IN THE SUPREME COURT OF FLORIDA

CASE NO. 63,114

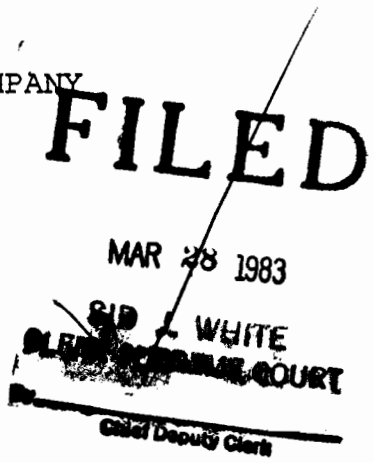
THE MIAMI HERALD PUBLISHING COMPANY

Petitioner

vs.

AURELIO ANE

Respondent



ON CERTIFIED QUESTION FROM THE DISTRICT COURT OF APPEAL, THIRD DISTRICT

BRIEF OF AMICUS CURIAE APALACHEE PUBLISHING CO.

George K. Rahdert
Patricia Fields Anderson
Rahdert, Anderson & Richardson
P.O. Box 960
St. Petersburg, Fl. 33731
(813) 823-4191

Attorneys for Amicus Curiae

IN THE SUPREME COURT OF FLORIDA

CASE NO. 63,114

THE MIAMI HERALD PUBLISHING COMPANY

Petitioner

vs.

AURELIO ANE

Respondent

ON CERTIFIED QUESTION FROM THE DISTRICT COURT OF APPEAL, THIRD DISTRICT

BRIEF OF AMICUS CURIAE APALACHEE PUBLISHING CO.

George K. Rahdert
Patricia Fields Anderson
Rahdert, Anderson & Richardson
P.O. Box 960
St. Petersburg, Fl. 33731
(813) 823-4191

Attorneys for Amicus Curiae

TABLE OF CONTENTS

TABLE OF CONTENTS (Cont'd)

TABLE OF CITATIONS

TABLE OF CITATIONS (Cont'd.)

TABLE OF CITATIONS (Cont'd.)

TABLE OF CITATIONS (Cont'd.)

OTHER AUTHORITIES

Preliminary Statement

Citation of the Amicus Curiae's Appendix will refer to document number, and, where applicable, the page number of the document itself, e.g., "App. 2," or "App. 1 at 20."

Interest of Amicus Curiae

Apalachee Publishing Co. publishes two small weekly newspapers, the Carabelle Times with approximately 800 circulation, and the Apalachicola Times which circulates approximately 3,000 copies. The company is owned by two brothers, Bob and David Lindsey, both long-time Floridians and newsmen. The company employs two full-time reporters, one for each paper, and several part-time correspondents. In recent years the Apalachicola Times has successfully defended two libel actions. Shiver v. Apalachee Publishing Co., ___ So.2d ____ 7 Fla.L.W. 340 (1st DCA, June 14, 1983); Wade v. Stocks and Apalachee Publishing Co., 7 Med.L.Rptr. 2200 (Fla. 6th Cir., 1981).

Total gross annual revenues of the Apalachee Publishing Company do not exceed a few hundred thousand dollars. After deducting salaries and other operating costs, legal expenses for even simple pretrial discovery will easily absorb annual net revenue of a publishing company of this size.

I.

THE IMPOSITION OF A NEGLIGENCE STANDARD OF FAULT IN PRIVATE FIGURE LIBEL CASES WILL HAVE A CONSTITUTIONALLY IMPERMISSIBLE CHILLING EFFECT ON NEWSGATHERING THAT WILL BE MOST KEENLY FELT BY THE SMALL NEWSPAPER.

A. Traditional concepts of negligence are unworkable in light of the technological and economic realties that affect both large and small newspapers.

Modern newsgathering techniques increasingly involve instantaneous communications. Electronic typesetting, satellite communications, modern word processing and other technologies have combined to compress time requirements in the dissemination of the news. As even small media organizations gain access to instantaneous newsgathering systems, the quantity of information to be processed increases, as expectations in the marketplace increase as well.[1] The pressures of time, information volume and market apply to small and large press organizations alike.

1

> Today, the issues and problem confronting our society are both complex and varied. The amount of information we require to understand not only what is going on, but how we are affected, has greatly increased. The mass media provides us with this information, often instantaneously, with the happening of the event.

(Footnote continued on next page)

Deadline pressures are constant in any newsroom, but with the technology available now to make news delivery virtually instantaneous, the deadline pressure has heightened. "News delayed is news denied," as this Court has remarked.[2]

In this pressure-cooker atmosphere, the reporter and editor must make fast decisions about a story's importance, about conflicting information from different sources, and about the reliability of those sources. The media's responsibility is to provide the public with information, as much and as quickly as possible, a function deemed fundamental to our system of government.[3] Of necessity, the editor does not have the luxury of holding a story back until it has been verified beyond cavil. Journalists, subject to these realities, can only write and

---

(Footnote [1] continued from previous page)

Media Concentration (Part I): Hearing before Subcomm. on General Oversight and Minority Enterprise of House Comm. on Small Business, 96th Cong. 2d Sess. 1 (1980)(opening statement of Chmn. John J. LaFalce). These hearings were concerned, in part, with the contracting role of small business in media, and the concomitant loss of cultural pluralism.

[2] State ex rel. Miami Herald Pub. Co. v. McIntosh, 340 So.2d 904, 910 (Fla. 1976).

[3] See, e.g., Ross v. Gore, 48 So.2d 412, 415 (Fla. 1950), quoting Thomas Jefferson ("No government ought to be without censors: and where the press is free no one ever will").

publish stories as accurately and completely as time and sources then available will allow. The ultimate determination of truth and falsity must be left to the citizenry in the marketplace of ideas.

The pressure of deadlines makes errors inevitable. The Ane[4] opinion would hold the newsroom to a standard of simple negligence, a standard unsuited and unworkable in the context of the modern mass media.

Negligence as a standard of fault is most familiar in the context of product liability, malpractice, liabilities of landowners, and personal injury or wrongful death cases. Wherever negligence is applied, it is based on reasonable, prudent, normative behavior.[5] Violation of the normative standard of behavior is punished as a deterrent to others, as recompense to the plaintiff, and, ultimately, to engender normative standards of behavior and precaution. The fundamental policy of negligence law is to increase safety and reduce risk to cost-effective levels.

---

[4] Miami Herald Pub Co. v. Ane, 423 So.2d 376 (Fla. 3rd DCA 1982).

[5]

> Negligence is the failure to observe, for the protection of another's interest, such care, precaution and vigilance as the circumstanaces justly demand or the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances or the doing of what such person would have done under the circumstances.

DeWald v. Quarnstrom, 60 So.2d 919, 921 (Fla. 1952).

Because negligence is uniquely within the province of the jury, and is determined from the intuitive common sense and experience jurors bring to their role, appellate courts are most reluctant to upset a jury finding that a defendant's conduct deviates from the norm. As a result, of course, what may seem negligent conduct to one jury may pass muster with another jury, and these divergent findings will be left largely undisturbed on appeal.[6]

Application of these principles to the gathering and dissemination of news creates numerous problems, and ultimately, constitutional paradox. No newspaper can produce an error-free product day after day, year after year. Even a small newspaper in a single edition carries thousands of pieces of information, ranging from the identity of wrongdoers to the meeting times of local clubs. All of this information is produced under deadline pressure.

B. The inevitability of error in newsgathering converts negligence into a constitutionally impermissible strict liability standard.

The Florida Supreme Court, in Ross v. Gore, 48 So.2d 412 (1950), has taken judicial notice of the

---

[6] "Likewise, the courts have subscribed to the general rule that where the circumstances are such that fair-minded men may differ as to what answer should be given to a charge of negligence, a jury question is presented." Handel v. Rudnick, 78 So.2d 709, 710 (Fla. 1955). ". . . [U]nder our law the jury and not the appellant are clothed with discretion to deduce the verdict and we have no power to disturb it if there is ample evidence to support it." (Court found evidence and affirmed). Id. at 711.

inevitability of errors in the newsgathering process:

> In the free dissemination of news, then, and fair comment thereon, hundreds and thousands of news items and articles are published daily and weekly in our newspapers and periodicals. This court judicially knows that it frequently takes a legal tribunal months of diligent searching to determine the facts of a controversial situation. When it is recalled that a reporter is expected to determine such facts in a matter of hours or minutes, it is only reasonable to expect that occasional errors will be made. Yet, since the preservation of our American democracy depends upon the public's receiving information speedily--particularly upon getting news of pending matters while there still is time for public opinion to form and be felt--it is vital that no unreasonable restraints be placed upon the working news reporter or the editorial writer.

Id. at 415. The imposition of a negligence standard is such an unreasonable restraint.[7] An analogy can be made to the imposition of a negligence standard upon the trial judge,

---

[7] Compounding the problem is Florida's recognition of different types of negligence:

> We think the rule which would more nearly solve the problem than any other would be one which recognized that simple negligence is that course of conduct which a reasonable and prudent man would know might possibly result in injury to persons or property whereas gross negligence is that course of conduct which a reasonable and prudent man would know would probably and most likely result in injury to persons or property.

Bridges v. Speer, 79 So.2d 679, 682 (Fla. 1955). Almost anything in a newspaper might possibly harm someone. Is it simple negligence to print damaging information, by virtue of its potential harm? Is there such a concept as "constitutional negligence," just as there is constitutional malice?

who is forced, as are newsroom personnel, to make judgments under extraordinary time pressures. Of course every judge will make errors in conducting a trial, thus the "harmless error" rule. Appellate courts realize that after "months of diligent searching to determine the facts of a controversial situation," they operate with the luxury of hindsight not available to the trial judge. Ross v. Gore, supra. In what state would our judicial system be if we substituted "negligent error" for "harmless error" as a standard of judicial review?

That same hindsight will guide jury deliberations if negligence is applied to newsroom operations. Any error a newspaper makes could be said to be negligent, in that a newspaper is not required to print anything at all. The editor could always have checked just one more source, or held the story just one more day, or proofread just one more time. Holding the news media to an unpredictable negligence standard, based ultimately on jury whim and hindsight rather than a fixed, judicially determined threshhold, must be interpreted by journalists, in the final analysis, as a strict standard of liability. This conclusion likewise follows from this Court's recognition that "it is only reasonable to expect that occasional errors will be made." Ross v. Gore, 48 So.2d at 415. If errors are inevitable, so is liability.

Any standard which cannot be anticipated is tantamount to no standard. Liability founded on mere

falsity, with no attendant showing of fault, is repugnant to the First Amendment and was firmly rejected by the United States Supreme Court in New York Times v. Sullivan, 376 U.S. 254 (1964). Truth is an insufficient shield to protect the occasionally erroneous statement that is inevitable in free debate, which "must be protected if the freedoms of expression are to have the 'breathing space'" they need to survive. 376 U.S. at 271-72, quoting N.A.A.C.P. v. Button, 371 U.S. 415, 433 (1963). Furthermore, strict liability was prohibited by the Supreme Court in Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974). An unpredictable jury negligence standard would accomplish indirectly what is, as a direct proposition of law, an unconstitutional chilling of free speech and free press.

C. Concepts of negligence are impossible to apply consistently.

If this Court decides to adopt a negligence standard, the question then becomes how that standard will be applied. The Court could adopt the "responsible publisher" standard of Curtis Publishing Co. v. Butts, 388 U.S. 130, 87 S.Ct. 1975 (1967). Should the court adopt the same standard for the small weekly paper published in rural Florida as the Miami Herald or the St. Petersburg Times? Should the defendant's conduct be measured by that of a

reasonable man or that of a reasonable journalist? In Gobin v. Globe Publishing Co., 216 Kan. 223, 531 P.2d 76 (1975), the Kansas Supreme Court adopted what amounted to a journalistic malpractice standard. The court said the standard was that of the "reasonably careful publisher or broadcaster in the community or in similar communities..." But the Illinois Supreme Court rejected that theory in Troman v. Wood, 62 Ill. 2d 184, 340 N.E. 2d 292 (1975). The Illinois court concluded that such a standard would permit the one newspaper community to set its own standard.

The Tennessee Supreme Court, however, has decided that the defendant should be held to the reasonably prudent man standard. Memphis Publishing Co. v. Nichols, 569 S.W.2d 412 (Tenn. 1978). Under this system, the jury determines from its own experience what is reasonable and assesses liability based on its impressions. This may be an appropriate standard for a car accident case since every juror can rely on personal experience as a driver, passenger or bystander. But most jurors have no experience with writing, with editing or with gathering news. Yet those jurors may be asked to determine what journalistic conduct is reasonable. As stated above, negligence is so indeterminate as a standard that, in the media context, it amounts to no standard.

D. A negligence standard strips trial judges and appellate courts of their duty to safeguard First Amendment interests in libel cases.

The Supreme Court in New York Times v. Sullivan articulated the appellate courts' responsibility to review de novo the entire record of a libel trial to assure that constitutional standards have been applied correctly. "This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied." New York Times, 376 U.S. at 285. Similarly, trial courts bear a constitutional responsibility to apply summary judgment whenever possible, to shield First Amendment values from the chilling effect of trials.[8] Application of a negligence standard delegates these duties to the jury.

A study of pre-trial, trial and post-trial disposition of libel cases reveals just how significant de novo judicial review is in this area of the law. A study published recently by Professor Marc Franklin of Stanford

---

[8] Treutler v. Meredith Corp., 455 F.2d 255, 257 n.1 (8th Cir. 1972) (summary judgment is "particularly appropriate" in defamation cases); Bon Air Hotel, Inc. v. Time, Inc., 426 F.2d 858, 864-65 (5th Cir. 1970) (summary judgment, rather than trial on merits, is the proper vehicle for constitutional protection); Washington Post Co. v. Keogh, 365 F.2d 965, 968 (D.C. Cir. 1966), cert. den. 385 U.S. 1011 (1967) (summary procedures are "more essential" in the First Amendment area).

University demonstrates that defamation defendants won three-fourths of trial court rulings at the pre-trial stage, and plaintiffs were able to obtain reversal of only one-quarter of those rulings.[9] If a plaintiff does survive the pretrial stages, however, he is more likely to win before a jury.

> Plaintiffs fared much better before juries than before judges. Plaintiffs won jury verdicts in 20 of 24 cases, but judge awards in only 2 of 5. Although trial judges tended to uphold jury verdicts as to liability, the appellate courts upheld fewer than half of plaintiffs' judgments entered on jury verdicts. Where defendants had prevailed at trial, these results were upheld in 13 of 15 cases.10

Plainly, if summary judgment and de novo appellate review are denied because of the traditional deference to jury fact findings of negligence, constitutionally unsound verdicts will emerge, untouched on appeal.

E. A negligent speech standard will engender self-censorship.

Under a negligent speech standard, news stories on the same substantive topics will be adjudicated on dramatically different standards of liability depending

---

[9] Franklin, "Suing Media for Libel: A Litigation Study," 1981 Am. Bar. Found. J. 795, 829. See also "Defamation Trials and Damage Awards--Updating the Franklin Studies," 4 Libel Defense Resource Center Bulletin (Pt. 1 1982).

[10] Franklin, supra note 9 at 829.

on the unpredictable status of potential libel plaintiffs mentioned in the stories. Is the subject a public figure, triggering the constitutional "actual malice" standard of knowing or reckless falsity, Curtis Publishing Co. v. Butts, 388 U.S. 130, 87 S.Ct. 1975 (1967), or is the subject a private figure, triggering a mere negligence standard? On its face, this inquiry may not seem too difficult, but consider some of the cases. In Steere v. Cupp, 226 Kan. 566, 602 P.2d 1267 (1979), the Kansas Supreme Court held that a lawyer who represented an accused murderer was a public figure, but Elmer Gertz, the Chicago lawyer who represented the family whose son was killed by a policeman, was not a public figure in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). An accountant for the Committee to Re-Elect the President was a public figure in Buchanan v. Associated Press, 398 F.Supp. 1196 (D.D.C. 1975), but a person convicted for failing to appear before a grand jury investigating espionage was not a public figure in Wolston v. Reader's Digest Ass'n, 443 U.S. 157 (1979). If learned jurists produce such divergent results, editors and reporters can hardly be expected to do better.

As a result of the fear of guessing the subject's status incorrectly, the only logical way to avoid the error is for prudent editors and reporters to steer wide of the danger zone, to engage in what one commentator has called

"journalistic orthodoxy."[11] This self-censorship is the fourth, and gravest, difficulty with applying negligence to a newsroom operation. Unlike other areas of tort law in which increased safety is a desirable goal, safe speech is an error of constitutional magnitude. As Justice Douglas remarked, "With such continued erosion of First Amendment protection, I fear that it may well be the reasonable man who refrains from speaking." Gertz, 418 U.S. at 360 (dissenting).

Although media are business enterprises, as are automobile manufacturers, the media's "product" is uniquely afforded constitutional protection. The First Amendment is not needed to protect the majoritarian, the safe view; the First Amendment protects the minority, the unpopular, even the erroneous view. The First Amendment is grounded on "the profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks. . . ." New York Times, 376 U.S. at 270 (citation omitted).

Self-censorship due to increased liability amounts to a constitutionally impermissible chilling effect

---

[11] Anderson, "Libel and Press Self-Censorship," 53 U.Tex.L.Rev. 422, 441 (1975).

upon the newsgathering process.[12] Its effects will be most damaging to the small newspaper or other media defendant.[13] The small news organization simply cannot afford to run the risk of protracted, expensive litigation, much less the

---

12

> . . .[A] jury determination, unpredicatable in the most neutral circumstances, becomes for those who venture to discuss heated issues, a virtual roll of the dice separating them from liability for often massive claims of damage.
>
> It is only the hardy publisher who will engage in discussion in the face of such risk. . . .

Gertz, 418 U.S. at 360 (Douglas, J., dissenting).

13

> [I]t is a fact of technology that all things being equal, a larger firm is able to produce output in terms of either circulation or space at a lower per-unit cost than a smaller establishment can . . . .
>
> . . . At one time, newspapers were dominated by local, family enterprises. Currently, they are more likely to be subsidiaries of larger corporate organizations.

Media Concentration (Part II): Hearing before Subcomm. on General Oversight and Minority Enterprise of House Comm. on Small Business, 96th Cong. 2d Sess. 8-9 (1980)(testimony of James N. Dertouzos).

large jury award.[14] The small newsroom staff, by definition, has fewer resources and is thus less able to obtain the absolute level of accuracy within the deadline constraint that the negligence standard would impose. The choice for the small newspaper is compelled by economics: less hard-hitting, less controversial news delivered in a less timely fashion. These editorial decisions, compelled as they are by economic considerations, do violence to the First Amendment principle of "uninhibited, robust, wide-open" debate and do an injustice to their readers and viewers. In the nearly nine yers since Gertz v. Robert Welch, Inc. was announced, evidence of self-censorship on the part of smaller press organizations has surfaced (such evidence was not available to the Gertz Court).

---

[14] Judge Irving R. Kaufman, of the Second Circuit, recently wrote of the chilling effect of "virtually unlimited damage awards," and noted that one recent libel defendant spent approximately $7 million in legal fees on the case. Kaufman, "The Media and Juries," New York Times, Nov. 4, 1982 (App. 3). Very few defendants, large or small, can afford the risk of large-scale libel defense.

Perhaps the best-known recent example is Green v. Alton Telegraph Printing Co., 107 Ill. App. 3d 755, 438 N.E.2d 203 (1982). There, the plaintiff won a $9.2 million jury verdict against the Telegraph, one of the last few family-owned daily newspapers circulating to 38,000 homes. Although the paper filed a timely appeal, it could not post the supersedeas bond, and filed for Chapter 11 reorganization under federal bankruptcy laws. Eventually, after the state court ruled it was without jurisdiction to decide the libel appeal, the parties reached a settlement that allowed the paper to continue operating. See Friendly, "Settlement Due in Alton Telegraph Libel Case," New York Times (April 15, 1982).

As a preliminary matter, it is to be noted that proof of self-censorship requires proving a negative, that is, proof of inaction. Self-censorship results in stories not printed, persons not quoted, angles not pursued, series not written. In a recent study, two researchers polled managing editors from newspapers across the country about their knowledge of and adjustment to federal libel decisions. The research determined that in light of "more restrictive libel protection," compared to their counterparts at major newspapers, 11% more of the editors of smaller circulation newspapers will be less aggressive. "The difference is statistically significant," the study concludes.[15] Furthermore, in this same study only 29% of the smaller circulation papers disagreed with the statement "I check potentially libelous passages with my publisher." Considering that publishers are responsible for the economic well-being of their papers, the inescapable conclusion is that the publication of controversial stories is to some extent controlled by economic considerations for the smaller press.

The Court in this case must consider that Floridians do not exclusively read large metropolitan newspapers. Most of Florida is served by small local

---

[15] Anderson and Murdock, "Effects of Communications Law Decisions on Daily Newspaper Editors," Journ. Q. 525 (1981).

daily or weekly newspapers.[16] The weakening or destruction of even one of these papers through libel litigation or a large libel award is a very real possibility that affronts constitutional values.[17]

That the United States Supreme Court in Gertz was not prepared to rule out a negligence standard on constitutional grounds does not preclude this Court, with the benefit of a more thoroughly developed historical record, from rejecting negligence. The Gertz Court, despite incorrect characterizations to the contrary[18] did not establish negligence as a standard for private figure libel actions. The Gertz Court instead ruled out strict liability without some showing of fault, but otherwise deferred to the states' judgment as to an appropriate standard. In effect, Gertz inaugurated an era of state-by-state experimentation to determine proper libel standards. Upon careful reflection, it is evident that negligence as a standard is unworkable, unpredictable, and chills robust free expression

---

16 See generally Editor & Publisher International Yearbook I-50-60, I-312-13 (1982).

17 See note 14, supra.

18 "As to the latter, a First Amendment rule of negligence obtains which precludes the imposition of 'liability without fault' in a defamation action, Gertz v. Robert Welch, Inc., 418 U.S. at 347, 94 S.Ct. at 3010, ..." Ane, 423 So.2d at 382.

which is the particular tradition and heritage of the small press organization in this country.[19] Florida cannot afford to take the chance that a negligent speech standard will have a chilling effect on this state's vigorous free press. Cautious circumscription of free speech and press is everyone's loss and is deadly to a free society.

---

[19] Judge Irving R. Kaufman reminds us that the status of the press at the time of ratification of the Bill of Rights differed from modern mass media: "The orgin of the modern newspaper lies in individual pamphleteering. Anyone who owned or had access to a printing press could broadcast his own avowedly subjective views of whatever interested him. Those who object to the 'biased' nature of American newspapers of today should read those of the last century ...." Kaufman, "A Free Speech for the Class of '75," The New York Times Magazine, 40 June 8, 1975 (App. 2 at 49).

II.

THE ANE OPINION, BY OVERSTATING THE EFFECT OF FEDERAL CONSTITUTIONAL LAW ON THE FLORIDA LAW OF DEFAMATION, CANNOT BE RECONCILED WITH THIS STATE'S COMMON LAW AND WILL LEAD TO THE EVISCERATION OF THE COMMON LAW OF LIBEL.

A. The Ane decision blurs the distinction between common law and constitutional privileges, and inappropriately casts doubt on the continued vitality of the common law of libel.

Chief Judge Hubbart's opinion in Ane appears to proceed from the assumption that the United States Supreme Court's rulings in the New York Times v. Sullivan line of cases have superseded Florida's common law of defamation:

> We hold, in accord with established First Amendment law and the overwhelming weight of authority throughout the country, that under Florida law such a non-public figure plaintiff is not required under any circumstances to make such an "actual malice" showing as an element of his cause of action, it being sufficient if the plaintiff establishes, as here, that the defendant published the alleged false and defamatory statements with negligence [i.e., without reasonable care as to whether the alleged false and defamatory statements were actually true or false].

Ane, 423 So.2d at 378 (e.s.).

The Third District's opinion compounds the confusion later in the opinion when discussing Florida common law in the context of changes in Florida's libel law:

> All of the above Florida law has been changed--correctly we think--by the New York Times line of decisions. . . . All of these higher standards are, however, not prerequisites of the Florida common law of defamation or Florida constitutional law; they are prerequisites of the First Amendment to the United States Constitution which heretofore did not exist under Florida law. Florida courts, in turn, have consistently sought to follow these federal standards in defamation actions in the post-New York Times era. . . .

Id. at 383. Again, the opinion of the court below appears to be interpreting Florida common law and appears to conclude that federal decisions have superseded or fundamentally altered that law.

At a minimum, this Court should make clear that federal law does not subsume Florida's common law as the Ane opinion implies. The majority's broad language is confusing: "[U]nder Florida law such a non-public figure plaintiff is not required under any circumstances to make such an 'actual malice' showing as an element of his cause of action, it being sufficient if the plaintiff establishes, as here, that the defendant published the alleged false and defamatory statements with negligence. . . ." Ane, 423 So.2d at 378 (e.s.).

As an illustration of the confusion Ane engenders, undersigned counsel experienced a refusal by the Tribune Co. v. Levin[20] trial judge to apply common law in a

---

[20] The Tribune Co. v. Levin, ____ So.2d ____, 7 Fla.L.W. 2549 (Fla. 2d DCA, Dec. 1, 1982).

non-media qualified privilege case. The trial court opined that the Plaintiff must prove either constitutional fault or common law, express malice.

> MR. RAHDERT: Under Common Law, he has to prove facts in the pleadings, not adverbs but facts that I can take and investigate of malice, of hatred, ill will, of bitterness towards his client, the Plaintiff, on behalf of Mrs. --
>
> THE COURT: Or reckless disregard.
>
> MR. RAHDERT: He has to prove both. It's not either/or.
>
> THE COURT: No, uh-uh. It is either/or, because how are you going to prove -- I mean, malice can be shown in one of two ways -- the person saying, "I hate your guts; I'm going to do you in; I'm going to do this with malice." That's actual malice.
>
> Now, there is the other malice, which is reckless disregard and which is under New York Times vs. Sullivan. (App. 1 at 20)

Immediately previously, the Court had asked, "But can't you have reckless disregard under Common Law malice?" and then, in an apparent reference to the Ane case, asked, "But isn't that the issue before the Florida Supreme Court now?" (App. 1 at 18).[21]

---

[21] See also Nodar v. Galbreath, 8 Fla.L.W. 739 (Fla. 4th DCA March 9, 1983), where the court confused, and evidently equated actual and express malice. "Defendant was not prejudiced by the court's refusal to declare the plaintiff school teacher a public official, a determination which would have required plaintiff to prove malice, as defendant still had the protection of the qualified privilege which required the same showing of malice." Id. at 740 (e.s.).

At common law, speech is actionable when maliciously published and when it tends to subject the plaintiff to hatred, contempt or ridicule. However Florida, like other states, recognizes certain absolute and qualified privileges for speech that would be otherwise defamatory and actionable.[22] The absolutely privileged utterance--a judge's remark from the bench, for example--can never be actionable, regardless of the speaker's motive. The qualifiedly privileged utterance can be overcome only by a showing of express malice, that is, ill-will, spite or hatred toward the plaintiff. This principle of the common law has not been changed or superseded by federal decisions.

Much of the confusion and uncertainty surrounding contemporary defamation law springs from the difference between common law malice (ill-will, spite or hatred) and constitutional malice (knowing or reckless disregard for the truth).[23] The Supreme Court, in formulating the actual malice (constitutional) standard, has created an additional test, it has not extinguished the common law malice standard.

---

[22] See, Rahdert & Snyder, "Rediscovering Florida's Common Law Defenses to Libel and Slander," 11 Stet. L.Rev. 1, 26-48 (1981).

[23] In construing Pennsylvania's common law malice, the Rosenbloom Court noted, "The reference here, of course, is to common-law 'malice,' not to the constitutional standard of New York Times Co. v. Sullivan." Rosenbloom, 403 U.S. 29, 37 n.9 (1971). Elaborating further the Court said "[b]ut ill will toward the plaintiff, or bad motives, are not elements of the New York Times standard." Id. at 52 n.18.

The effect of the Ane negligence language is to obfuscate Florida's common law of qualified privilege, and cannot be reconciled with Florida cases.

B. In contrast with constitutional precedent, Florida common law protections are based on the content of the speech, not the status of the speaker.

The history of Supreme Court adjudication to determine appropriate constitutional standards for libel is commonly viewed as a process of basing standards of liability on the status of the plaintiff. Starting with a "public official" standard in New York Times v. Sullivan,[24] the Court proceeded to define a "public figure" Curtis Pub. Co. v. Butts, 388 U.S. 130 (1967), and finally, in Gertz, a "private figure." Rosenbloom v. Metromedia, Inc., 403 U.S.

---

[24] While New York Times is most often cited for its holding, which delineates a "public official" standard requiring a showing of actual malice, a close analysis of the Court's reasoning demonstrates the Supreme Court's early reliance on judicial policy expressed through the common law as a guide in protecting First Amendment values. Relying on common law privilege cases, the Court started with the premise that criticism of a public official's conduct is always socially useful and deserving of special constitutional protection. Thus, the actual malice standard of New York Times stems from the same root of concern for the social utility of speech as do the common law privilege cases. New York Times may be said, in fact, to articulate privilege as well, albeit of constitutional stature. Amicus urges the Florida Supreme Court to likewise recognize that state policy expressed through common law protections should shape constitutional standards for free speech and free press.

29 (1971), from which the Court receded, represents the sole venture in setting libel standards on the basis of the inherent content of information communicated.[25]

By contrast, Florida common law analyzes the social utility of the speech, not the status of the speaker.[26] As a result, Florida common law is much more immediately responsive to the impact of libel standards on the public's interest in robust free speech.

Focusing on the social value of public debate, as a matter of common law the Florida Supreme Court adopted a qualified privilege for "fair comment on a public matter" prior to Rosenbloom v. Metromedia, Inc. This common law qualified privilege was reaffirmed as recently as Gibson v. Maloney, 231 So.2d 823, 826 (Fla. 1970), more than one year prior to Rosenbloom. That the United States Supreme Court subsequently receded from the Rosenbloom plurality's constitutional privilege for "events of public or general

---

[25] Curiously, in the related area of constitutional standards for invasion of privacy, the Court has consistently analyzed the cases in terms of the nature of publication rather than the status of the speaker. Time Inc. v. Hill, 385 U.S. 374 (1967); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).

[26] Florida's broad array of common law libel privileges, (see footnote 22, supra and accompanying text) base the privilege on the nature and context of the speech involved, for example, comment about a former employee. Appell v. Dickinson, 73 So.2d 824 (Fla. 1954). Recently, this Court accorded an absolute privilege for a police lieutenant to comment to a colleague about a former deputy because "... we perceive that an important public function was involved. City of Miami v. Wardlow, 403 So.2d 414, 416 (Fla. 1981)(e.s.).

interest" did not and could not "overrule" or disturb a Florida Supreme Court ruling providing greater protection than that mandated later as a constitutional minimum. In Gibson, this Court anticipated the federal ruling; the Court did not seek "to follow these federal standards." Ane, 423 So.2d at 383.

A careful reading of Gibson shows that it cannot be narrowly construed in terms of a federal law holding. While the Gibson Court did find the plaintiff to be a public figure, it rested this holding on "the command of the Abram, Jacova and Sullivan cases." Gibson, 231 So.2d at 826.

Jacova v. Southern Radio and Television Company, 83 So.2d 34 (Fla. 1955) focused on the nature of the information, not the circumstances of the plaintiff, to establish a "newsworthy" defense to a suit for invasion of privacy. In so ruling, the Court expressly noted that the plaintiff had not voluntarily become a public figure. By relying on Jacova, the Gibson court intended to transport this same defense of newsworthiness into the law of defamation, and held that the defendant's statements were "'fair comment' on a public matter relating in part to an individual who had by choice made himself newsworthy and a part of the passing scene." Gibson, 231 So.2d at 826. (e.s.) Obviously, the defendant's statements that did not pertain to the plaintiff's status as a public figure were

nevertheless privileged as comment on a public matter. This privilege is grounded on the character of the information rather than the status of the plaintiff.

Media defendants, just as any other defendants, are entitled to both common law and federal constitutional protections. If the subject is a "public matter" under Gibson and the plaintiff is a private figure such as Aureloio Ane, the common law requires a showing of express malice before the plaintiff may recover, and federal constitutional law requires a showing of at least "some fault." Gertz. It is in this very situation, then, now before this Court, that Florida's century-long commitment to free speech and free press provides greater protection to the defendant than does federal constitutional law. To suggest that Florida courts, by seeking to follow federal cases, are dependent upon the United States Supreme Court to give meaning to Florida's common law "stands Florida defamation law on its head." Ane, 423 So.2d at 385. The Gertz Court clearly intended just the opposite: great deference to the states' resolution of the question.

Although the appropriate standard of fault under the First Amendment for a private figure plaintiff is now the question before this Court, that standard of fault has already been settled as a matter of Florida common law. The Miami Herald in this case was entitled to a showing of express malice, at the least, before the plaintiff could recover.

C. Gertz adopted state-by-state experimentation to determine an appropriate libel standard. Florida should recognize a constitutional standard similar to it's common law privilege for publication of matters in the public interest.

Close analysis of the Gertz decision shows that the Court intended to defer to the states' determination of the appropriate standard of fault in a private figure plaintiff defamation action. That standard, the Court said, must at a minimum require the showing of "some fault" on the part of the defendant.[27] To the extent that the Gertz opinion prohibited strict liability for defamation at common law, the Ane opinion is correct; but neither Gertz nor any other Supreme Court case can be read as otherwise obliterating the common law of Florida or of any other state. In fact, Gertz invites, if not requires, state-by-state development of the law of libel.

Constitutional standards announced by the U.S. Supreme Court, in this as in any other area of law, merely represent the minimum protection the Constitution requires. These standards are not the maximum protection a state may

---

[27] "We hold that, as long as they do not impose liability witout fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." Gertz, 418 U.S. at 347.

afford; they are floors, not ceilings. One need read no further than Gertz to conclude that the Supreme Court does not, indeed cannot, attempt to limit a state's decision to give greater protection to constitutional guarantees than is required as a matter of federal judicial interpretation. The states are always free to provide higher protections as a matter of state or federal constitutional law, or state common law.

Florida, for its part, has a long and illustrious history of protection of free speech and free press.[28] This history suggests the appropriateness of a state policy recognizing broader constitutional protection than simple negligence affords. See Abraham v. Baldwin, 52 Fla. 151, 42

---

[28] To illustrate, this Court recently ruled that a police lieutenant enjoys an absolute privilege to comment privately to his colleague about the abilities of former employees who have applied for work in the colleague's department, City of Miami v. Wardlow, 403 So.2d 414 (Fla. 1981). By contrast, the United States Supreme Court affords no privilege to a United States Senator who comments about the expenditure of public funds, save the minimum constitutional requirement that in suing the Senator for libel, the public funds recipient must prove negligence. Hutchinson v. Proxmire, 443 U.S. 111 (1979)

Numerous additional examples in a variety of contexts illustrate this state's commitment to free speech and free press, including cases opening judicial proceedings to electronic news coverage, In re Petition of Post-Newsweek Stations of Florida, Inc., 370 So.2d 764 (Fla. 1979); and to the press and public generally, Miami Herald Pub. Co. v. Lewis ___ So.2d ___, 7 Fla. L. W. 385 (Fla. Sept. 3, 1982); cases protecting reporters' sources Gadsden County Times, Inc. v. Horne, 8 Fla.L.W. 522 (Fla. 1st DCA Feb. 10, 1983), Morgan v. State, 337 So.2d 921 (Fla. 1976); and cases affording a myriad of common law privileges to libel defendants (see note 22, supra.

So. 591 (1906); Coogler v. Rhodes, 38 Fla. 240, 21 So. 109(1897); Montgomery v. Knox, 23 Fla. 595, 3 So. 211 (1887); Abram v. Odham, 89 So.2d 334 (Fla. 1956).

Information and experience not available to the Gertz court counsels in favor of greater constitutional protection. Although lengthy, it is instructive to follow Judge Irving R. Kaufman's logic in reaching his recently published conclusion that "eighteen years [after New York Times] and hundreds of judicial pronouncements later, the time has come to acknowledge that this exercise in constitutional intervention has been a stunning, if well-intentioned failure." (App. 3).

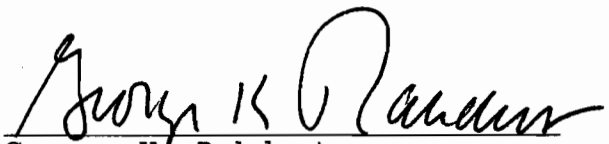
Judge Kaufman's critique of jury determinations in libel cases is particularly apt to an evaluation of the negligence standard, for reasons discussed earlier. It is an eloquent conclusion and summary of this amicus brief:

> Juries can hardly be expected to understand all the constitutional subtleties. The trial judge's efforts to explain the constitutional definition of "malice," "public figure," "acutal injury," and the like notwithstanding, I have little doubt that these elaborate instructions are lost upon even the most conscientious jury. At best, a juror can be expected to rely on common-sense notions of fairness. In the usual case, the award represents a rough monetary accommodation of the claim for compensation weighed against the media's culpability. At worst, a jury will permit its verdict to reflect its disapproval of the views espoused by the defendant or its frustration with the state of world or national affairs reported by the media generally. In any event, the verdict is largely

uninfluenced by the constitutional imperative of an unrestrained press that undergirds the Sullivan case. The First Amendment protections emanating from that case now play little or no role when and if a defamation action is submitted to a jury.

(App. 3).

Respectfully submitted,



George K. Rahdert
Patricia Fields Anderson
Rahdert, Anderson & Richardson
P.O. Box 960
St. Petersburg, Fl. 33731
(813) 823-4191

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of this brief was mailed March 23, 1983 to:

Frank R. Angones, Esquire
Adams and Ward
66 West Flagler Street
Miami, Florida 33130

Joe Creel, Esquire
2222 Ponce de Leon Boulevard
Coral Gables, Florida 33134

Hugh J. Morgan, Esquire
317 Whitehead Street
Key West, Florida 33040

L. Norton Preddy, Esquire
Michael J. Parenti, III, Esquire
12th Floor, Concord Building
66 West Flagler Street
Miami, Florida 33130

Talbot D'Alemberte, Esquire
Steel Hector & Davis
1400 Southeast Bank Bldg.
Miami, Florida 33131

Richard Ovelmen
General Counsel
The Miami Herald Publishing Company
One Herald Plaza
Miami, Florida 33101