio," Shepherd said. "I think we're ready to move forward and will."

However, the weight of Judge Gross' opinion is a point of debate between the parties and even the appellate panel.

In another concurring opinion, Judge Alan O. Forst said that because the court found it does not have jurisdiction, it is not appropriate for it to "render a view" on the merits of the case and that any opinion addressing the merits would be an advisory opinion, which Florida's appellate courts lack authority to issue.

Attorneys Joseph W. Janssen III and Mark G. Keegan of Janssen, Siracusa & Keegan PLLC, who are representing Materio, said Judge Gross' opinion should carry no significance.

"The appellate cases tell us that a concurring opinion in a denial of a petition for the extraordinary writ of certiorari has no precedential value, and further, carries no legal weight," they said in an email. "The only win for the Asnani defendants in this appeal would have been the outright dismissal of Mrs. Materio's common law defamation and conspiracy to defame claims. Any other characterization of this ruling is akin to the Houston Astros claiming they won Game 7 of the World Series."

The Astros lost the 2019 World Series to the Washington Nationals on Oct. 30, the same day the opinion was released.

But as the first judge to outline a legal analysis and address the substance of Materio's claims, Judge Gross' findings stand out, suggested Bill Shepherd of Holland & Knight LLP, who is representing Asnani and Cornerstone.

"We're certainly heartened by Judge Gross' analysis and agree with it," he said.

Bill Shepherd and Frank Shepherd, who are not related, both also said they found it notable that the other panelists did not disagree with Judge Gross.

"You would have heard from them. They're not wallflowers," said Frank Shepherd, who previously sat on the Third District Court of Appeal and said he knows the panel members personally. "I think it will be persuasive either in the Florida Supreme Court or almost certainly in the trial court, wherever the case goes next."

As it stands, the defendants have some options to mull over, including whether to seek review in the Florida Supreme Court, pursue reconsideration by the Fourth District or return to the trial court with the Fourth District's writings.

"It's a significant statement by the [appeals] court that they are certifying the conflict," Bill Shepherd

said of the potential for the state's highest court to weigh in on the anti-SLAPP issue.

In the meantime, the Fourth District's ruling leaves Materio in a position to continue pursuing her claims.

"We are pleased that the appellate court applied the correct standard of law, and dismissed the appeal," her attorney Janssen said in an email. "Our client now has the opportunity to have a jury of her peers evaluate the legality and propriety of defendants' actions, and we look forward to full discovery" — which she said the SLAPP issue prevented — "of the entirety of the actions taken by the defendants against our client."

Counsel for WPB Resident for Integrity did not respond to a request for comment.

Judges Robert M. Gross, Melanie G. May and Alan O. Forst sat for the Fourth District.

WPB Residents For Integrity In Government is represented by Leonard Feuer of Leonard Feuer PA.

Asnani and Cornerstone are represented by William N. Shepherd, Seth J. Welner and Jeff Schacknow of Holland & Knight LLP.

Materio is represented by Joseph W. Janssen III, John M. Siracusa and Mark G. Keegan of Janssen Siracusa & Keegan PLLC.

Amicus Curiae Americans for Prosperity, the Public Participation Project and First Amendment Foundation are represented by Frank A. Shepherd of GrayRobinson PA.

The case is WPB Residents for Integrity in Government Inc. v. Materio, case numbers 4D19-967 and 4D19-997, in the Fourth District Court of Appeal of Florida.

--Editing by Michael Watanabe.