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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

PETITIONER'S BRIEF

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EXPLANATION OF REFERENCES

Petitioner, The Miami Herald Publishing Company, will be referred to as the "defendant" or "The Herald." The Respondent, Aurelio Ane, will be referred to as the "plaintiff" or "Ane."

The following symbols will be used: For appendix (A. 1), for transcript (Tr. 1), and for record (R. 1). The appendix contains the two news articles on which suit was brought, the pleadings, relevant trial testimony, the trial court's instructions, the charges requested by The Herald (with the single defense charge granted so marked) and the opinion of the Third District.

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INTRODUCTORY STATEMENT

The following question has been certified by the Third District Court of Appeal as of great public importance:

> [W]hether a Plaintiff [who is neither a public official nor public figure] in a libel action is required under Florida law to establish as an element of his cause of action that the defendant published the alleged false and defamatory statements sued upon with "actual malice" as defined in *New York Times Co. v. Sullivan*, . . . [*i.e.*, either with knowledge of its falsity or with reckless disregard of its truth or falsity] when the alleged false and defamatory statements relate to an event of public or general concern.
>
> 423 So.2d at 378.

This question is before the Court because the United States Supreme Court, which once was thought to have constitutionalized virtually the entire field of defamation law, has now substantially divested to state courts the task of protecting free speech. A brief review of the United States Supreme Court's recent decisions may help place the certified question in its proper context.

The Court first injected First Amendment theory into the common law of libel in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). That decision and its progeny drew the attention of many state courts, including this Court, away from the common law of defamation.

New York Times held that the "profound national commitment" to "robust debate" of public issues required First Amendment protection for the publication of false and defamatory statements made concerning public officials. The Court held proof that the *New York Times* had published defamatory falsehoods about the conduct of Alabama public officials who allegedly mistreated civil rights activists was not sufficient to support a claim for libel. Unless such statements were published with "actual malice" (defined to be actual knowledge of falsity or reckless disregard of falsity), the Court held that no liability could be imposed. Later cases expanded this protection to cover reports concerning "public figures." *See Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

In *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), a plurality opinion of the Court suggested that the *New York Times* rule be extended to libel actions brought by private individuals for defamatory falsehoods published in news reports concerning matters of public or general concern. Thus, in view of the *Rosenbloom* plurality, the application of the constitutional privilege depended upon

the newsworthiness of the event, and not merely the classification of the person involved.[1]

In 1974, the United States Supreme Court added another chapter to the law of libel with its decision in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). Five justices of the Supreme Court[2] redefined the protection the First Amendment provides defamatory falsehood and held that state courts need not adopt the position advocated by the *Rosenbloom* plurality. State courts, the Supreme Court held, could fashion their own liability rules in libel cases not involving public officials or public figures within the following remaining restraints required by the First Amendment:

1. No liability may be imposed in any defamation case unless a finding of fault is made—strict liability is thus constitutionally impermissible, 418 U.S. at 347;

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1. The plurality opinion, written by Brennan and joined by Burger and Blackmun expresses the view that, "If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not 'voluntarily' choose to become involved. The public's primary interest is in the event . . . not the participant's prior anonymity or notoriety." 403 U.S. at 43.

The plurality was joined by Justice Black who stated his well known "absolutist" view of the First Amendment and by Justice White who stated his view that the *New York Times v. Sullivan* doctrine, "gives the press . . . a privilege to report and comment upon the official actions of public servants in full detail, with no requirement that the reputation or the privacy of an individual involved in or affected by the official action be spared from public view." 403 U.S. at 62.

Justices Harlan, Marshall, and Stewart dissented. Justice Douglas did not participate.

2. The bare five justice majority in *Gertz* was reached only by participation of Mr. Justice Blackmun who was candid in announcing his opinion that the Brennan *Rosenbloom* plurality decision (in which he joined) was a "logical and inevitable" development. Dismayed by the confusion of the Supreme Court, however, he cast his vote with the *Gertz* majority stating, "If my vote were not needed to create a majority, I would adhere to my prior view." 418 U.S. at 354.

2. No damages may be awarded which are not supported by "evidence of actual loss," 418 U.S. at 349;

3. Punitive damages may not be awarded which are not supported by clear and convincing evidence of actual malice, in short—proof that the publication was of a falsehood with knowledge of its falsity, 418 U.S. at 350.

Within those limitations, "the States may define for themselves the appropriate standard of liability for a publisher . . . of defamatory falsehood injurious to a private individual." 418 U.S. at 347.

Since *Gertz,* there has been no definitive decision from this Court on the standard of fault for private figure libel cases[3] and the present case at bar and the certified question presents the occasion for this Court to reaffirm its traditional commitment to free speech—announced in a number of pre-*New York Times* cases—and to designate the standard of fault to protect speech about issues of real public or general concern.

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3. This Court and the other Florida courts did have occasion to render opinions after the *Rosenbloom* decision (1971) and before the *Gertz* decision (1974) and the law created in Florida at that time is reviewed in part II of the Argument.

STATEMENT OF THE CASE AND THE FACTS

At about midnight on a Sunday night in Marathon, Florida, Monroe County Sheriff's deputies stopped an Old Milwaukee beer truck on U.S. 1 and discovered that it carried a large quantity of marijuana (A. 3). The present case concerns a newspaper's two reports of that incident (A. 3-4). The first article was written the next day—Monday—and published on Tuesday. At that time the investigation of law enforcement officials was not yet complete: the driver had been arrested and was identified but the owner of the vehicle was unknown. It was also unknown whether the owner was in any way involved since drug traffic is frequently conducted in vehicles which have been leased, borrowed or stolen (A. 56-65). The second article was written on Tuesday, after the police investigation was complete.

The First News Article. The reporter, Greg Kirstein, first learned of the Sunday evening arrest the next morning. He immediately made a diligent investigation of all the clues to ownership of the truck. He called the company which formerly owned the truck (Tr. 56, A. 35), he phoned the firm which had formerly leased the truck (Tr. 50, A. 29), he checked with the state officials responsible for auto registration (Tr. 73, A. 52), he called the Dade County officials who handled auto licenses (Tr. 70, A. 49), and he had multiple contacts with the Sheriff's office (Tr. 63, A. 42; 69, A. 48; 73, A. 52). No one was able to state, categorically, who then owned the truck (Tr. 89, A. 54), although Marvin Kimmel, president of the company which formerly leased the truck, stated that Aurelio Ane had recently purchased the truck.[4] Before writing the

4. Mr. Kimmel denied making this statement but the reporter so testified and the plaintiff Ane also testified that Kimmel admitted making the statement (Tr. 68, A. 104-105). The jury found against Kimmel.

first article, which reported on all *four* possibilities regarding ownership, the reporter made repeated efforts to reach Mr. Ane, the plaintiff (Tr. 103, A. 55). Thus, the first article was not the result of a haphazard or careless investigation, but, rather, it followed extensive efforts to obtain the facts.

On Tuesday, November 22, 1977, The Miami Herald Keys Edition published the first article[5] entitled, "Truck Advertised Beer; Carried Marijuana Bales." (A. 3). It began:

> 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.

It is this language the plaintiff asserted to be libelous.

The article states that an "Old Milwaukee" beer truck had been seized while carrying approximately three tons of marijuana and the driver of the truck charged with possession of marijuana. The remainder of the article deals with the confusion which surrounded the ownership of the vehicle. The story indicated four possible owners of the vehicle.

The plaintiff's name is first mentioned in the fourth paragraph of the article which quotes the co-defendant, Kimmel, the Old Milwaukee distributor in Miami who knew Ane:

---

5. The article of November 22 is one of *two* articles alleged to be libelous. It is referred to in the complaint as Exhibit C, a composite exhibit which contains both articles. Both articles were referred to also in the single demand for retraction. The plaintiffs lump the two articles together, asserting that, taken together, they are libelous.

> The 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 the trucks would be used for spare trucks to haul beer in Key West," Kimmel said.

The article then states that the owner might be Lillian Fernandez:

> Although Kimmel said Ane purchased the trucks, both sheriff's officials and state Motor Vehicle Department officials said the truck's plate was registered to another Key West resident, Lillian Fernandez, 2718 Harris Avenue.
>
> Sheriff's officials said they did not know whether Fernandez is involved in the case. She could not be reached for comment Monday.

The uncertainty surrounding ownership, the fact that the Sheriff's office had not determined ownership of the truck, and the fact that ownership may have changed hands was *emphasized* by the article in stating:

> "It may be that the truck's changed hands two or three times recently. We're just starting (the investigation)," Detective Joe Valdes said of the confusion over the truck's ownership. "We find a lot of this in these cases."

A third possibility is then brought into the story:

> Adding more confusion to the case was a registration sticker pasted on the beer truck's license plate that did not coincide with Dade County Auto Tag Division records for that plate. A division spokeswoman said the sticker found on the beer truck rightfully belonged on a 1964 Chevrolet pick-up truck owned by a Miami man.
>
> "That sticker doesn't belong on that tag," Monroe County Sheriff William Freeman said.

Finally, the article discusses factors pointing to a fourth party, Universal Brands:

> The truck also bears a state beverage license registered to Universal Brands, which expired Sept. 30, according to state beverage officials. State officials said that license has been renewed but could not determine who now owned it.
>
> "Somebody forgot to scrape the sticker off," Universal's Kimmel said. "It's not one of ours and you can rest assured that the driver (Horton) is not on our payroll."

Thus, the first article taken as a whole and read in proper context did not claim the plaintiff owned the truck and it cannot be even asserted to state he was involved in drug smuggling.

The Second News Article. On the following day, Wednesday, November 23, 1977, another article written by the same reporter was published in a position somewhat more prominent than the first article with the headline, "Woman Owns Pot-Laden Beer Truck." (A. 4).

Where the first article reported confusion, the second article reported with certainty that the ownership of the

vehicle had been traced to Lillian Fernandez, who had purchased the vehicle the previous week. It also emphasizes that Aurelio Ane was not involved in the purchase of the vehicle:

> Police and a Miami beer distributor said Tuesday that Aurelio (Porky) Ane, president of Key West Distributors, Inc., was not involved in the purchase of the truck. They blamed earlier reports of his involvement on a "misunderstanding."
>
> Ane's firm distributes Old Milwaukee beer in Key West. Old Milwaukee is the trademark painted on the confiscated truck.
>
> * * *
>
> Marvin Kimmel, president of Miami's Universal Brands, Inc., which formerly leased the trucks, had said Monday that Island Leasing officials told him the trucks were sold to Ane.
>
> Kimmel said Tuesday, however, that a "misunderstanding" occurred and that Island Leasing personnel were led to believe it was Ane who purchased the trucks.
>
> Ane said Tuesday he has previously purchased trucks from Island Leasing but not recently. He also said, however, that his employes are aware the Miami firm sells trucks.
>
> "Ross knew the trucks weren't for me," Ane said. He added that one of his employes might have falsely represented Ane's firm when purchasing the trucks, thus leading Island Leasing officials to believe the vehicles were for Ane.
>
> Ross also said Ane was "in no way involved in this thing."

> "Somebody might have surmised that (Ane's involvement)," Ross said, "because it involved Key West and Porky (Ane) is the Old Milwaukee distributor in Key West."

Thus, neither news article suggested that Ane was involved in any drug traffic, and taken together they reported that he was not even the owner of the truck.

The Reporter's Good Faith. Prior to the arrest of the driver, the discovery of the marijuana, and publication of the first article, The Herald reporter did not know Ane, he had never met or spoken to the plaintiff and there is no evidence of any ill will, hostility or intention to injure or defame the plaintiff. Further, there was no evidence that the reporter had any knowledge that Kimmel was incorrect when he told the reporter—on Monday—that Ane had recently purchased the truck. The record is entirely devoid of any malicious conduct by The Herald.

The Lawsuit. The libel action was filed originally against only Marvin Kimmel and his company (R. 1). The complaint was amended to include The Miami Herald as a defendant only *after* Kimmel at deposition denied making the statements attributed to him (R. 119; A. 5). The Herald asserted both constitutional and Florida common law privileges in its defense (R. 133; A. 15).

The Trial. At the trial, there were five witnesses. The reporter was called and examined as an adverse witness. He testified that the information on Ane came from Marvin Kimmel, the President of Universal Brands, Inc. (Tr. 57-59; A. 36-38).

Sheriff Freeman testified that Ane was not implicated in the investigation and that the investigation was not completed until Tuesday, sometime *after* the first article was published (Tr. 248-257; A. 56-65). It was not until that time that the ownership of the vehicle was conclu-

sively established. The Sheriff also indicated that frequently a vehicle, boat or airplane owned by someone not implicated in the smuggling is used to transport drugs (Tr. 253; A. 61). He explained that vehicles which are leased or stolen are involved about 50 percent of the time. The Sheriff testified that Ane was never under suspicion for drug trafficking (Tr. 254; A. 62).

Aurelio Ane testified that he believed the reporter published only what he had been told (Tr. 316; A. 101; Tr. 468-469, A. 105-106). Ane did not claim any special damages—loss of income or otherwise—and no one was ever identified as believing that the plaintiff was involved with drug traffic. Ane also testified of his conversations with Marvin Kimmel in which Kimmel admitted telling The Miami Herald that Ane owned the truck (Tr. 273-275; A. 66-68; Tr. 471, A. 108).

At trial, Kimmel denied telling the reporter that Ane had purchased the trucks (Tr. 199).

The remaining testimony demonstrated that one of Ane's former employees was involved in the truck purchase. Indeed, the former employee talked with Ane about the purchase of the truck before the truck was purchased (Tr. 310; A. 96) and Ane asked the former employee to bring back a load of 400 cases of beer from Universal Brands to Ane's Key West company when the truck was brought to Key West (Tr. 314; A. 100). Ane, who did business with Universal Brands, Mr. Kimmel's company, called and told an employee of Universal Brands that one of his (Ane's) men would be picking up beer in a truck which was being purchased in Miami (A. 314).

The Jury Instructions. At the charge conference, the defendant objected to the court's charges putting the case to the jury on a negligence theory and urged the court to instruct on the standard to be used when reporting

on a newsworthy event (A. 118), on the issue of public or general concern (A. 8, 9), on the privilege to quote others accurately on a matter of general concern (A. 124), and other matters relating to the articles (A. 110-133). These were denied (Tr. 489-490).

The Unusual Verdict. After finding liability against both Kimmel and The Herald for publication of the Kimmel statement, the jury brought back different damage awards —$10,000 against Kimmel and only $5,000 against The Herald, a curious result where the only alleged defamation was identical for both defendants (R. 368-370, A. 143). The Herald sought post-trial relief and, when its motion for judgment notwithstanding the verdict was denied (R. 368), it appealed to the Third District Court of Appeal (R. 371).

The Third District's Decision. On October 12, 1982, the Third District Court of Appeal handed down its 2 to 1 decision affirming the trial court. The decision is reported at 423 So.2d 376 (A. 145). Two majority opinions held that a "negligent speech" rule—imposing liability whenever a defendant speaks "without reasonable care as to whether the alleged false and defamatory statements were actually true or false" 423 So.2d at 378—would govern reports of matters of general or public concern where the plaintiff is neither a public official nor a public figure. The dissent urged that an actual malice rule had been or should be adopted for Florida.

Judge Hubbart's Opinion. Judge Hubbart begins his opinion with the broad pronouncement "that under Florida law . . . a non-public figure is not required *under any circumstances* to make . . . 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 allegedly false and defamatory statements with negli-

gence." 423 So.2d at 378 (emphasis added). All Florida common law and constitutional privileges are summarily jettisoned, 423 So.2d at 385, and the opinion concludes the actions of The Herald amounted to negligence.[6]

The Hubbart opinion also concludes that "no effort was made to retract the false statements . . .,"[7] although the article which appeared the following day was headlined, "Woman Owns Pot-Laden Beer Truck," and it specifically referred to the Sheriff's conclusion that Lillian Fernandez owned the truck (just as the first article had suggested) and even returned to the *sole source* of information linking Ane to the truck—Marvin Kimmel—and reported his retraction:

> Marvin Kimmel, president of Miami's Universal Brands, Inc., which formerly leased the trucks, had said Monday that Island Leasing officials told him that the trucks were sold to Ane.

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6. Judge Hubbart's opinion reads the first paragraph of the first news article as negligently attributing to the law enforcement officers the statement that Ane purchased the truck. 423 So.2d at 379. Because the plaintiff's name is *not even mentioned in that paragraph,* the majority opinion searches the article to find some mention of Ane and then ties that back to the first paragraph. The opinion ignores the article's essential, direct statement concerning the statements of law enforcement officials:

> Although Kimmel said Ane purchased the trucks, *both sheriff's officials and state Motor Vehicle Department officials said the truck's plate was registered to another Key West resident,* Lillian Fernandez, 2718 Harris Ave.
>
> (Emphasis added).

7. This opinion reads:

> [N]o effort was made . . . to retract the false statements that the Monroe County Sheriff's office had accused the plaintiff Ane of owning the marijuana-laden truck in question.
>
> 423 So.2d at 380-81.

Of course, the article, read reasonably, never said this in the first place.

> Kimmel said Tuesday, however, that a "misunderstanding" occurred and that Island Leasing personnel were led to believe that it was Ane who purchased the trucks.

Based on his reading of the facts, his assessment of the "weight of authority," his concern that the higher standard of care would result in "gutting the average person's right to protect his privacy against negligent libel," and his concern for controlling the press,[8] Judge Hubbart concluded that simple negligence, requiring reasonable care under all circumstances when the plaintiff is a private figure, is the proper standard.

Judge Daniel Pearson's Opinion. The concurring opinion of Judge Daniel Pearson is based on his belief that the Florida Supreme Court has already, "in post-*Gertz* proceedings of *Firestone v. Time, Inc.*, adopted without discussion, a negligence standard of liability." 423 So.2d at 391.[9]

Judge Hendry's Dissent. Judge Hendry's dissent directly attacks Judge Pearson's conclusion that this Court's action in the *Firestone* series of cases[10] adopted a simple

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8. Judge Hubbart's opinion states: "Indeed, it is a basic tenet of democracy that all power—public as well as private—must be subject to effective limitation lest the power be abused." 423 So.2d at 388.

9. Significantly, Judge Pearson's opinion also notes that the Florida Supreme Court determined in *Firestone* that there was "clear and convincing evidence of negligence" yet this burden of proof was not met in the present case and the jury instruction requested was not granted (A. 160).

10. This Court handed down three separate opinions in the series and the United States Supreme Court authored an additional opinion. *Firestone v. Time, Inc.*, 271 So.2d 745 (Fla. 1972) (cited hereinafter as *Firestone I*), *after remand*, 305 So.2d 172 (Fla. 1974) (cited hereinafter as *Firestone II*), *vacated sub nom., Time, Inc. v. Firestone*, 424 U.S. 448 (1976), *on remand*, 332 So.2d 68 (Fla. 1976) (cited hereinafter as *Firestone III*).

negligence standard for all private figure libel cases. Judge Hendry stated his contrary opinion that "the court in *Firestone I* established in Florida an actual malice standard for defamation suits brought by private individuals involved in 'matters of public or general concern.'" 423 So.2d at 392. Even assuming the *Firestone* precedent is in doubt, he stated he would find a common law actual malice privilege to report on matters of general or public concern exists. 423 So.2d at 391.

Judge Hendry observed that the adherence of Florida courts to the principles of the *Rosenbloom* decision could not be explained by asserting that the judges were bound by the precedent of the *Rosenbloom* plurality decision because the plurality opinion never received a majority vote and "thus did not represent a mandate to the Florida Supreme Court." Judge Hendry concludes, "Consequently, *Firestone I* was neither 'explained' by *Rosenbloom* nor undermined by *Gertz*." 423 So.2d at 391.

Further, Judge Hendry asserts in footnote 4 of his opinion that Judge Pearson's reading of *Firestone II*, the post-*Gertz* decision of this Court, ignores the determination in *Firestone I* that the *Firestone* case did *not* involve a report on a matter of public concern and therefore could not have adopted a negligence standard for such cases.

Judge Hendry also based his opinion on Florida case law prior to the 1964 involvement of the United States Supreme Court in defamation law and a concern that a simple negligence standard would destroy pluralistic journalism by silencing those voices economically unable to afford litigation whenever the reasonableness of their speech is questioned:

> In my opinion, the majority's holding severely threatens media freedom. Error by a vigorous press is inevitable, and by permitting financial sanctions to be imposed solely for negligent errors, the majority's decision will inevitably reduce the flow of vital information and ideas to the public . . . many smaller newspapers unable or unwilling to defend against libel litigation will be apt to self-censor, resulting in narrower coverage of newsworthy events.
>
> 423 So.2d at 395.

Motion for Rehearing. The defendant's motion for rehearing and en banc consideration was denied January 7, 1983. The defendant then brought the case to this Court on the certification of the issue as one of great public importance.

ARGUMENT

I.

FLORIDA'S COMMON LAW PRIVILEGES AFFORD GREAT PROTECTION TO SPEECH ABOUT MATTERS OF PUBLIC OR GENERAL CONCERN AND THEREFORE ADOPTION OF A SIMPLE NEGLIGENCE STANDARD IS IMPROPER.

The majority opinion of the Third District Court of Appeal appears to reach a rational conclusion, adopting a standard of care which many other states have approved[11]—allowing a private figure plaintiff to recover in a defamation case involving a matter of public or general concern merely by proving the defendant negligently published a defamatory falsehood. A review of Florida common law privileges which this Court has shaped demonstrates, however, that the decision is a radical departure from Florida libel law and is contrary to the values of a free society and an open government nurtured by this Court in a variety of contexts.[12] Specifically, this Court

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11. If this Court were to be guided merely by counting up the states which have to date passed on the issue, the Petitioner will not prevail. At last count, 17 states had adopted a simple negligence standard, one had adopted an intermediate test ("grossly irresponsible" in New York) and four states had adopted the actual malice standard of *Rosenbloom*. A simplistic arithmetic resolution would ignore the significant body of common law established in Florida and set Florida off on a perilous new course. See 423 So.2d at 385, n. 3 (citing the decisions of the state courts).

12. *The Miami Herald Publishing Co. v. Lewis*, ... So.2d ....., 7 Fla. L. W. 385 (Fla. 1982) (Adkins, J.) (pretrial criminal hearings) are presumptively open; *In re Petition of Post-Newsweek Stations, Florida, Inc.*, 370 So.2d 764 (Fla. 1979) (Sundberg, J.) (access of electronic media to trials granted); *State ex rel. Miami Herald Publishing Co. v. McIntosh*, 340 So.2d 904, 908-09 (Fla. 1976) (Boyd, J.) (trials are presumptively open); *Canney v. Board of Public Instruction*, 278 So.2d 260 (Fla. 1973) (Adkins, J.); *Board of Public Instruction v. Doran*, 224 So.2d 693 (Fla. 1969) (Adkins, J.) (state agency meetings must be open).

has protected news of general or public interest through the establishment of a common law privilege requiring at a minimum, the pleading and proof that the reports were published falsely, fraudulently and with express malice and intent to injure the persons against whom they were directed. Common law privileges were fashioned by the courts to provide sufficient latitude for socially important speech even if erroneous. Prior to any federal interest in the complex question of how the principles of free speech could be accommodated to private reputational interests, this Court adopted and applied privileges which protected non-malicious (but erroneous) speech in a wide variety of contexts.

The Third District's decision ignores these fundamental principles and promulgates a simple negligence standard of liability which requires reasonable speech about public issues and therefore provides far less protection to such speech than was provided by the common law privileges.[13]

The very idea of "reasonably careful speech" mandated by juries under a simple negligence standard is obnoxious to constitutional ideals of "free speech" and American traditions of individualism. It offends common sense notions of how human beings think and speak and is contrary to the philosophy of the common law privileges.

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13. Two charts may be found in the first two pages of the appendix (A. 1-2) which attempt to illustrate graphically the different degrees of protection this Court has given different types of speech. The charts demonstrate that the Third District, by adopting a simple negligence standard of fault, has given speech about issues of general or public interest the least amount of protection constitutionally permissible. The contrast between this decision and other decisions of this Court offering expansive protection—far above the constitutional minimum protection—for many types of speech is striking and easily observed on the charts.

A. Florida Libel Law Historically Has Provided Strong Protection for All Speech Benefiting Society by Requiring Proof of Falsity and Express Malice.

The Florida common law of libel embodies "a rich state heritage of protecting speech and publication from the chilling effect of plaintiffs' judgments."[14] This Court has developed a broad range of common law privileges to encourage free speech.[15]

With speech *by* public officials, where the standard is set, not by federal law but by decision of this Court,[16]

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14. Rahdert and Snyder, *Rediscovering Florida's Common Law Defenses to Libel and Slander,* 11 Stetson L. Rev. 1, 2 (1981).

15. This Court's opinion in *Ross v. Gore,* 48 So.2d 412 (Fla. 1950), eloquently expresses this Court's appreciation for the values of a free press and the problems of getting the news reported. Holding that the article on which the action was brought was not defamatory and that the Florida retraction statute is constitutional, the Court stated:

> 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.
>
> 48 So.2d at 415 (emphasis added).

16. In *McNayr v. Kelly,* 184 So.2d 428 (Fla. 1966), this Court endorsed the principle of *absolute immunity* from defamation suits against public officials, stating:

> It is also pertinent to note that in this strange area *where the courts seem to have originated the idea of absolute immunity instead of the legislatures,* . . . In stating the grounds upon which the rule of absolute privilege is sustained as to judicial proceedings, this Court has said that all persons connected therewith should be free of fear of being called upon to defend suits arising as a result of derogatory disclosures.
>
> 184 So.2d at 430-31 (emphasis added).

the protection for free speech is complete, *absolute immunity*. No higher protection of speech is available. As this Court has stated in *McNayr v. Kelly*:

> However false or malicious or badly motivated the accusation may be, no action will lie therefor in this State.
>
> 184 So.2d at 430.

Justice Drew and a unanimous Court did not adopt such a broad rule of immunity for public officials without some agony. The Court was faced with a decision of the Third District Court of Appeal which, in turn, relied on a body of distinguishable authority for its conclusion that reputational interests should be preferred over free speech.[17]

The contrast between the *McNayr* decision of this Court and the decision of the United States Supreme Court in *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), is instructive, demonstrating that this Court's holdings on free speech are designed to provide *more* protection to free

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17. This Court also reversed the Third District in *City of Miami v. Wardlow*, 403 So.2d 414 (Fla. 1981) (Boyd, J.), extending the absolute immunity of *McNayr* to non-public statements by officers of the executive branch—a police chief and police internal security officer, regarding the background of another police officer. Agreeing with the First District's decision in *Cripe v. Board of Regents*, 358 So.2d 244 (Fla. 1st DCA 1978), *cert. denied*, 365 So.2d 710 (Fla. 1978), this Court held any "public employee is absolutely immune from actions for defamation" if "the communication was within the scope of the officer's duties" 403 So.2d at 416. Two Florida circuit court judges have recognized the absolute privilege protecting public employees as extending to newspapers which republished statements made by public employees in the scope of their duties. *El Amin v. The Miami Herald Publishing Co.*, 9 Med. L. Rptr. 1079 (Fla. 11th Cir. 1983); *Hatjiannou v. The Tribune Company*, 8 Med. L. Rptr. 2637 (Fla. 13th Cir. 1982).

speech than that allowed by the United States Supreme Court even at the risk of injury to private reputation.[18]

Thus, with public officials in all three branches and at every level of government, this Court has adopted a rule which bars actions for defamation *even for the deliberate lie uttered with intent to harm* and has rejected a qualified privilege rule which would put the courts in the business of deciding speech rights based on the status of the speaker rather than the subject of the speech.

The absolute immunity which *McNayr* held protects elected and appointed public employees—under the theory that "all persons connected therewith should be free of fear of being called upon to defend suits as a result of derogatory disclosures," 184 So.2d at 431—is also available to those who work in the judicial process.[19]

Of course, the absolute immunity extends only to communications which are "relevant." But even where lawyer's communications are not "relevant," a lawyer's speech is strongly protected.

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18. The *Hutchinson* decision, denying protection to the press releases of an elected United States Senator speaking on wasteful government expenditures, contrasts starkly with the *McNayr* decision of this Court where protection was provided for an appointed county manager who delivered a report on the discharge of a Sheriff *after* the Sheriff had been discharged, because this was an action "within the orbit of his duties and responsibilities. . ." 184 So.2d at 430. The *Hutchinson* case adopts an illogical "geographic" analysis of the speech and debate clause. Speech on the Senate floor is permissible but the same speech off the floor—same speaker, same subject matter, same object of speech—is not protected. *McNayr* rejected such a rule for Florida.

19. As one scholarly article has observed, "Florida has specifically applied this privilege to statements made to a judge in seeking an arrest warrant, to pleadings, to physician's reports to judges, to attorneys' comments during depositions, to answers to interrogatories, and to witnesses' testimony at trial," Rahdert and Snyder, *Rediscovering Florida's Common Law Defenses to Libel and Slander,* 11 Stetson L. Rev. 1, 27 (1981) (footnotes omitted). This article contains an excellent review of the common law privileges and provides much more detail than can be placed in this brief.

In *Sussman v. Damian,* 355 So.2d 809 (Fla. 3d DCA 1977), Judge Hubbart analyzed and applied privileges for lawyer free speech—providing absolute immunity for speech relevant to judicial proceedings and a qualified privilege for other lawyer speech. Where the plaintiff, himself a lawyer, had been falsely accused by another lawyer of unprofessional conduct and the mishandling of trust funds by an angry lawyer, Judge Hubbart upheld summary judgment for the defendant.[20] 355 So.2d at 811.

The discrepancy between *Sussman* and *Ane* requires some reflection: It is easy for judges to see the necessity for lawyers' free speech privileges, for lawyers work in the judicial process where, without bold and robust adversarial speech, the system will not work. Our society is willing to accept injury to private reputation which will surely come from the application of those broad privileges because, on balance, society benefits. That is precisely

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20. Comparison of *Sussman* with the instant case demonstrates that the Third District, speaking through Judge Hubbart, would afford the bar far greater protection from libel than would be afforded the press:

In *Sussman,* the lawyer who spoke was angry and intemperate, striking back at the plaintiff. In *Ane,* the reporter was entirely dispassionate and had no desire to strike at or hurt Mr. Ane.

In *Sussman,* the attorney spoke "strong defamatory words . . . and asserted presumed untruths," 355 So.2d at 812. In *Ane,* the reporter wrote a story which faithfully reported the observations of a news source, the president of a large Miami merchandising firm, to whom he had been referred for answers to his questions .

In *Sussman,* the defendant spoke from his personal irritation with another lawyer, without investigation. In *Ane,* the reporter wrote a news article about a drug arrest—indisputably a matter of real public interest—and wrote it only after diligently pursuing all leads.

In *Sussman,* the defendant apparently never corrected his angry misstatement. In *Ane,* the reporter continued to investigate until he was able to run down the complete truth and he wrote a news article which appeared the very next day correcting the error made by his source, Mr. Kimmel.

the basis of the claim of privilege in this case. As the next sections demonstrate, the courts of Florida traditionally have recognized or created privileges from liability to protect speech invoked to serve important social interests. Those privileges, although not absolute, historically have provided far greater protection for speech than a simple negligence standard of care.

The treatment of the three categories of expression reviewed above—speech *by* public officials (absolute immunity), speech *about* public officials (actual malice standard) and speech by lawyers outside the courtroom including speech not connected with legal proceedings (common law malice standard)—stands in vivid contrast with the decision made by the two members of the Third District.

Their extreme view departs from the Florida common law and does not allow any accommodation to the interests of the public in a range of subjects necessary for self-government and for participation in a free society.[21]

This Court previously has found restrictive standards requiring "reasonable speech" unacceptable for application to the dissemination of information by public officials, by lawyers, by people engaged in discussions of church, labor union, and business affairs. Such relationships require a tolerance of erroneous, uncareful—even untrue and unreasonable—speech. As will be seen from the discussion below, this Court has fashioned broad privileges and applied them broadly in these many contexts. Historically, these privileges also have applied to any discussion of issues of public or general concern.

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21. See Blasi, *The Checking Value in First Amendment Theory*, 1977 American Bar Foundation Research Journal 523.

B. Adoption of the Negligence Test Was Improper Because the Common Law Privilege to Report News of Public or General Interest Requires Proof of Falsity, Fraud and Ill Will.

The news articles in this case are protected by at least two Florida common law privileges—the privilege to report news of "public interest" and the closely related privilege now known as "neutral reporting."

From the common law privilege to report on official acts and records, this Court has shaped a privilege of republication, *Layne v. Tribune Co.*, 108 Fla. 177, 146 So. 234 (1933). *Layne* held a newspaper could not be held liable for accurately publishing wire service stories which incorrectly reported that the plaintiff had been indicted. As this Court stated:

> To hold otherwise would mean that newspapers at their peril published purported items of news, against the falsity of which no ordinary human foresight could effectually guard and at the same time keep up with the prompt daily service expected of present-day newspapers.
>
> 146 So. at 239.

This privilege of republication, recognized in Florida cases since *Layne v. Tribune*,[22] has provided a foundation for the evolution in Florida's lower courts of a general privilege of "neutral reporting,"[23] which protects

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22. *MacGregor v. Miami Herald Pub. Co.*, 119 So.2d 85 (Fla. 2d DCA 1960); *Von Meysenbug v. Western Union Tel. Co.*, 54 F. Supp. 100 (S.D. Fla. 1944); *Sexton v. American News Co.*, 133 F. Supp. 591 (N.D. Fla. 1955).

23. *El Amin v. The Miami Herald Publishing Co.*, 9 Med. L. Rptr. 1079 (Fla. 11th Cir. 1983) (Goldman, J.); *Hatjiannou v. The Tribune Co.*, 8 Med. L. Rptr. 2637 (Fla. 13th Cir. 1982) (Miller, J.); *Bair v. Palm Beach Newspapers, Inc.*, 8 Med. L. Rptr.

(Continued on following page)

newspapers when the errors they publish are not their own, but those of others. The articles published by The Miami Herald in the instant case are accurate reports of each of the competing views regarding the truck's ownership and therefore they should be protected by the neutral reporting privilege.

The other Florida privilege significant here is a broader privilege which protects speakers from liability even when the error or falsehood is their own and not that of some other person or source. This privilege allows newspapers to report on matters of public or general interest without fear of liability for false defamatory statements so long as they are published without fraud and express malice. This privilege is in many ways similar to the numerous qualified privileges which were developed to protect any communications made by a person who had a right, duty, or interest in the subject matter of the communication. Privileges are found in the Florida common law for credit reports, *Putnal v. Inman,* 76 Fla. 553, 80 So. 316 (1918), statements about members of social, religious or professional organizations, *Loeb v. Geronemus,* 66 So.2d 241 (Fla. 1953), *Frieder v. Prince,* 308 So.2d 132 (Fla. 3d DCA 1975), *Brandwein v. Gustman,* 367 So.2d 725 (Fla. 3d DCA 1979), and communications to the Governor about a person who was to receive a commission as Sheriff, *Coogler v. Rhodes,* 38 Fla. 240, 21 So. 109 (1897).[24] In the *Coogler* case, this Court said:

Footnote continued—

2028 (Fla. 15th Cir. 1982) (Kapner, C. J.), appeal docketed, No. 82-1362 (Fla. 4th DCA, June 29, 1982); *Smith v. Taylor County Publishing Co.,* 8 Med. L. Rptr. 1294 (Fla. 2d Cir. 1982) (Rudd, J.), appeal docketed, No. AN 103 (Fla. 1st DCA, June 28, 1982); *Wade v. Stocks,* 7 Med. L. Rptr. 2200 (Fla. 2d Cir. 1981) (Cooksey, J.).

24. Note that this case protected falsehood under the public interest test long before the United States Supreme Court developed its "public figure" test. The Florida test is based on the subject matter of the speech, not the status of the plaintiff.

> In such cases, no action will lie for false statements in the publication unless it be shown that they are *both false and malicious,* and the burden of proof in this respect rests upon the plaintiff.
>
> 21 So. at 112 (emphasis added).

In *Cooper v. Miami Herald Publishing Company,* 159 Fla. 296, 31 So.2d 382 (1947), this Court decided that dismissal of a libel action was appropriate under facts very similar to those of the present case and a common law privilege was one of the grounds for decision, 31 So.2d at 384. The article in *Cooper* reported on a shooting under the headline, "Miamian Shot at Night Spot." The owner of the establishment sued and this Court stated that the article "considered in its entirety" is not defamatory "but simply reflects an *incident of public interest* in the environs of the City of Miami." 31 So.2d at 384 (emphasis added).

The development of this privilege culminated with this Court's decision in *Abram v. Odham,* 89 So.2d 334 (Fla. 1956), which held a newspaper publisher was entitled to dismissal of a libel suit where the news report quoted a political candidate's charge that the plaintiff, Abram, was a "phony" pollster. The basis of the court's decision was that the newspaper (and the candidate) were entitled to a qualified privilege and recovery would be allowed only where the plaintiff could prove "the communication is published *falsely, fraudulently* and with *express malice* and *intent to injure* the persons against whom it is directed." 89 So.2d at 336 (emphasis added). The Court held that untruth in the communication was not sufficient to carry the plaintiff's case but, relying on *Loeb, Coogler,* and *Abraham v. Baldwin,* 52 Fla. 151, 42 So. 591 (1906), the Court required proof of some actual ill will or hatred

and held that this malice could *not* be inferred from the fact that the statement was untrue.

Significantly, the privilege in *Abram v. Odham* is labeled by the Court:

> The defendant publishing company gave a fair and accurate account of the remarks made by the defendant Odham at a political rally, in accordance with its *qualified privilege to publish matters of great public interest.*
>
> 89 So.2d at 336 (citation omitted, emphasis added).

This qualified privilege to report on matters of public interest was next treated by this Court in *Gibson v. Maloney,* 231 So.2d 823 (Fla. 1970), *cert. denied,* 398 U.S. 951 (1970), after the *New York Times* case but before the *Rosenbloom* case. The plaintiff was a newspaper publisher and the defendant was a telephone company executive. When the case reached this Court, the appellate court had affirmed a jury verdict against the defendant. This Court reversed. The opinion must be carefully read because it meshes three strands of cases—the Florida common law privilege cases typified by *Abram v. Odham,* the Florida private figure/public event privacy cases and the federal *New York Times* series of cases—into a coherent philosophic strain.[25]

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25. The opinion is extremely interesting precisely because, even though the Court appears to regard the plaintiff as a public figure and the *New York Times/Butts* "actual malice" standard was then available, the Court declined to displace the Florida common law privileges which are based not on the status of the person but the nature of the communication. Thus, under the *Gibson* case, the plaintiff must pass *both* the *New York Times* actual malice test (knowing falsehood) and the *Abram v. Odham* express malice test.

Justice Adkins' opinion first turns to the Florida common law as the basis for decision and he quotes extensively from *Abram v. Odham,* italicizing the words, "*there is no liability in the absence of express malice,*" and stating that "we need go no further to reverse the case *sub judice* than the *Abrams* case." 231 So.2d at 825. The opinion next draws on a concept previously developed in the Florida law of privacy and cites *Jacova v. Southern Radio and Television Co.,* 83 So.2d 34 (Fla. 1955), which endorsed the principle that "[w]here one, *whether willingly or not,* becomes an actor in an *occurrence of public or general interest,* he emerges from his seclusion, and it is not an invasion of his 'right of privacy' to publish his photograph with an account of such occurrence." 231 So.2d at 825 (emphasis added).

Thus, the Court indicated the plaintiff could be barred from recovery if he were the subject of a report on a matter of "public or general interest" even if he were "unwillingly" a part of that scene on which the report was made.

Only after holding the Florida common law privilege to report matters of public interest is applicable to protect the news articles at issue (even where the plaintiff is drawn into the report against his will),[26] does the opinion turn to the federal cases.

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26. The conclusion that *Gibson* was not merely a public figure case is buttressed by the analysis of the First District Court of Appeal in *Gibson v. Maloney,* 263 So.2d 632 (Fla. 1st DCA 1972), *cert. denied,* 268 So.2d 909 (Fla. 1972), *cert. denied,* 410 U.S. 984 (1973). On remand from the Florida Supreme Court, the Circuit Court entered a jury verdict for the plaintiff. In reversing, the district court relied on the Florida Supreme Court's former disposition in *Gibson* and on the intervening decision of *Rosenbloom v. Metromedia, Inc.,* 403 U.S. 29 (1971). 263 So.2d at 635. Instead of determining whether or not the plaintiff was a public figure, the court concluded that the case fell within the ambit of the protection of matters for public interest or concern. *Id.* at 635-38.

Justice Adkins' opinion leaves no doubt that it is free discussion on public matters which motivates the Court's decision. He states:

> It was therefore fitting and proper that at such a public meeting the failure of a segment of the community to grow and the apparent reason for it not growing should be *freely discussed.*
>
> 231 So.2d at 826 (emphasis added).

The *Gibson* case is not the end of the trail for, as Point II will demonstrate, Florida's qualified privilege allowing free reporting absent express malice rather naturally evolved after *Rosenbloom* into a requirement for proof of actual malice (knowing falsehood). But *Gibson* provides a convenient vantage point to view the Florida common law privileges for reports of public or general interest which were developed well before the United States Supreme Court plurality reached a similar conclusion in *Rosenbloom.*

The privilege accorded for neutral reporting under *Layne, Coogler, Loeb,* and the privilege accorded by *Abram v. Odham* grant far greater protection to the expression at issue here than the Third District afforded the articles. *Gibson v. Maloney* provided the bridge between Florida common law privileges and the federal constitutional requirements which the Third District neglected.[27] A "reasonable speech" test has no place where the expression deals with matters of public or general concern.

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27. There, where the plaintiff was a public figure, it appears to require *both* actual malice under *New York Times/Butts* and express malice under the *Abram v. Odham* series.

C. The Plaintiff Failed to Prove Express Malice and Fraud Essential to Overcome the Qualified Privilege.

The evidence at trial showed The Miami Herald reporter who wrote both articles had never met or spoken with the plaintiff and had no interest other than quickly and accurately reporting the events as they happened. Obviously, The Miami Herald did not act maliciously or fraudulently.

Furthermore, this Court has repeatedly held that, in situations such as the present case, malice and fraudulent intent may not be presumed. This Court has used the same language in *Coogler* (1897), *Abram* (1956) and *Gibson* (1970):

> [T]he presumption which attends cases not so privileged of malice from the publication of libelous language does not prevail. The burden of proof is changed, and, in order for the plaintiff to recover he is called upon affirmatively and expressly to show malice in the publisher.
>
> 231 So.2d at 825.

Proof of express malice and fraud will defeat a qualified privilege, but it must be proof, not a presumption. No malice was present in this case. The Third District's decision should be quashed and entry of judgment for the defendant should be directed under the Florida common law. The Third District's conclusion that liability may be imposed for negligently published defamatory falsehoods regarding a matter of public or general interest is erroneous.

II.

ADOPTION OF THE SIMPLE NEGLIGENCE STANDARD CONFLICTS WITH THIS COURT'S ENDORSEMENT OF THE ACTUAL MALICE STANDARD FOR DEFAMATION ACTIONS INVOLVING MATTERS OF REAL PUBLIC OR GENERAL CONCERN.

In *Firestone v. Time, Inc.* (*Firestone I*—see footnote 12), this Court endorsed the *Rosenbloom* standard requiring plaintiffs to plead and prove "actual malice" in defamation actions based on news reports relating to matters of "real public or general concern." The rationale of *Firestone* remains persuasive; there have been no developments in Florida or federal law suggesting this Court would recede from this rule as a standard of Florida law and a negligence standard for expression would not be workable.

A. In Firestone I This Court Adopted the Actual Malice Test for Cases Involving Matters of Real Public or General Concern.

This Court decided *Firestone I* in 1972, after the *Rosenbloom* decision in 1971 but prior to the *Gertz* decision in 1974. It is the timing of this decision which has led some courts and commentators to question its precedential value.[28] A careful reading of *Firestone I* and the subsequent decisions in *Firestone II* and *Firestone III* reveals, however, that this Court endorsed the actual malice standard as a proper means of protecting news reports re-

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28. Two district courts, aside from the Third, have noted the uncertainty which now exists regarding the standard. *Palm Beach Newspapers, Inc. v. Parker*, 417 So.2d 323 (Fla. 4th DCA 1982), *From v. Tallahassee Democrat, Inc.*, 400 So.2d 52 (Fla. 1st DCA 1981), *pet. denied*, 412 So.2d 465 (Fla. 1982). Both districts declined to address the issue.

lating to matters of real public or general concern because it was persuaded that such standard struck the proper balance between free speech and reputational interests. This became, and remains, the rule of law in Florida. The unanimous decision of *Firestone I* for Mrs. Firestone discussed extensively the concept of "matters of public or general concern" as it developed under federal constitutional law:

> To begin with, the term "matters of public or general concern" is more apt, as will become obvious, than the expression "matters of great public interest," and we prefer it. Conceptually, it is public *concern* which clearly underlies the *ratio decidendi* of the entire line of Supreme Court cases beginning with *New York Times;* and the concept was ultimately resolved in Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 91 S. Ct. 1811, 26 L.Ed. 2d 296.
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> * * *

This Court then proceeded to draw its own definition of this concept:

> What, then, are matters of real public or general concern? Most obvious, of course, are matters relating to governmental affairs, which necessarily involve public officers, public servants and employees and even candidates for public office. Both the public and private activities of these people, to the extent that they relate to performance of their duties or their qualifications or fitness for public service are clearly matters of public concern.
>
> But public concern is not limited to matters governmental.
>
> * * *

> Thus, it appears, it can be broadly said that matters of real public or general concern are those which invoke common and predominant public activity, participation or indulgence, and cogitation, study and debate; and they include such matters as sporting events, the performing and fine arts, morality and religion, the sciences, and matters relating generally to the health, well-being and general comfort of the public as a whole. *Accordingly, news items or featured articles or commentaries by communications media relating to these matters are and should be constitutionally protected notwithstanding that obscure or prominent individuals may be caught up in the current and regretfully defamed.*
>
> 271 So.2d at 748, 749 (emphasis added).

The Court's opinion in *Firestone I* drew on the policy analysis advanced in the *Rosenbloom* plurality opinion. There was no requirement, and none was recognized, that Florida follow the plurality opinion which did not have the binding precedential weight of a majority opinion of the United States Supreme Court.[29] This Court endorsed the *Rosenbloom* plurality opinion because it found the reasoning of the plurality persuasive, however, the Court also held that since the Firestone divorce was not a matter of general or public concern, the "actual malice" rule did not apply to the *Firestone* article. Indeed, after citing to *Rosenbloom* extensively, the Court stated,

> *But while we agree to all this,* we are nevertheless strongly persuaded from our reading of the cases that a line must be drawn somewhere.
>
> 271 So.2d at 750 (emphasis supplied).

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29. Justice Brennan's opinion announcing the decision of the Court was joined by two other members of the Court. Such an opinion has no precedential effect. *United States v. Pink,* 315 U.S. 203, 216 (1942); *Hertz v. Woodman,* 218 U.S. 205, 213-14 (1910).

This Court then proceeded to quote with approval from *Rosenbloom* plurality opinion, 271 So.2d at 750, and, articulated with clarity the test to be as follows:

> [W]e think that as a workable test the question is whether there is a *logical relationship* between the reported activities of the prominent person or between the subject matter of the conduct, occasion or event reported or recorded, and the real concern of the public.
>
> 271 So.2d at 751.

This question, the Court stated, is a *question of law* for, "[t]hus a publisher need not gamble on whether a given jury may reject as unreasonable his decision that a proposed publication involves a matter of public or general concern," 271 So.2d at 751. Thus the Court in *Firestone I* approved the *Rosenbloom* rationale thereby adopting a rule which requires a plaintiff to plead and prove actual malice when he bases a libel action on a news report about matters of real public or general concern.[30]

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30. Two Florida trial courts which have analyzed *Firestone I* in written opinions, reached this same conclusion. In *Sobel v. Miami Daily News, Inc.*, 50 Fla. Supp. 70 (11th Cir. 1980), Judge Orr in holding the actual malice standard applicable to a libel action brought by a private figure noted that "Florida's commitment to a free and unfettered press is uncontradicted . . . Florida has long, as a matter of public policy encouraged free debate of matters of public policy encouraged free debate of matters of legitimate public concern and has long recognized the undesirable societal implications of placing 'unreasonable restraints' on newspaper reporters." Inexplicably, the Third District Court of Appeal affirmed Judge Orr's entry of final summary judgment for the defendants, 395 So.2d 282 (Fla. 3d DCA 1982) (per curiam), citing only *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), and *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), without offering any further explanation of reasons. The *Sobel* decision was not cited by Judges Hubbart or Pearson in *Ane*. In *Bair v. Palm Beach Newspapers, Inc.*, ... Fla. Supp. ....., 8 Med. L. Rptr. 2028 (15th Cir. 1982),

(Continued on following page)

Because this Court in *Firestone* found that the Firestone divorce was not a matter of public or general concern, there was no occasion to address that issue again in any of the subsequent *Firestone* opinions by any court. Moreover, since the *Firestone* decision had determined that the divorce was a private matter, this Court had no opportunity to address the common law qualified privilege for matters of public or general concern.

This Court has not expressly considered the question of the standard of care applicable to libel suits involving matters of general or public concern since either *Firestone* or the decision in *Gertz*. There has been no development in the law which would support the conclusion that this Court would find the rationale of *Rosenbloom* unpersuasive today. Prior to *Gertz*, this Court adopted the actual malice test stating its belief that the policy reasons for doing so were compelling. The *Gertz* decision renders that decision no less compelling since *Gertz* holds only that this Court need not adopt the standard and offers no plausible basis for change. Moreover, Florida's common law privilege for reporting matters of general or public concern is very similar to the *Rosenbloom* test and much stronger than a simple negligence standard.

To eliminate the confusion regarding this state's commitment to free speech it is now essential for this Court to reaffirm its *Firestone I* decision and clearly establish

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Footnote continued—

Chief Judge Kapner carefully analyzed *Firestone I* to determine the precise question of whether its adoption of the actual malice test rested on the First Amendment or on Florida law. He noted, "after *Gertz* was decided, the Florida Supreme Court again dealt with the Firestone case in *Firestone v. Time, Inc.*, 305 So.2d 172 (Fla. 1974). This was the occasion for the Florida Supreme Court to abandon its earlier *Firestone* opinion setting out the doctrine of 'matters of public or general concern.' The Court did not do so. Instead, it cited the language of *Firestone* and adhered to its earlier opinion." 8 Med. L. Rptr. at 2031-32.

that Florida law provides strong protection of all speech about issues of real public or general concern by requiring libel plaintiffs to prove actual malice as other state courts have done.[31]

Thus, the Third District committed two fundamental errors. First, it concluded that this Court, which had found the *Rosenbloom* rule and rationale persuasive as a standard for matters of general or public concern, would abandon that position as a common law standard for such communications even though *Gertz* provides no support

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31. Those states, like Florida, which historically have given free speech strong protection have expressly announced adoption of the public interest/actual malice standard of *Rosenbloom v. Metromedia, supra. See, Walker v. Colorado Springs Sun, Inc.*, 538 P.2d 450 (Colo. 1975), *cert. denied*, 423 U.S. 1025 (1975); *Aafco Heating and Air Conditioning Co. v. Northwest Publications, Inc.*, 321 N.E.2d 580 (Ind. App. 1974), *cert. denied*, 424 U.S. 913 (1976); *Peisner v. Detroit Free Press, Inc.*, 266 N.W.2d 693 (Mich. 1978); *Ryder v. Time, Inc.*, 3 Med. L. Rptr. 1170 (D.D.C. 1977); and *Metromedia, Inc. v. Hillman*, 400 A.2d 1117 (Md. App. 1977). There is also an "intermediate standard" such as that adopted in New York requiring a plaintiff to "establish, by a preponderance of the evidence, that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties." *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 379 N.Y.S.2d 61, 64, 341 N.E.2d 569 (1975). Most states which have decided the question before the Court appear to have adopted the simple negligence standard. These states have justified their adoption of this standard on their various state constitutional provisions, statutes, and policies which are inconsistent with Florida's parallel constitutional provisions, statutes, and policies. Some state constitutions, for example, explicitly protect reputation. *See, e.g., Troman v. Wood*, 62 Ill.2d 184, 340 N.E.2d 292 (1975); *Gobin v. Globe Publishing Company*, 216 Kan. 223, 531 P.2d 76 (1975). Florida's does not. Some states have never afforded any more protection for speech than a negligence standard. *See, e.g., Cahill v. Hawaiian Paradise Park Corp.*, 56 Haw. 522, 543 P.2d 1356 (1975); *Taskett v. King Broadcasting Co.*, 86 Wash.2d 439, 546 P.2d 81 (1976). Florida always has required at least proof of express malice when the speech involved a matter of public interest or concern. Some states have found that their courts never have defined what constitutes a matter of public concern. *See, e.g., Martin v. Griffin Television, Inc.*, 549 P.2d 85, 91 (Okla. 1976). Florida has an extensive array of cases clearly defining matters of public concern.

for that conclusion. Secondly, as noted above, the Third District failed to recognize that even where expression concerning a matter of general or public concern is false and negligent, it is still privileged under Florida common law unless it is fraudulent and motivated by ill will.[32]

The Third District should have concluded that this Court would adhere to the "actual malice" liability rule for matters of general or public concern and that the remaining traditional common law requisites of falsity and ill will would have to be met as well.

This standard, when applied to the present case, mandates that judgment be entered for The Herald. The articles deal with drug traffic, a police arrest and an on-going official investigation, all matters of public and general concern. This Court, recognizing what is generally known by society and what it knows from the criminal cases which reach it, should have no difficulty in finding that drug traffic activities are a major subject of public interest in this country, and in the Florida Keys.

Because the articles are about a matter of public and general concern, they are privileged and because there is no evidence of "actual malice," falsity, or ill will the decision below should be quashed and entry of judgment for the defendant should be directed.

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32. In *Firestone II* this Court, having concluded that the news article did not deal with a matter of general or public concern, proceeded to consider whether or not the qualified privilege to report on judicial proceedings barred liability. Because the report was judged not to be "fair and accurate," the qualified privilege was deemed not to apply. This Court found this determination necessary even though it had concluded that the reporting had been negligent. Thus, even were the Third District Court correct in rejecting "actual malice" as the proper liability rule for a report of a matter of general or public concern, it should have addressed the question of whether the remaining elements of the common law privilege for reporting matters of general and public concern still barred liability: falsity, express malice and fraud.

B. The Reasonable Care Standard Adopted by the Third District Is Unworkable.

The facts of this case and the decision of the Third District dramatically illustrate why a simple negligence standard is impossible to apply to daily news reporting of important public events.

The reporter in this case diligently investigated all clues to ownership of the truck. He called the company which formerly owned the truck, the firm which had formerly leased the truck, the state officials responsible for auto registration, Dade County officials who record auto licenses, and he had multiple conversations with the police (A. 29-55). He made repeated efforts to reach the Plaintiff. Despite these efforts on Monday, he was unable to determine who owned the beer truck which had been sold only the previous Thursday and which was picked up by police around midnight on Sunday (A. 29-55). He then reported in the first article the complete results of his investigation—it was a report of the confusion over the ownership (A. 3). The following day, as soon as officials made a positive identification of the truck owner, the reporter published this fact, quoting everyone connected with the story. Ane is quoted, Kimmel is quoted, the police are quoted, the former owner is quoted. All said that Ane was not involved (A. 4).

Two judges on the Third District nevertheless concluded "we deal, in our view, with a clear case of journalistic negligence, the evidence of which in this case was more than ample to go to the jury for final resolution." 423 So.2d at 390 (A. 145). If this is a clear case of negligence, it is difficult to imagine any news article which contains an arguably false statement or which reports on multiple possibilities of an unfolding public matter which could not provide a basis of liability for negligence.

The result in this case shows that the most obvious shortcoming of a simple negligence standard is that it is, in fact, no standard at all and there is no predictability about the jury response to a given question or a given set of facts. This is of obvious importance to the law which governs speech, for doubt about free speech rights places the speaker at risk that some future jury may disapprove of his speech and assess damages.

This uncertainty also exists in other cases where negligence is employed. There the concept of negligence has been serviceable—negligence operates largely in areas where citizens have experience or can be provided sufficient expert guidance to set standards of reasonableness. Most citizens have had experience driving automobiles and are able to deal with concepts of negligence where the question relates to the operation of a motor vehicle. The risk of a jury formulating after-the-fact standards is at a minimum where the jurors are able to deal with matters within the common knowledge of us all.

The "reasonable speech" standard—requiring "responsible" journalism—will not prove so useful. In the area of free speech, jurors do not generally have experience in the collection of news, nor writing, nor publishing. There are no legal standards of publication nor should there be, as Professor Anderson has observed:

> A "responsible publishers" standard would discriminate unjustifiably against media or outlets whose philosophies and methods deviate from those of the mainstream. Fundamental disagreements exist within the profession concerning what constitutes responsible journalism. . . . There is disagreement over the extent of the profession's responsibility to inform the public; some believe good journalism must attempt

> to arrest the attention of the disinterested and therefore must try to entertain, shock, or outrage, while others see their function as simply making information available to those sufficiently motivated to seek it. Although some deplore extensive editorial second-guessing and advocate maximum freedom for individual writers, others view the best journalism as a team effort by reporters, writers, and editors. Furthermore, there is little agreement within the profession on the acceptability of various journalistic practices, including the use of unnamed sources, the unauthorized dissemination of classified government information, and the technique employed by some of obtaining information without revealing one's identity as a reporter. Some press outlets feel a responsibility to suppress items whose veracity they are unable to ascertain, but others assert that the press has no more right than the government to deny information to the public unless it is demonstrably false.
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> Anderson, *Libel and Press Censorship,* 53 Texas L. Rev. 422 (1975).

Moreover, unlike medical practice, law practice or other government regulated professions where the First Amendment does not limit or prohibit government action, the absence of a standard for the "responsible publisher" may not be filled by government enactments.

The second major weakness in a "reasonable speech" standard is closely related to the first. If a juror is asked to pass on the "reasonableness" of speech, we will quickly move to the concept of the "ordinary reasonable prudent speaker" much as we have moved to the concept of the "ordinary reasonable prudent driver." The imposition of such a standard of care will result in a great abridgement

(or homogenization) of free speech rights for, as Justice Douglas noted, the imposition of a reasonable care standard governing speech will insure that no one who is reasonable will speak.

The ultimate arbitrator of reasonableness will be a jury impaneled many months later—looking back at possibilities unthought of and unknown for further investigation, conjuring up different ways of phrasing, and shades of meaning which would never have occurred at the time of the original publication.

The Third District's concept of journalistic negligence requiring "reasonable care" whenever a news article identifies a private figure—irrespective of any other circumstances—is contrary to all Florida common law. Such a theory would prove unworkable in practice, would unnecessarily complicate libel law, chill free speech by threatening a flood of litigation and create a nightmare for judges, litigants, journalists, and the public who ultimately will suffer most from the impact of a tightly fitting liability standard.

C. The Plaintiff Failed to Prove Actual Malice.

The plaintiff did not prove actual malice. The Third District itself acknowledged this point in rejecting the plaintiff's cross-appeal attacking the jury verdict for failing to assess punitive damages against The Herald, 423 So.2d at 350.

Given the clear absence of actual malice, this Court should quash the decision of the District Court and direct the trial court to enter judgment for The Miami Herald Publishing Company.

III.

EVEN IF A SIMPLE NEGLIGENCE STANDARD WERE IMPOSED, JUDGMENT FOR THE DEFENDANT SHOULD BE DIRECTED.

This point need not be reached if either of the earlier two points is accepted. This point assumes for argument purposes that the publication which is the subject of this action is not protected by any privileges and that the correct standard of care to be used is journalistic negligence requiring the exercise of reasonable care to determine whether statements are true or false. It argues that even under this standard, judgment for the petitioner should have been directed by the trial court because the articles are not defamatory and the elements of negligence are not shown.

This case demonstrates the inappropriateness of a simple negligence standard for reports of public concern because the jury and the Third District applying this standard were able to impose liability against The Herald even though the articles were not defamatory, there was no evidence of negligence, and the evidence that was presented at most supported an award of nominal damage.

A. The Articles Are Not Defamatory.

The articles at issue are not defamatory for two reasons: First, the rule of law in Florida is that an article alleged to be libelous must be read as a whole and its statements construed in accordance with their context in the article. The Third District's opinion finds the articles to be defamatory only by taking out of context a statement from the first article and by failing to consider other statements which must be considered if the article is read as a whole. Second, neither article is defamatory

because the mere ascription to an individual of ownership of a business which in turn owns a truck involved in a crime is not defamatory.[33]

1. When Read As a Whole, Neither Article Is Defamatory.

Under Florida law, an article alleged to be defamatory must be taken as a whole and the statements alleged to be false must be read in their proper context. *Washington Post Co. v. Chatoner,* 250 U.S. 290, 293 (1919); *Valentine v. CBS,* 698 F.2d 430, 432 (11th Cir. 1983) (Dyer, Johnson and Roney, JJ.) (interpreting Florida law); *Diplomat Electric, Inc. v. Westinghouse Electric Supply Co.,* 378 F.2d 377, 381-8 (5th Cir. 1975); *Rush-Hampton Industries v. Home Ventilating Inst.,* 419 F. Supp. 19, 21 (M.D. Fla. 1976). Each article, when read in context and taken as a whole, reports nothing more than Ane owned a beer distributorship that may have owned the truck that was used in a crime. To find defamatory meaning, the Third District ignores the clear statements in each article that law enforcement personnel did not believe Ane owned the truck and takes out of context the "lead" paragraph of the first article which is, at worst, ambiguous, even when considered out of context. Judge Hubbart did not read the first article as a whole but hunted through it to find a reference that would tie Ane to the truck and simply ignored explicit statements in the article which fully clarified the issue. Such a construction is improper as a matter of law.

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33. Assuming the articles may be construed as defamatory, they cannot be construed as making substantial damage to reputation apparent. The United States Supreme Court intimated in *Gertz v. Robert Welch, Inc.*, 418 U.S. at 810, that all such publications, if about matters of public concern, may well be protected by the actual malice standard required by the First Amendment.

2. The Erroneous Attribution of Ownership of Property Involved in a Crime Is Not Defamatory.

In any action for defamation, the plaintiff has the burden of proving the defamatory character of the communication. In order to satisfy this burden, the plaintiff must first convince the court that the communication is capable of a defamatory meaning. *Valentine v. CBS,* 698 F.2d 430 (11th Cir. 1983) (Dyer, Johnson, Roney, JJ.) (interpreting Florida law). The court determines as a matter of law whether language is susceptible of a defamatory meaning in the context in which it is found. *Washington Post Co. v. Chatoner,* 250 U.S. 290, 293 (1919).

At most, the articles allege possible ownership by the plaintiff of a commercial vehicle which was stopped while being operated by another person and found to contain an illicit substance. The articles further indicate that confusion surrounded ownership of the vehicle and explore indications that the vehicle was owned by others at the time of the incident.

The articles do not state that Ane was involved in any way with the marijuana found on the truck. Marvin Kimmel is accurately quoted as stating that Ane had purchased the vehicle, and the second article cleared this up entirely.

To construe the language of the articles as being defamatory of Ane, a person would first be required to assume that Ane actually did own the vehicle at the time of the incident, ignoring all contrary information in the first article and the definite statements in the second article that Ane was not the owner. A person would then further have to assume that Ane was involved in and

knew of the use to which the vehicle was being put.[34] The publications are not reasonably susceptible to such an interpretation and there is no showing that anyone ever read the articles in such a strained way.

Ownership of the truck, even if assumed to exist, is an innocent fact because commission of a crime is in no way imputed. This Court has held that merely reporting an individual owns property involved in a crime cannot be considered malicious or defamatory. In *Cooper v. Miami Herald Publishing Company*, 159 Fla. 296, 31 So.2d 382 (1947), the plaintiff was the owner of a restaurant called the Dragon Club. He alleged he had been defamed by *The Herald* reporting a man had been shot in his club. The trial court sustained the defendant's demurrer to the complaint. Upon appeal, this Court recognized The Herald "has the responsibility of supplying daily its readers and subscribers news and information occurring each hour, not only locally but from the remotest corners of the world" and then held:

> It is our conclusion that when the article is considered in its entirety it cannot be said that it is either malicious or defamatory but simply reflects *an incident of public interest* in the environs of the City of Miami. It was admitted at the bar of this Court during oral argument that the person was shot about the place of business but the actual shooting occurred a short distance from the plaintiff's place of business.
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> 31 So.2d at 384 (emphasis added).

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34. Indeed, the Third District held in a recent case dealing with this very incident that the police officers had a reasonable basis for believing that the truck was stolen, *Horton v. State*, 375 So.2d 1112 (Fla. 3d DCA 1979). Of course, ownership of a vehicle does not logically indicate the owner is involved in drug transportation, particularly where the perpetrators of such crimes frequently use boats, airplanes and vehicles which belong to someone else (Sheriff Freeman's testimony, Tr. 253; A. 61).

Note that the Court accepted that The Herald erred in reporting a man was shot *in* the Dragon Club, but the Court nevertheless found this error non-malicious and non-defamatory. *See also Hatjiannou v. The Tribune Company,* 8 Med. L. Rptr. 2637 (Fla. 13th Cir. 1982) (articles identifying bar as a "trouble spot" but which did not accuse the bar of encouraging criminal conduct are not defamatory). This rule of law is particularly obvious in the case of a commercial vehicle, where the owner, or corporate officer in the case of a corporation, may be completely unaware of who is driving the vehicle. An employee can readily be involved in illegal behavior without knowledge and consent of an owner. Moreover, vehicles are often stolen in order to be utilized for an illicit purpose.[35] A news article which reports ownership of a vehicle does not assert that the plaintiff was involved with the possession of the marijuana, and that fact was particularly obvious here where Mr. Ane is identified as one of four possible owners of a truck sold the Thursday before the Sunday incident was reported to the newspaper on Monday and printed on Tuesday.

B. There Was No Evidence of Negligence.

Judge Hubbart holds The Miami Herald failed to exercise reasonable care by making a faulty attribution in the lead paragraph of the first article and by relying on hearsay information.

As pointed out above, the reading of the whole article clearly shows that the lead paragraph did not make the attribution Judge Hubbart claims. The article unequivocally states Marvin Kimmel said Ane owned the truck

35. The testimony of Lillian Fernandez indicates that the truck which was the subject of this article was, indeed, stolen.

and sheriff's officials said Lillian Fernandez owned the truck. Judge Hubbart's ungrammatical dissection and isolation of the lead paragraph does not create negligence. The "lead" may not be written as clearly as Judge Hubbart would have liked it, but surely any standard of care, no matter how high, does not require perfect clarity of expression. And the full context of the article resolved any confusion about the "lead."

The second negligent act found by Judge Hubbart is the reporter's reliance on information from Marvin Kimmel which he characterizes as "hearsay information," "an unverified statement," and "unverified and uncontradicted hearsay." Obviously, all information gathered and published by the reporter was "hearsay" in the technical sense of the word. Reporters do not have the power to compel testimony under oath and therefore must rely on "hearsay" for the vast majority of information reported about any event.

The facts do not demonstrate that the reporter had any basis for giving greater or lesser credibility to any of the statements he received. At the time the first article was published, there was general confusion regarding ownership of the truck sold the Thursday before and so the reporter accurately published all the information he had about ownership. Each source was reported with substantial accuracy. As to the quality of the information reported, the reporter made no judgment.[36]

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36. It is this factual characterization of the Kimmel information as "hearsay" which appears to have led the majority astray. The majority uses a technical legal term which is inappropriate to apply to the reporter or any other citizen who is gathering and disseminating information about public issues. It will be demonstrated below that, only if it is concluded that the information may not be used unless it first passes a "hearsay" test, can the Court conclude that there was any fault in the accurate publication of Mr. Kimmel's statements.

Moreover, Mr. Kimmel's information was about Mr. Ane who was known by Kimmel (they were both Old Milwaukee beer distributors, Kimmel in Miami, Ane in the Keys) and not by the reporter. The information was reproduced faithfully in the news article, and followed immediately by reports of two official agencies—the sheriff's department and state motor vehicle officials—which contradict Mr. Kimmel. Perhaps all of this was "hearsay" in a technical legal sense, but it was the type of information, *gathered from reliable sources,* upon which reporters and other citizens generally rely.[37]

These two acts—the construction of the lead paragraph and the reliance on "hearsay" information—are the only acts which the Third District finds supporting a verdict that The Herald was negligent. If such acts are sufficient to support a libel verdict in this state, whatever the standard of fault adopted, freedom of the press will have been eviscerated and the courts should prepare to clear their dockets for the many defamation actions which no doubt will follow. Virtually every news article which is written contains paragraphs which are subject to varying interpretations and information which can be characterized as hearsay.

The petitioner before this Court submits that, at the very least, Judge Hubbart has wrongly applied the standard he announces. The petitioner and its reporter were reasonably careful in determining whether the statements reported were true or false. No evidence of negligence was submitted to the jury.

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37. It is possible to characterize all the reported statements as "hearsay" but this characterization fits all of the four sources of information, not just Mr. Kimmel's statement.

C. The Evidence of Injury Does Not Support the Damage Award.

The plaintiff recovered a $5,000 damage award in this case although he submitted no evidence to the jury of any damage to reputation.[38] The sole basis of his claim for damages, as even the Third District majority recognized, was Ane's testimony relating to his mental suffering. 423 So.2d at 390.

This Court held in *Miami Herald Publishing Co. v. Brown,* 66 So.2d 679 (Fla. 1953), that a plaintiff who fails to prove damage to reputation is entitled to recover only nominal compensatory damages. This Court in *Firestone II,* 305 So.2d 172 (Fla. 1974), appeared to overlook *Brown,* but that case remains the law of Florida today. *See,* Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer,* 61 Va. L. Rev. 1349, 1438 (1975). Ane therefore at best was entitled to a recovery of nominal damages.[39]

Moreover, the petitioner respectfully urges the Court to reconsider its holding in *Firestone I,* that a libel case

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38. Nor was there any evidence of injury to Ane's business. Ane stated that he had no difficulty with the authorities (Tr. 298; A. 91), or business associates (Tr. 283, 299; A. 76, 92). The plaintiff was not able to show any injury to business even in examination by his own counsel. Under cross examination, he admitted that he was making more money since the articles were published (Tr. 302; A. 95).

The allegations relating to physical injury are also unsupported. Ane testified that he has not been treated by a doctor (Tr. 301; A. 94) and he never claimed that he was ill because of the articles.

The only testimony which remotely relates to the damage allegations was Mr. Ane's testimony that, when he first learned of the publication, he was angry and disturbed because his family was upset (Tr. 282; A. 75). Ane's anger was not focused on the newspaper, however because he thought the reporter was merely doing his job (Tr. 293; A. 86). He was angry at Marvin Kimmel.

39. In the *Brown* case jury award of $1,500 was reversed.

may be maintained although no damage to reputation is claimed. That rule has since been thoroughly criticized, *see* Eaton, *supra,* at 1438-39, and at least two other state courts have reached opposite conclusions, holding that damage to reputation is the gist of every defamation action. *Gobin v. Globe Publishing Co.,* ..... N.W.2d ....., 8 Med. L. Rptr. 2191 (Kan. 1982); *France v. St. Claire's Hospital & Health Center,* 82 App. Div. 2d 1, 441 N.Y.S.2d 79 (1981). The instant case presents the opportunity for the Court to reconsider the rule.

The damage rule, accepted by the Third District, creates an absurdity in Florida law by allowing a plaintiff to recover damages merely by submitting proof of negligent speech and proof of mental distress. This holding is completely inconsistent with a considerable body of law which severely limits the circumstances under which a plaintiff may recover for emotional injury.

To sustain an action for infliction of emotional distress in Florida, if such indeed can be done,[40] the plaintiff must allege and prove conduct so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community.[41] Following this

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40. *See Mundy v. Southern Bell Telephone and Telegraph Company,* 676 F.2d 503 (11th Cir. 1982) (noting that Florida has not definitively resolved whether an independent cause of action for intentional infliction of mental distress exists). Apparently because of this doubt, the Second District certified in *Gmuer v. Garner,* ..... So.2d ....., 8 Fla. L. W. 649 (Fla. 2d DCA 1982), the following question to this Court as having great public importance: "May one recover damages for intentional infliction of severe mental distress which is not incidental to or consequent upon any separate tort or other actionable wrong?"

41. *See, e.g., Slocum v. Food Fair Stores, Inc.,* 100 So.2d 396, 397 (Fla. 1958); *Gmuer v. Garner,* ..... So.2d ....., 7 Fla. L. W. 2219 (Fla. 2d DCA 1982) now pending on certification to this Court, 8 Fla. L. W. 649 (1982); *Lay v. Roux Laboratories,*

(Continued on following page)

test, Florida courts recognize the tort "only in the most outrageous circumstances." *Habelow v. Travelers Insurance Company,* 389 So.2d 218, 220 (Fla. 5th DCA 1980).

The most recent of these cases, *Gmuer v. Garner,* ..... So.2d ..... (Fla. 2d DCA 1982) involved a claim that the plaintiff had been injured by certain statements made by the defendant. The court rejected her claim, however, because no independent tort had been proven and the "obnoxiously and socially odious words and suggestions . . . were nevertheless without physical contact or threat of bodily harm to plaintiff." 7 Fla. L. W. at 2219.

Under the holding of the majority opinion in the instant case, a plaintiff may avoid all of these hurdles by labeling his action for infliction of mental distress an action for defamation instead. The defamation plaintiff, the Third District majority held in *Ane,* need prove nothing more than that the defendant negligently published a falsehood and that consequently he (the plaintiff) suffered mental distress. He need not claim or prove damage to reputation, although traditionally an action for defamation has been defined as a remedy for damage to reputation. Under the holding of the majority, he need not prove any form of malice or intent to harm or special damage or any other independent tort to support a naked claim of mental distress.

Thus, any person who utters emotionally harmful words *intentionally* is not liable under the tort of intentional infliction of emotional distress but one who is only

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Footnote continued—

Inc., 379 So.2d 451, 452 (Fla. 1st DCA 1980); *Food Fair, Inc. v. Anderson,* 382 So.2d 150, 152 (Fla. 5th DCA 1980); *Ford Motor Credit Co. v. Sheehan,* 373 So.2d 956, 959 (Fla. 1st DCA 1979), *cert. dismissed,* 379 So.2d 204 (Fla. 1979); *Gellert v. Eastern Air Lines, Inc.,* 370 So.2d 802, 808 (Fla. 3d DCA 1979), *cert. denied,* 381 So.2d 766 (Fla. 1980).

negligent in his speech (even on public issues) and who does not damage the plaintiff's reputation is nonetheless liable for emotional damage.

This result simply makes no sense.

There is no actual injury shown to have been caused to the plaintiff's reputation. Entry of judgment for the defendant should be directed.

CONCLUSION

In the present case the Third District, in every respect, has accorded the least possible protection to free speech. Properly read in full, the news articles are not even defamatory, and, indeed, the articles actually exonerate the plaintiff—the Old Milwaukee beer distributor in the Keys—from ownership of the Old Milwaukee beer truck which was carrying the marijuana.

Even if the articles could be construed to be defamatory, the case was put before the jury without any instruction establishing a standard of care and under a burden of proof which offered no protection to speech. The plaintiff never proved any negligence, never showed any injury to his reputation, never proved any damages other than emotional distress. There is no basis for this award and it should be reversed.

Moreover, even if the plaintiff had proven the defendant failed to act with reasonable care, Florida never has allowed recovery under a "reasonable speech" theory when matters of public or general concern were involved. Florida common law privileges require proof of *at least* express malice before recovery for a report on a matter of public or general concern and this has expressed its independent preference for the actual malice (knowing falsehood) standard.

The Court should quash the decision of the Third District Court of Appeal and announce the standard of care or privilege to govern communications of public or general concern in Florida. That standard should be drawn from the traditions of the Florida common law and it should require any plaintiff who sues on a communication involving matters of public or general concern to prove the defendant acted with a malicious intent to harm by telling a deliberate knowing lie.

Respectfully submitted,

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