30

IN THE SUPREME COURT OF FLORIDA

CASE NO. 63,114

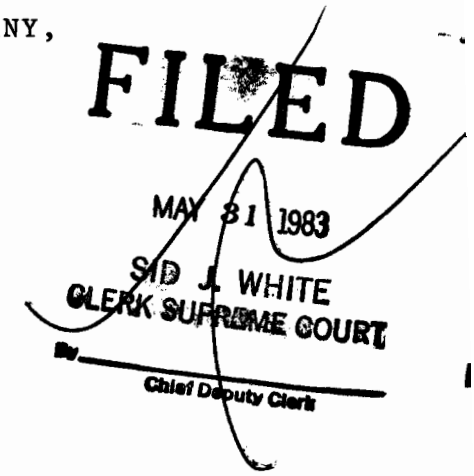
THE MIAMI HERALD PUBLISHING COMPANY,

Petitioner,

v.

AURELIO ANE,

Respondent.



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

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF CONTENTS (Continued)

OTHER AUTHORITIES

INTRODUCTION

Defendant/petitioner, MIAMI HERALD PUBLISHING COMPANY, will be referred to as The Herald. Plaintiff/respondent, AURELIO ANE, will be referred to as Ane. Portions of the record on appeal will be referred to by the symbol "R"; portions of the trial transcript will be referred to by the symbol "T".

STATEMENT OF THE CASE AND FACTS

This libel action was the result of an article published in The Miami Herald Key West addition on November 22, 1977. The article entitled, TRUCK ADVERTISED BEER, CARRIED MARIJUANA BALES, was authored by Miami Herald staff writer Greg Kerstein. Kerstein, in writing the article on November 21,1977, made a determination that Aurelio Ane owned a certain truck carrying three tons of marijuana which was confiscated by Monroe County police near Marathon, Florida. (T. 52) This statement is untrue. In doing this, Kerstein contacted several sources, including the company which formerly owned the truck (T. 56), the firm which had formerly leased the truck (T. 50), State officials at the Beverage Commission (T. 53), Dade County officials who handled auto licenses (T. 70), the Department of Motor Vehicles in Tallahassee, (T. 68) and the Monroe County Sheriff's office (T. 63). Only one of these sources, Marvin Kimmel of

Universal Brands, the company which formerly leased the truck, allegedly stated that he had been told by "...the Island Leasing people..." that Mr. Ane was the owner of the truck. (T. 73-75, 107)

At the trial, however, Mr. Kimmel repeatedly testified that he never implicated Mr. Ane in any way and that he specifically told the author, Kerstein, that the truck belonged to a Lillian Fernandez. (T. 199, 201, 213-215, 238) Not one of the other sources mentioned Mr. Ane as a possible owner of the truck. (T. 75) In fact, Kerstein was informed by the license tag office in Dade County that the vehicle belonged to a man in North Miami. He was informed by Sheriff Freeman of the Monroe County Sheriff's office that the vehicle definitely belonged to a woman named Lillian Fernandez, who it was subsequently shown did, in fact, own the truck. (T. 74, 372) The Department of Motor Vehicles in Tallahassee also confirmed that the truck was owned by Lillian Fernandez prior to the story being published. (T. 68).

Following the aforementioned investigation, Mr. Kerstein submitted the story to his supervisors in Miami, and after editing, the article in question was published on November 22, 1977 and began as follows:

> An Old Milwaukee beer truck, sold only last Thursday by a Miami firm to a Key West distributor, was confiscated early Monday carrying about three tons of baled marijuana on U.S. 1 in Marathon, Monroe Sheriffs officials said.

Two paragraphs later, the article continues:

> A large red and white truck, which Monday contained bales either wrapped in burlap or packaged in cartons from Colombia, had been purchased Thursday by Aurelio Ane, Key West Distributors, Inc., president, according to Marvin Kimmel, President of Miami's Universal Brands, Inc.
>
> Kimmel's firm formerly leased the 1970 Chevrolet truck from Miami's Island Leasing, but Kimmel said Island Leasing officials told him Ane bought the confiscated truck and a similar vehicle bearing the Schlitz beer trademark for $2,750 cash each last week. He, Ane, told us that the trucks would be used for spare trucks to haul beer in Key West, Kimmel said. Ane could not be reached for comment Monday.

As the above excerpt evidences, the article explicitly stated that Ane owned the truck in question and it impliedly asserted that he was, therefore, involved in drug smuggling. On this basis, Mr. Ane, who is neither a public figure or a public official, filed a libel action against Marvin Kimmel and his company, Universal Brands, Inc., in February, 1978. The complaint was later amended to include The Miami Herald as a defendant on September 14, 1978 after Kimmel, at deposition, denied making the statements attributed to him. (R. 119) The case went to trial in Key West and a jury returned verdicts against both Kimmel and The Miami Herald. Compensatory damages of $10,000 were assessed by the jury against Kimmel who did not appeal. Compensatory damages of $5,000 were assessed by the jury against The Miami Herald.

At the jury charge conference, the judge ruled that the case would go to the jury on a negligence theory. The defendant Miami Herald's proposed instructions to be used when reporting on a newsworthy event, on an issue of public or general concern and on the privilege to quote others accurately on a matter of general concern, were denied. (T. 49-490) The Herald subsequently sought post-trial relief, and when its motion for a judgment notwithstanding the verdict was denied (R. 368), it appealed to the Third District Court of Appeal. (R. 371) Additionally, Ane cross-appealed as error the trial court's failure to award punitive damages against The Herald.

On October 12, 1982, the Third District Court of Appeal rendered its 2 to 1 decision affirming the judgment below. (See 423 So2d 376) Judge Hubbard's and Pearson's majority opinions held that the negligence theory would govern in cases of matters of general or public concern where the plaintiff is neither a public official nor public figure. In other words, liability would be imposed whenever a defendant fails to use reasonable care in determining whether the alleged false and defamatory statements were true or false.

On January 7, 1983, the defendant's motion for a rehearing and en banc consideration was denied by the Third District. The Herald then brought the case to the Supreme

Court on the certification of the issue as to the appropriate liability standard to be applied as one of great public importance.

ARGUMENT

I.

EXISTING FEDERAL AND STATE PRECEDENTS REQUIRE THAT A NON-PUBLIC FIGURE PLAINTIFF IN A DEFAMATION CASE PROVE ONLY NEGLIGENCE AS OPPOSED TO MALICE ON THE PART OF THE DEFENDANT IN ORDER TO RECOVER.

Appellant argues at page 37 of its brief that the adoption of a negligence standard conflicts with the Florida Supreme Court's endorsement of the actual malice standard for defamation actions involving matters of real public or general concern. In fact, this court has already adopted a negligence standard for non-public figure plaintiffs. Firestone v. Time, Inc., 332 So2d 68, 69 (Fla. 1976).

In New York Times Company v. Sullivan, 376 U.S. 254 (1964), the Supreme Court stated as follows:

> The constitutional guarantees require...a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not. Id. at 279, 280.

Subsequently in Rosenbloom v. Metro Media, Inc., 403 U.S. 29 (1971), the court extended the New York Times rule by applying it to all those cases involving matters of public or

general concern even if they were neither public officials nor public figures. However, in Gertz v. Robert Welsh, Inc., 418 U.S. 223 (1974), the court repudiated the Rosenbloom extension of the constitutional privilege. The court held that the New York Times malice standard did not apply to purely private individuals even though they were involved in matters of public or general concern. Finally, in Time, Inc. v. Firestone, 424 U.S. 448 (1976), the Supreme Court reaffirmed the Gertz holdings finding that the particular plaintiff did not fall within the Gertz definition of a "public figure".

Appellant contends that the Florida Supreme Court has adopted the Rosenbloom standard concerning a public issue. In making this contention, The Herald cites the Firestone case decided by the Florida Supreme Court in 1972 after Rosenbloom, and cites extensively therefrom. However, as mentioned earlier, in Gertz the United States Supreme Court overruled Rosenbloom in 1974 and held that the actual malice standard was not constitutionally mandated in defamation actions brought by private individuals.

> For these reasons we conclude that the states should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual. The extension of the New York Times test proposed by the Rosenbloom plurality would abridge this legitimate state interest to a degree that we find unacceptable. And it would occasion the additional difficulty of forcing state and federal judges to decide on an ad hoc basis which

> publications address issues of 'general or public interest' and which do not--to determine, in the words of Justice Marshall, 'what information is relevant to self-government'. Rosenbloom v. Metro Media, Inc., 403 U.S. at 79, 91 Sup.Ct. at 1837. We doubt the wisdom of committing this task to the conscience of judges. Nor does the consitution require us to draw so thin a line between the drastic alternatives of the New York Times privilege and the common law of strict liability for defamatory error. The 'public or general interest' test for determining the applicability of the New York Times standard to private defamation actions inadequately serves both the competing values at stake. Gertz, supra, at 345, 346.

Similarly, federal courts have been faced with situations where defendants in defamation suits have argued that the actual malice standard should be applied to private individual suits based upon state and Supreme Court cases decided after Rosenbloom, but before Gertz. In each instance, the federal court faced with the question of the survival of post-Rosenbloom cases, in light of Gertz, held that any constitutional constraint imposed by Rosenbloom was no longer applicable. Mills v. Kingsport Times-News, 475 F.Supp. 1005, 1010, W. Dist. of Va. (1979); Mathis v. The Philadelphia Newspapers, Inc., 455 F.Supp. 406, 411, 412, E. Dist. of Pa. (1978).

In Firestone, II, as Justice Hubbard accurately pointed out in the Third District's opinion (423 So2d at 383) the Florida Supreme Court adopted without discussion the negligence standard. This was done after the U.S. Supreme Court vacated the Florida Supreme Court decision for failure to apply a negligence standard. The Supreme Court held that because neither the jury nor the judge had found Time, Inc, at fault, the Gertz negligence requirement had not been met. Upon remand, the Florida Supreme Court vacted the decision of the Fourth District and remanded the matter to the Circuit Court "for further proceedings not consistent with the United States Supreme Court's opinion. Firestone v. Time, Inc., 332 So2d 68 (Fla. 1976). This last decision of the Supreme Court then in effect adopted without discussion the Gertz standard of negligence and ultimately a jury verdict finding the defendant, Time, Inc., guilty of negligence was reinstated in favor of the plaintiff, a non-public figure.

Since the Firestone case, Florida courts have justifiably assumed that the negligence standard applies to defamation cases involving non-public figure plaintiffs. The Standard Florida Jury Instructions which are viewed and reviewed by the Supreme Court Committee contain a negligence standard for defamation actions. Florida Standard Jury Instructions MI 4.3. In Helton v. UPI, 303 So2d 650 (1 DCA

1974), the court explicitly held that the doctrine of public or general issue is no longer available to the media as a defense and a defamation suit by a citizen who is neither a public official nor a public figure and that such a defamation plaintiff is not required to prove knowledge of falsity or reckless disregard for truth. The trial court in entering summary judgment, had erroneously applied the New York Times and Rosenbloom standards. The appellate court noted that summary judgment had been entered on March 19, 1974; but because Gertz had been decided on June 25, 1974, the First District was compelled to follow the U.S. Supreme Court precedent. Judgment was reversed and remanded for further proceedings "consonant with...the opinion of the Federal Supreme Court in Gertz v. Welsh, supra." Helton, supra, at 651.

In another case, Holtever v. WLCY-TV, Inc., 366 So2d 445 (Fla. 2 DCA 1978), the court in extensively reviewing the standards for imposition of liability upon any segment of the mass communication media, noted:

> As had occurred in so many areas of the criminal law, this field of civil jurisprudence has now been assumed in large measure, if not totally, by the United States Supreme Court. It is to that court's decisions that this court must look for determination of the question presented.

The court then went on to trace the constitutional standards governing libel actions as ennunciated by the United States

Supreme Court, from New York Times Company through Time, Inc. v. Firestone, 424 U.S. 448 (1976). The court specifically noted that the United States Supreme Court had renounced the Rosenbloom decision in Gertz. The court's decision thus makes it clear that the Florida courts are to be guided by the decisions of the United States Supreme Court and that the standard against which the evidence must be examined is that of the New York Times and its progeny.

Florida case law, therefore, amply demonstrates that the Florida Supreme Court, as well as the District Courts, which have considered the question follow the precedent established by the U.S. Supreme Court in Gertz v. Robert Welsh, Inc., supra, that a private individual in a defamation suit is not required to show actual malice. Therefore, this court should affirm the judgment of the Third District Court of Appeal in favor of the plaintiff/respondent, Ane.

II.

PRE-GERTZ FLORIDA COMMON LAW GOVERNING LIBEL WOULD NOT HAVE IMPOSED A MALICE STANDARD IN THE CASE AT BAR.

The petitioner argues (Argument I, page 19 of their brief) that a review of Florida common law privileges with respect to Florida libel law indicates that the decision of the Third District adopting a negligence standard is a "radical departure" from prior Florida decisions. However, a

short review of Florida case law pre-dating the New York Times Company v. Sullivan, shows that a malice standard was unknown to the law of Florida.

Prior to the New York Times decision in 1964, Florida had adopted a strict liability standard in defamation actions. If the degrading language was actionable "per se", the jury could presume both malicious intent and damages. Hence, there was in effect strict liability. Lane v. Tribune Company, 108 Fla. 177; 146 So. 234 (1933). See also Hartley & Parker, Inc. v. Copelan, 51 So2d 789 (Fla. 1951); Metropolis Company v. Croasdell, 145 Fla. 455; 199 So. 568 (1941).

The petitioner argues at page 28 of their brief "that because the common law privilege to report news of public or general interest requires proof of falsity, fraud and ill-will," the court has in effect adopted the equivalence of an actual malice standard. The terms, "falsity, fraud and ill-will", however, refer to the more general expression "express malice" which differs from the constitutional malice of the New York Times v. Sullivan, and is otherwise known as "malicious intent". Axelrod v. Califano, 357 So2d 1048, 1050 (Fla. 1 DCA 1978). See also Abraham v. Baldwin, 42 So. 591 (1906). If the respondent can show, as the petitioner itself admits, the presence of express malice, the qualified privilege of The Herald would fail as a defense. As

previously shown, however, it is an established rule in Florida that express malice is presumed as a matter of law when the statements complained of are libelous per se. Axelrod v. Califano, supra, at 1050 (Fla. 1 DCA 1978); Barry College v. Hall, 353 So2d 575 at 578 (3 DCA 1977); Brown v. Fosett Publications, 196 So2d 465 (Fla. 2 DCA 1967). Since the type of accusations libelous per se include those imputing to another person, among other things, criminal conduct and conduct incompatible with the proper exercise of his business, exactly the types of accusations made against Ane by The Herald. Miami Herald Publishing Co. v. Brautigam, 127 So2d 718, 722 (Fla. 3 DCA), cert. den. 135 So2d 741 (Fla. 1961), cert. den. 369 U.S. 821 (1962). The Herald would have been held strictly liable under the pre-Gertz law notwithstanding the absence of express malice.

In fact, were it not for the Times case and its progeny,specifically Gertz, Ane would not have been required to prove any fault on the part of The Herald let alone negligence. It is abundantly clear that Florida law, if it is consistent with any standard, both pre-Gertz and post-Gertz, it is the lesser standard of negligence.

III.

THERE IS SUBSTANTIAL COMPETENT EVIDENCE TO SUPPORT THE JURY VERDICT FINDING THE PUBLICATION DEFAMATORY.

There can be absolutely no question in the instant case that the following statement was both false and defamatory:

> An Old Milwaukee beer truck sold only last Thursday by a Miami firm to a Key West distributor was confiscated early Monday morning carrying about three tons of baled marijuana on U.S. 1 in Marathon, Monroe County Sheriff's officials said.

Not only is it undisputed that Monroe County Sheriff's officials never said that Ane owned the truck,

> Q: (Mr. Adams): Had any Monroe County Sheriff official said to you that a Key West distributor was involved in this?
>
> A: No, sir. (T. 82)

but the language of the article is certainly defamatory. The words published about respondent, Ane, i.e., that he owns a truck full of marijuana, tend to degrade him, bring him into ill- repute, destroy confidence in his integrity, and subject him to distrust and contempt. There was evidence of each of these elements. Ane testified that buyers and consumers might feel reluctant to buy his products. (T. 277) He also testified as to derogatory remarks of various people and that this distrust evidenced toward him was the result of the article. (T. 283,304,305)

There is adequate authority for the proposition that a writing is defamatory if it tends to expose the person to hatred, contempt or aversion, or to induce an evil or unsavory

opinion of him. Axelrod v. Califano, supra, at 1050; Montgomery v. Knox, 3 So. 211 (1887). See also Tracey v. News Day, 182 N.Y. S.2d 1 (N.Y. 1959). Furthermore, as stated previously, an article is libelous per se where it imputes a criminal offense to an innocent person or attributes to him conduct incompatible with the proper exercise of his business. Miami Herald Publishing Co. v. Brantigam, supra, at 722. The article in question plainly attributes to the plaintiff, Ane, criminal offense amounting to a felony, trafficking in large quantities of marijuana. Even if the publication is susceptible of several meanings, one of which is defamatory, it is still actionable. Belli v. Orlando Daily Newspapers, Inc., 389 F.2d 579 at 582 (5th Cir. 1968).

At the trial level, The Herald, moved for summary judgment, one of the grounds being that "the plain and natural meaning of the publication is not defamatory". (R. 153) The trial court properly denied this motion. (R. 284) The general law and Florida law are in agreement, and as stated in Belli, supra, it is as follows:

> It is for the court in the first instance to determine whether the words are reasonably capable of a particular interpretation, or whether they are necessarily so; it is then for the jury to say whether they were in fact understood as defamatory. If the language is open to two meanings, it is for the jury to determine whether the defamatory sense was the one conveyed. Belli, supra, at 583, quoting Prosser the Law of Torts, §106 at 765 (1963).

The court, in Belli, goes on to quote from the Restatement Second which expresses the rule as follows:

> Section 614
> (1) the court determines
>
> (a) whether the communication is capable of bearing a particular meaning, and
>
> (b) whether that meaning is defamatory.
>
> (2) the jury determines whether a communication, capable of a defamatory meaning, was so understood by its recipient. That under that Section 615(1) the court determines
>
> (a) whether a defamatory meaning of libel is apparent from the publication itself without reference to extrinsic facts, and
>
> (b) whether an imputation of crime or disease or unchasity to a woman is of such character as to make libel or slander actionable without proof of special harm.
>
> (3) subject to the control of the court whenever the issue arises, the jury determines whether language imputes to another conduct characteristics or a condition incompatible with the proper conduct of his business, trade, profession or office. Belli, supra, at 583.

Belli involved a publication of an article in a newspaper which contained a false statement concerning a prominent attorney. Although the Fifth Circuit Court of Appeals had "very little doubt that (the publication in question) carries a defamatory meaning", the court nonetheless concluded that "the final determination of the issue of defamation should be made by a jury." The court stated:

> Florida has adopted the common mind test. Loeb v. Geronemus, 66 So2d 241 (Fla. 1953). Any doubt as to the defamatory effect of a publication should be resolved by the common mind of the jury, not even the most carefully considered judicial pronouncement. Belli, supra, at 585.

In the case at bar, the trial judge first properly determined that the words were capable of defamatory meaning and denied The Herald's motion for summary judgment. Then, the jury properly decided that the words were defamatory in fact. The jury found that The Herald publication was false or not substantially accurate in that it "tended to expose Ane to hatred, ridicule or contempt, or tended to injure him in his business or occupation or charge that Ane committed a crime." (R. 346) Based upon the evidence presented, the jury was entitled to conclude that the article was defamatory, and this court may not excise the role of the jury in a defamation case. Id. accord Early v. Palm Beach Newspapers, Inc., 354 So2d 351 (1977); Diplomat Electric, Inc. v. Westinghouse Electric Supply Co., 430 F.2d 38 (5th Cir. 1970); McCormick v. Miami Herald Publishing Co., 139 So2d 197, 200 (Fla. 2 DCA 1962);

The rationale for such a rule is obvious. The article was published in Key West and the trial was held in Key West.

> Since one's reputation is the view which others take of him...whether an idea injures a person's reputation depends on the opinions of those to whom it is published. Belli, supra, at 585.

As the trial judge, jury and District Court held, the article's meaning was plainly defamatory with respect to the respondent, Ane, and the decision of the Third District in this regard should be affirmed.

IV.

THERE WAS SUBSTANTIAL COMPETENT EVIDENCE SHOWING THAT THE HERALD IN PUBLISHING THE ARTICLE FAILED TO USE REASONABLE CARE UNDER THE CIRCUMSTANCES.

As mentioned earlier, the article in question names "Monroe County Sheriff's officials" as a source of its information, thus giving the article a high sense of official authority. The fact is, however, the Sheriff's Department never provided such information to the reporter Kerstein, and additionally, Kerstein knew from two independent sources, the police and Florida Department of Motor Vehicles, that the owner of the truck was a Lillian Fernandez.

Despite all of this, Kerstein still wrote in the lead paragraph that his source was the Monroe County Sheriff's officials when in reality they had specifically told him that the respondent, Ane, was not a suspect in the case. The only information regarding Mr. Ane and the truck allegedly came from Mr. Kimmel from Universal Brands. Mr. Kimmel supposedly stated that the people from Island Leasing had told him that Ane had purchased the truck from Island Leasing the

Thursday prior to the marijuana siezure. With a man's reputation at stake, Kerstein then made absolutely no attempts to verify this unreliable hearsay by contacting the people from Island Leasing.

What the reporter did then, was print a statement with respect to his source, the Monroe County Sheriff's officials, which he knew was false, and a statement concerning the alleged sale of the truck to Ane, which sale was contradicted by reliable information the reporter had unearthed. Kerstein should have known or must have known that both these statements had no basis in reality, and to simply go ahead and publish them is obviously negligent. This constituted more than substantial competent evidence to serve as a basis for the jury's verdict finding The Miami Herald negligent.

V.

THERE WAS SUBSTANTIAL COMPETENT EVIDENCE OF REPUTATION, STANDING IN THE COMMUNITY, PERSONAL HUMILIATION AND MENTAL ANGUISH AND SUFFERING TO ENTITLE THE PLAINTIFF TO GENERAL COMPENSATORY DAMAGES.

In the case at bar, there was substantial competent evidence showing that the respondent, Ane, was injured in his business (T. 277, 283-284, 297); that his reputation was besmirched by distrust and contempt in the community (T. 283-284, 303-305); and that his family life as a result was disrupted. (T. 278, 281, 283) All this caused the respondent

to suffer great mental anguish, which anguish was vividly brought out in the trial. (T. 98, 269, 273-276, 318)

Florida law recognizes two types of compensatory damages which are recoverable in defamation suits: general and special. Bobenhausen v. Cassat Avenue Mobile Homes, Inc., 344 So2d 279, 281 (Fla. 1 DCA 1977):

> General damages are those which the law presumes must naturally, proximately, and necessarily result from publication of the libel or slander. They are allowable whenever the immediate result is to impair the plaintiff's reputation, although no actual pecuninary loss is demonstrated. Id. at 281.

General compensatory damages, the type which was recovered by the respondent in this case, are constitutionally permissible under the United States Supreme Court decision in Gertz, supra:

> 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 impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Of course, injuries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury. Gertz, supra, at 350.

The petitioner incorrectly asserts in his brief at page 59 that there was no evidence of any injury to reputation. On the contrary, the evidence shows that the plaintiff was subject to abusive remarks from strangers while at a bank in

Key West and that other people were reluctant to work for him in his business. (T. 304-305)

Thus, general damages were properly awarded by the jury in this case. On the one hand, the respondent shows that the general damages were proved by substantial competent evidence. However, even in the absence of that evidence, the award was proper because, as was shown in Argument II, the words at issue are actionable as libel per se, and thus necessarily purport general damages. In other words, damages need not be pleaded or proved, but are conclusively presumed to result and special damages need not be shown. Bobenhausen, supra, at 281; Campbell v. Jacksonville Kennel Club, 66 So2d 495 (1953); Cooper v. Miami Herald Publishing Co., 31 So2d 382 (1947).

It should be further noted that in a defamation action brought by one who is neither a public official nor a public figure, an award may be based on elements other than injuries to reputation: Petitioner's theory seems to be that the only compensable injury in a defamation action is one which may be done to one's reputation, and that a claim not predicated upon such injury is by definition not defamatory. But Florida has obviously decided to permit recovery for other injuries without regard to measuring the effect a falsehood may have had upon a plaintiff's reputation. This does not transform

the action to something other than an action for defamation as that term is meant in Gertz. In that opinion, "we made it clear that states could base awards on elements other than injury to reputation, specifically listing 'personal humiliation, mental anguish and suffering' as examples of injuries which might be compensated consistently with the constitution upon a showing of fault." Time, Inc. v. Firestone, 424 U.S. 448 at 460 (1976).

Based upon the evidence presented and the applicable law regarding damages and defamation suits, the plaintiff was entitled to the $5,000 damage award against The Herald, and this court should affirm the same.

VI.

ADOPTION OF THE NEGLIGENCE STANDARD WILL NOT RESULT IN WIDE-SPREAD ECONOMIC DESTRUCTION WITHIN THE PUBLISHING INDUSTRY.

The main thrust of Amicus Couriae, Florida Press Association's argument in opposition to the adoption of the negligence standard, is that it will "cause the average Florida publisher to be either unable or unwilling to absorb ad hoc libel judgments or the costs of trying to anticipate a jury determination". See page 9 of Amicus, Florida Press Association's brief. However, as C. Michael Deese, the attorney for Leonard D. Levin and General Energy Devices, Inc., in the case of Tribune Company v. Levin, has clearly and

concisely pointed out this economic argument is totally without basis. He argues first of all that the negligence standard has been applied in Florida since Gertz, and there has been no marked decline in the number of Florida newspapers due to this standard since that time.

Secondly, there is no reference to the effects such a standard had on the small newspapers in the 28 jurisdictions that have adopted it. Rather, the decline in a number of small independently owned newspapers is due more to the gradual concentration of control of the media across the country. This phenomenon was noted by Chief Justice Berger in the case of Miami Herald Publishing Company v. Tornillo, 418 U.S. 241 at 248-250 (1974). Additionally, as counselor Deese makes clear, this concentration of media power also has taken place in Florida:

> As is pointed out by the petitioners, not all of Florida's newspapers are as large as the Tampa Tribune. The court is asked to consider the potential plight of the Jackson County Floridian, cited by the FPA's Amicus Brief at 2 as Florida's smallest daily newspaper. While petitioners would like the court to take pity upon the Floridian, it is hardly a defenseless business entity. It is owned by Thompson newspapers, a company which owns four newspapers in Florida and 77 nationwide. Thus, behind the Floridian stands one of the largest concentrations of newspaper ownership in the United States.
>
> Indeed, of the 43 daily newspapers in the State of Florida, 35 are owned by large newspaper chains and one of the eight independents is the St. Petersburg Times, the second largest paper in the State. The 'chains,' the financial resources of each which are

> substantial, include: Media General, Inc., (owner of numerous newspapers, including the Tampa Tribune, as well as radio and television located primarily in the southeast), Knight-Ridder Newspapers, Inc. (owner of four Florida newspapers, including The Miami Herald and The Tallahassee Democrat), Gannet Newspapers (owner of three Florida newspapers and scores of others nationwide), Cox Enterprises (owner of two newspapers in Florida and 35 nationwide), The New York Times Publishing Company (owner of six newspapers in Florida and numerous others throughout the country), and the Tribune Company of Chicago (owner of the Orlando Sentinel Star and the Ft. Lauderdale Sun-Sentinel News). Page 38-39 Brief of Leonard D. Levin and General Energy Devices in the case of Tribune Co. v. Leonard D. Levin currently before the Supreme Court of Florida, Case No. 63,217.

Apparently then, the small daily newspapers which Amicus Curiae FPA makes reference to, are not as small as they would have the court believe.

The third reason why the economic argument is absurd is because of the availability to publishers of libel insurance. Such a policy will usually pay for not only investigation and defense of any claim of libel, but amounts paid in settlement, and additionally, punitive damages. Because it is the rare libel case which is won against a newspaper, the premiums for such insurance are low and could easily be borne by even the smallest newspaper in Florida. It must also be noted that Florida Statute §770.02 (1982) restricts recoveries against publishers to actual damages when defamation is published in good faith and the publisher issues a retraction. The statute also precludes the recovery of punitive damages in cases of

good faith even if the publication is made negligently. If the publisher, therefore, wants to prevent a large libel judgment, all it has to do is refrain from bad faith publications, and when a defamation has occurred through negligence, by publishing a retraction.

It is, therefore, respectfully submitted that the plight of the small daily newspaper in Florida is a myth. What is true is that the press, the most powerful private institution in this country, seeks virtual immunity from responsibility for their negligence through the adoption of an actual malice standard. The only thing "small" in this case were the resources of Aurelio Ane when compared to those of his opponent. The ability of an individual to hold even the most powerful institutions in this country responsible for the damage they cause him is like a free and independent press, one of the basic cornerstones of our society. While the adoption of an actual malice standard with its high threshold of proof will leave the press virtually immune from responsibility for the publication of libel, the adoption of a negligence standard will merely cause them to exercise responsible journalism. This is a small price to pay to enable an individual private citizen to retain his longstanding ability to protect his reputation from an unrestrained press. It is, therefore, urged that the court affirm the decision below.

CONCLUSION

Respondent would request the court to affirm the Third District's use of the negligence standard in the court below, or in the alternative, a new trial. The decision by the Third District correctly adhered to Florida's adoption of the negligence standard and Firestone II, and it was consistent with Florida's pre-Gertz standard of strict liability for publication of defamatory falsehoods. Petitioner asserts on page 45 of their brief that this standard is "unworkable", but as the petitioner states on page 19, footnote 11, the standard has been adopted in 17 states and this case itself showed "that the standard does work".

The respondent has successfully showed that there was substantial competent evidence to support the jury verdict with respect to the defamatory nature of the article, the negligence of The Herald and the damages suffered by the respondent. The decision should thereby be affirmed in all respects or, in the alternative, remanded for a new trial.

Respectfully submitted,

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