IN THE SUPREME COURT OF FLORIDA

Case No. 63,114

THE MIAMI HERALD PUBLISHING COMPANY,
Petitioner,
vs.
AURELIO ANE,
Respondent.

QUESTION OF GREAT PUBLIC IMPORTANCE
CERTIFIED BY THE THIRD DISTRICT COURT
OF APPEAL OF FLORIDA

BRIEF OF AMICUS CURIAE FLORIDA PRESS ASSOCIATION

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INTRODUCTION—INTEREST OF AMICUS CURIAE

This case and the related case of *The Tribune Company v. Levin,* Case No. 63,217 (*"Levin"*), both involve large, daily newspapers publishing in major Florida cities, each employing a substantial number of reporters and editors working out of multi-million dollar facilities. *The Miami Herald* and *The Tampa Tribune* are not typical of Florida's newspapers; they are among the very largest newspapers in Florida and are not representative of the average Florida Press Association ("FPA") member. Therefore, FPA offers this brief as *amicus curiae* to show how affirmance of the Third District's decision in this case (and the Second District's decision in *Levin*) presents a serious threat to the ability of the typical Florida newspaper to report the news to the public.

FPA is an association of approximately 55 daily and 160 weekly newspapers published in Florida. With perhaps one or two exceptions, every Florida newspaper belongs to FPA. Florida's largest *daily* newspaper is *The Miami Herald,* circulation 550,000, and its smallest is *The Jackson County Floridan,* circulation 3,000. The average circulation for a Florida *weekly* newspaper is approximately 5,000, and approximately 75% of the weekly newspapers do not exceed this average in circulation. The largest weeklies are distributed free and enjoy an average circulation of approximately 60,000; the smallest have a circulation of about five or six hundred. The average staff of a Florida weekly newspaper numbers between four and five people, from publisher to receptionist.

Of the approximately 215 regular members of FPA, only six have circulations of over 200,000, all located in Florida's major metropolitan areas, such as Miami, Tampa, or Jacksonville. The resources of the small independent newspaper—the typical Florida newspaper—are dwarfed by the larger metropolitan dailies. The United States Supreme Court has noted that the small independent is a vanishing phenomenon. *See Miami Herald Publishing Company v. Tornillo,* 418 U.S. 241, 248-250 (1974). Yet much local Florida news, controversial and non-controversial, reaches the local audience only through the small local newspaper.

The enormous incremental costs associated with the adoption of a negligence standard for reporting matters of general or public concern will necessarily have an equally enormous impact on small Florida newspapers since they do not share in the economic wealth and resources enjoyed by the few major publications. While some may argue that large papers such as *The Miami Herald* and *The Tampa Tribune* can absorb a large libel verdict, or consult their

lawyers routinely for opinions lessening their exposure to libel suits created by publishing certain stories, or hire additional staff to attempt to shield against the unpredictable spectre of negligence liability—no one may even plausibly assert this would be true of the typical Florida newspaper. The average paper, with its limited resources and handful of employees, may have only one means of self-preservation: self-censorship. To avoid significant potential costs—in people, time and money—associated with libel litigation, and in lieu of hiring the extra staff it cannot afford, the typical Florida newspaper may well be forced to simply report less news. Local citizens in the communities served by these newspapers will suffer because it will be these citizens who will be denied information our freedoms of speech and the press were designed to guarantee.

For the reasons set forth below, FPA implores this Court to adopt a test which will make a publisher liable for a defamatory falsehood published in connection with a matter of real or general public concern only if it publishes with knowledge of the statement's falsity or with a reckless disregard of the statement's truth or falsity.

STATEMENT OF THE CASE AND FACTS

FPA adopts the Statement of the Case and Statement of the Facts contained in the Initial Brief of Petitioner The Miami Herald Publishing Company in this case. FPA also adopts the arguments presented to this Court by the petitioners in the *Levin* case.

ARGUMENT

RECOVERY FOR DEFAMATORY FALSEHOODS IN CONNECTION WITH A MATTER OF REAL PUBLIC OR GENERAL CONCERN SHOULD BE PERMITTED ONLY IF THE PLAINTIFF PROVES THE PUBLISHER KNEW THE STATEMENT WAS FALSE OR PUBLISHED WITH RECKLESS DISREGARD OF THE STATEMENT'S TRUTH OR FALSITY.

I. A NEGLIGENCE STANDARD WILL RESULT IN SELF-CENSORSHIP.

The average FPA member, a small local newspaper with a small staff and a small circulation, often provides the only independent voice for news in a particular locality; it must struggle to present this local information in the face of television networks and large dailies from neighboring and distant metropolitan areas.

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) ("*Gertz*"), left to this Court the duty to determine a fault standard for defamatory falsehoods published while reporting matters of real or general public concern. This Court should reject a negligence standard for determination of liability for such reports as an unpredictable "Russian roulette" standard. Under a negligence standard small publishers with limited resources must simply guess at whether they have acted with "due care" and hope they can muster sufficient resources and goodwill to persuade a jury to agree with them long after the fact. Without benefit of the substantial financial, legal and editorial resources of a major metropolitan daily, they may print, under deadline pressure, material which may later turn out to be unintentionally false, but also actionable. A

jury may find something as apparently innocuous as a report on the local garden club offensive to a potential plaintiff mentioned therein and unintentionally false. While *The Miami Herald* or *The Tampa Tribune* may be able to assume that risk, the result of guessing wrong for the typical Florida newspaper could be disastrous: a libel judgment imposed by a jury applying its own idea of "reasonableness" to that which was published, or unfortunately, in these days of extremely high legal costs, the substantial cost of a successful defense against an angry plaintiff determined to fight forever.

The negligence standard will accordingly result in self-censorship to any typical, small, Florida newspaper unable to pay the consequences of guessing wrong. Self-censorship will manifest itself in two basic ways. First, because the negligence or "reasonable man" standard is vague and subject to after-the-fact *ad hoc* jury determinations, newspapers seeking to avoid litigation costs and adverse damage judgments will simply avoid publishing anything which might turn out to be a problem. Second, most small papers with budgets corresponding to the size of their four or five man operations will be unwilling or unable to absorb costs of complying with a negligence standard.

A. A Negligence Or "Reasonable Man" Standard Will Result In Unreasonable Restraints On Publication.

Newspapers may be liable for negligence in many contexts. If a circulation truck is in an automobile accident, ordinary tort rules apply. This is the rule for many of a newspaper's other activities. In these activities, a newspaper is similar to other businesses, and other employers. The question here, though, is whether this rule should be extended, as was done by the Second District

in *Levin* and the Third District below, to that area of a newspaper's business which is totally different from that of any other business—publication of the news. We submit that the "reasonable man" standard of ordinary tort cases is inappropriate in determining liability for publication. The reason is simple. Press defamation is no ordinary tort. Any standard which will chill dissemination of information by the press to the public impacts society in a way totally different from a car accident or even a surgical death. Since the uncertainty of application of a negligence test will, in all probability, cause many "reasonable" small publishers to choose not to risk the possibility of a libel suit or judgment for unintended, yet negligent falsehoods published in connection with matters of real or general public concern, information as to such matters simply will not be published. In the local context, matters of real public concern are likely to be published in the local press, or not at all. As Justice Douglas warned as to application of a negligence standard, "I fear that it may well be the reasonable man who refrains from speaking." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 360 (1974) (Douglas, J., dissenting). Faced with a negligence standard, Florida's typical newspaper is likely to become Douglas' reasonable man.

Florida courts have recognized the special duties discharged by the press, as well as the unique pressures under which the press operates in promptly disseminating news. *See Ross v. Gore*, 48 So.2d 412 (Fla. 1950). Even the most richly budgeted newspapers with hundreds of employees are faced each day with resolving under time deadlines questions with no clear answers, *e.g.*, the need for further verification of fact or source, the reliability of a source, the balancing of the public's immediate need to know certain information against a delay for further confirmations and verifications. The task of the small

local paper in dealing with similar deadlines with a fraction of the large paper's resources becomes vastly more difficult.

Any standard of liability which would cause small local papers to choose not to print certain matters of public interest must be looked at with grave disfavor. Undue concern about printing unintentional falsehoods will force the publisher to avoid printing much truth as well. Creating a disincentive to speak or publish because of a vague, hindsight-oriented negligence rule should be avoided. We, as a society, "are less willing to have [free speech] inhibited. It is a special kind of activity in our society. That, in brief, is what the traditions of the First Amendment are all about—a special sensitivity to the risks of inhibiting communication activity and services." Kalven, *The Reasonable Man and the First Amendment*, 1967 SUP.CT.REV. 267, 301 (1967).

Can we, in a society built on the "marketplace of ideas", tolerate a standard of liability for publication of matters of real public concern that is based on after-the-fact views of a lay jury, free of deadline pressures, applying its idea of "reasonable" to what was published? With a negligence standard, in contrast to a knowing or reckless falsehood standard, creative lawyering can often create a sufficient appearance of negligence to present an issue to the jury. The small publisher faced with this spectre is likely to refrain from publishing facts properly conveyed to the public in order to protect himself against libel actions. *See Walker v. Colorado Springs Sun, Inc.*, 538 P.2d 450, 458 (Colo. 1975), *cert. denied sub nom. Woestendiek v. Walker*, 423 U.S. 1025 (1975). Deprivation of local press publication to the local public of such issues by reason of these concerns is an unacceptable result.

The alternative rule urged by FPA provides more guidance to the small publisher and will be much less sub-

ject to *ad hoc* jury determinations. Under a rule where publishers are liable for knowing falsehoods and those where they entertained serious doubts as to the truth, a publisher has sufficient "notice" before publishing that a statement may be actionable. Publishers must know whether they are at least publishing with "serious doubts" as to the truth of a statement or with a "high degree of awareness of its probable falsity". Moreover, publication of the knowing falsehood is conduct which should be deterred by the force of law.

B. The Negligence Standard Will Cause The Average Florida Publisher To Either Be Unable Or Unwilling To Absorb Ad Hoc Libel Judgments Or The Costs Of Trying To Anticipate A Jury Determination.

Large metropolitan dailies comprise less than 3% of all the daily and weekly newspapers published in Florida. This Court should avoid a standard which will result in the vast majority of Florida's newspapers avoiding publication of socially valuable information because of the prospect of (i) large judgments flowing from unintentional falsehoods and (ii) the protracted costs of litigation under a fact-intensive negligence standard. The third alternative, hiring additional editorial and/or legal assistance to screen stories and to assist in anticipating subsequent jury determinations, is simply not available to a paper with limited financial resources.

While the Supreme Court in *Gertz* attempted to lessen the probability of extraordinarily excessive and disproportionate libel judgments by the adoption of constitutional damage rules, damage verdicts awarded subsequent to *Gertz* do not reflect the operation of any effective constraint on juries. Although *Gertz* assertedly abolished

"presumed damages," the definition of "actual damage" permits recovery for elements of damage unrelated to damage to reputation:

> Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include . . . personal humiliation, and mental anguish and suffering.

Gertz, 418 U.S. at 350. Accordingly, many juries have returned substantial verdicts even where reputational damages were waived.[1]

Second, the negligence standard frustrates the cheaper summary disposition of meritless cases because of its fact-intensive nature, and may prove especially onerous to the small newspaper. It lends itself to lengthy trials and substantial discovery costs. Defending such litigation is costly, and the chilling effect upon publishers unwilling to risk litigation is recognized:

> The threat of being put to the defense of a lawsuit brought by a popular public official may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself, especially to advocates of unpopular causes.

Washington Post Company v. Keogh, 365 F.2d 965, 968 (D.C.Cir. 1966), *cert. denied* 385 U.S. 1011 (1967).

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1. *Burnett v. National Enquirer*, 7 Med.L.Rptr. 1321 (Cal. Super. Ct. 1981) (jury award of $300,000 in compensatory damages and $1.3 million in punitive damages remitted to $50,000 in compensatory damages and $750,000 in punitive damages); *Levin v. Tribune Company*, Case No. 79-12781-20 (Fla. 6th Cir. Ct. 1982) (total jury award of $480,000 reduced to $380,000 by trial judge striking $100,000 of the punitive damages). *See Pring v. Penthouse*, 695 F.2d 438 (10th Cir. 1981) (jury award of $25 million reversed on grounds other than excessiveness).

The third consequence—higher and questionably effective quality control costs—simply is ludicrous when applied to the small publisher. A four person paper simply cannot afford to take the same in-house pre-publication precautions as its larger metropolitan counterparts.

The foreseeable result of a negligence rule is an unacceptable degree of silence in reports by small newspapers. Worse, a realistic result of a small newspaper being found liable for a negligent misstatement is to be forced out of business. The costs of libel defense and jury verdicts have already taken this toll. One newspaper was forced into bankruptcy because of a judgment against it for statements it never published. *Green v. Alton Telegraph Printing Co.*, 107 Ill.App.3d 755, 438 N.E.2d 203 (Ill.Ct.App. 1982).

II. A KNOWING OR RECKLESS FALSITY STANDARD PROVIDES MORE GUIDANCE TO PUBLISHERS AND STRIKES THE PROPER BALANCE BETWEEN FREEDOM OF SPEECH AND REPUTATIONAL INTERESTS.

A. The Knowing Or Reckless Falsity Test Is Consistent With The Protection Florida's System Of Common Law Privileges Has Traditionally Afforded Socially Valuable Speech.

The issue before this Court is how Florida should strike the proper balance between two competing social values: (i) the freedom to vigorously express socially valuable speech and (ii) the protection of individuals from personal harm caused by such speech. Free and vigorous speech about matters of real public concern is the foundation of American society as we know it, and is recognized in federal constitutional law and by this State as deserving great weight. Accordingly, no liability attaches for defamatory press reports, if true, no matter how great the

harm caused thereby. If defamatory press speech is false but involves public officials or figures, no liability will attach unless the press knew of the falsehood or truly doubted the truth.

In deciding the standard of liability with respect to other false defamatory speech uttered in connection with matters of public concern, this Court must analyze its past decisions in analogous areas. A review of Florida's historical protection of various types of valued speech shows that a negligence standard would fundamentally depart from common law tradition as reflected in Florida's law of qualified privilege. Accordingly, false defamatory speech on matters of real public or general concern should not be the subject of liability unless its falsity was known or the report was published with reckless disregard of its truth or falsity.

Imposing liability on publishers for knowing falsehoods and for falsehoods where serious doubts are entertained as to their truth is more consistent with Florida's historical treatment of speech that is valued. In the past, Florida has created "qualified privileges" from liability for falsehood uttered without ill will, fraud, or an intent to defame (*i.e.*, common law "express malice"), when balancing the recognized societal interest in speech with an individual's interest in compensation for damage to his reputation. A knowing or reckless falsity test, as urged by FPA, for reports on matters of real or general public concern would fit Florida's established common law scheme for protecting speech valued by society, without displacing or upsetting existing common law privileges, which may provide additional or overlapping protection.

In a wide variety of contexts, involving an imposing array of speakers and subjects, Florida law protects speakers from liability for negligent misstatements where the speech serves or relates to matters which are valued by

society. For example, a host of "absolute privileges" have been extended in the context of speech by executive, judicial and legislative officials, which render nonactionable defamatory falsehoods uttered in connection with the discharge of their official duties.[2] A wide variety of "qualified privileges" in startlingly diverse contexts in both the private and public sector have also evolved which expose the speaker to defamation liability only if falsehoods are uttered with common law "express malice".[3] Each privilege reflects Florida's recognition of the value speech plays in matters of real public or general concern in Florida society, either by shielding false and defamatory

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2. *See McNayr v. Kelly,* 184 So.2d 428, 430 (Fla. 1966) ("However false or malicious or badly motivated the accusation may be, no action will lie therefor in this state").

3. Among the types of speech found to be worthy of protection from liability based on negligence are defamatory statements circulated among members of professional organizations, *Frieder v. Prince,* 308 So.2d 132 (Fla. 3d DCA 1975), and *Rush-Hampton Industries, Inc. v. Home Ventilating Institute,* 419 F.Supp. 19 (M.D.Fla. 1976); defamatory statements circulated among members of religious organizations, *Loeb v. Geronemus,* 66 So.2d 241 (Fla. 1953); a private citizen's letters to a city manager charging zoning violations, *Moody v. Crist,* 287 So.2d 412 (Fla. 2d DCA 1973); communications to a government official impugning the qualifications of an individual to be appointed to public office, *Coogler v. Rhodes,* 38 Fla. 240, 21 So. 109 (1897); statements by a high school administrator and teacher to a parent charging drug trafficking at a particular store, *Chapman v. Furlough,* 334 So.2d 293 (Fla. 1st DCA 1976); false statements made in connection with the discharge of a statutory duty, *Brandwein v. Gustman,* 367 So.2d 725 (Fla. 3d DCA 1979); and falsehoods in communications which are required by statute. *See Hartley & Parker, Inc. v. Copeland,* 51 So.2d 789 (Fla. 1951). Negligent falsehoods communicated in the course of daily business are also routinely subject to privilege and are not actionable. *See Johnson v. Finance Acceptance Co. of Georgia,* 118 Fla. 397, 159 So. 364 (1935) (letter from loan company to customer charging bad ethics of competitor is privileged "trade talk"); *Montgomery v. Knox,* 23 Fla. 595, 3 So. 211 (1887) (statement in insurance association newsletter about a fire not being accidental is privileged). Defamatory statements about the qualifications or conduct of employees between interested parties are also protected. *Appell v. Dickinson,* 73 So.2d 824 (Fla. 1954); *Leonard v. Wilson,* 150 Fla. 503, 8 So.2d 12 (1942); *Briggs v. Brown,* 55 Fla. 417, 46 So. 325 (1908).

statements entirely, or by making falsehoods actionable only if the speaker maliciously intended harm. Significantly, the qualified privilege has also been applied to protect speech communicating matters of real public or general concern to the public. *Gibson v. Maloney,* 231 So.2d 823 (Fla. 1970), *cert. denied* 398 U.S. 951 (1970); *Abram v. Odham,* 89 So.2d 334 (Fla. 1956).[4]

Adoption of a rule creating press liability for negligent falsehoods would be a departure from Florida's past treatment of valued speech. In every other instance of speech in which the public has interest, negligent falsehood is insufficient. Requiring proof of knowing or reckless falsehood in press publications relating to matters of general or public concern would strike the balance of competing interests of individuals and society in a manner which is consistent with the way Florida has always synthesized such interests.

The press should be accorded that protection which corresponds to its role in Florida society. Failure to accord the press the protection of a knowing or reckless falsity standard would illogically undervalue the press' role in informing the public. Conferring absolute immunity to defamatory statements made by public servants in recognition of the importance of such speech to society, while making the press liable for negligent misstatements, undermines the value of the contribution of press speech *vis-a-vis* society's interest in other "privileged" speech.

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4. In *Abram,* this Court held Odham's statements in defense of Abram's assertion that Odham trailed in a gubernatorial election poll were covered by the qualified privilege because Odham had an interest in addressing Abram's poll and the public had a corresponding interest in hearing Odham. The *Abram* court also recognized the public's interest in being informed by the press as to a matter of general or public concern (*i.e.,* a gubernatorial campaign), characterizing the newspaper's conduct as an exercise of its "qualified privilege to publish matters of great public interest." 89 So.2d at 336. *Accord, Gibson v. Maloney,* 231 So.2d 823 (Fla. 1970), *cert. denied* 398 U.S. 951 (1970).

CONCLUSION

For the reasons set forth above, this Court should hold that recovery for defamatory falsehoods in connection with a matter of real public or general concern should be permitted only if the plaintiff proves the publisher knew a statement was false or published with reckless disregard of the statement's truth or falsity.

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