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 REPLY BRIEF

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STATEMENT OF THE FACTS

Respondent, Aurelio Ane ("Ane"), has failed to provide the Court with an accurate statement of the central facts of this case. This failure is particularly ironic considering that the statement was produced under circumstances far more conducive to accuracy than were the news articles which Ane alleges to be "negligently published"—respondent having available sworn testimony, a transcript and a leisurely appellate timetable. Ane's errors demonstrate the ease with which factual inaccuracies find their way into any report or narrative and the folly of predicating liability on mere negligence.

Three Significant Errors

Error Number 1: Referring to the newspaper reporter, Ane states:

> Kerstein (sic), in writing the article on November 22, 1977, *made a determination* that Aurelio Ane owned a certain truck. (Respondent's Brief at 1).

Fact: In writing the November 22 article, the reporter never determined who owned the truck. The article stated:

> "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."

The article accurately reported the existence of general "confusion over the truck's ownership" (A. 3) and did not make any determination of ownership.

Error Number 2: Ane asserts that "the article explicitly stated that Ane owned the truck."

Fact: The article *never* stated Ane was the owner of the truck *at the time it was picked up carrying marijuana,* and it does not even attribute that view to Marvin Kimmel.[1] The article stated:

> "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. pres-

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1. The article noted there was confusion over the truck's current ownership and, indeed, quoted the Deputy sheriff:

> "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. 3).**

ident, according to Marvin Kimmel, president of Miami's Universal Brands, Inc." (A. 3) (emphasis added).

Error Number 3: Ane stresses the fact that Marvin Kimmel denied making the statements attributed to him. (Brief, pages 3, 17).

Fact: Ane's error here is that the statement—although containing a germ of truth—is misleading on the most significant aspect of this case. Marvin Kimmel did deny making the statements about Ane's purchase of the truck, but Kimmel was a co-defendant in this case (indeed, the original defendant) and the *sole* basis for the claim against Kimmel was the statement made by Kimmel to the newspaper reporter and quoted in the news article. The facts governing this case have now been settled by the jury verdict against Kimmel, a verdict which was double that returned against *The Miami Herald* and which has not been challenged by Kimmel. It has been judicially settled that Kimmel *did make the statement* and any assertion that the facts are otherwise is an attempt to look behind a settled fact.[2]

These errors demonstrate that there is no basis for liability in this case, even under a negligence theory, and yet both a jury and appellate court have misapplied a negligence standard to find liability. The errors also demonstrate the difficulty of reporting breaking news and the real danger that under a negligence standard the press will lose libel suits no matter how hard reporters strive to be accurate.

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2. It is important for the Court to understand that the newspaper is not being sued for distorting information but, rather, for accurately reporting a statement made by a person from whom the paper sought information. It was Kimmel who was in error and the newspaper reported this the next day as soon as the Kimmel error was discovered.

ARGUMENT

Ane's argument is based upon two fundamental legal errors. First, Ane suggests Florida courts are "compelled" to apply a negligence standard by the United States Supreme Court's interpretation of the first amendment found in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). This simply is not true. The plain words of *Gertz* are there to be read. Where public officials and public figures are not involved, the standard of fault is to be decided by the states. Second, Ane continually returns to irrebuttable presumptions as pegs for liability in this case, ignoring the fact that under both *Gertz,* and the Florida common law privileges which protect "public issue" speech, the states cannot impose liability for speech through presumptions.

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.

Ane offers the Court an interpretation of Florida common law privileges which renders them virtually useless to protect speech of any type (Respondent's Brief at 10-12). He flatly ignores the cases which demonstrate the existence of broad privileges in Florida[3] and the important trio of cases, discussed extensively in the petitioner's initial brief, which demonstrate that Florida courts

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3. *McNayr v. Kelly,* 184 So.2d 428 (Fla. 1966); *City of Miami v. Wardlow,* 403 So.2d 414 (Fla. 1981) (Boyd, J.); *Sussman v. Damian,* 355 So.2d 809 (Fla. 3d DCA 1977) (Hubbart, J.).

have upheld a common law privilege affording strong protection to non-malicious speech about matters of public or general concern.[4]

Reference to these common law principles is essential in determining the appropriate standard of fault applicable in Florida cases. The purpose of determining a standard of fault is to provide a mechanism for balancing the value of free speech against the value of private reputational interests. The common law privileges also provide such a mechanism and therefore they exist as precedent for gauging the standard of fault.

Ane interprets Florida's common law as providing minimal protection of speech, apparently with the hope that this Court will determine that a standard of fault affording minimal protection of free speech also is appropriate in Florida.

In fact, Ane contends that common law qualified privileges, including the right to report news of public or general concern, have been historically defeated whenever the speech at issue was libelous per se.[5] This is plainly wrong. Under Florida law, when speech is protected by a qualified privilege, the burden of *proving* common law express malice is placed squarely on the plaintiff, even though the expression is defamatory per se. The qualified privilege doctrine was devised to protect speech from the harsh presumption of libel per se. Justice Adkins' opinion in *Gibson v. Maloney* destroys the core

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4. *Coogler v. Rhodes*, 38 Fla. 240, 21 So. 109 (1897); *Abram v. Odham*, 89 So.2d 334, 336 (Fla. 1956); *Gibson v. Maloney*, 231 So.2d 823 (Fla.), *cert. denied*, 398 U.S. 951 (1970).

5. Ane's argument that the articles published by *The Miami Herald* are defamatory per se is refuted by Part III. A. of the petitioner's initial brief.

of respondent's argument. Quoting *Coogler* and *Abram*[6] the opinion states:

> *The 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 to recover he is called upon affirmatively and expressly to show malice in the publisher.*
>
> 231 So.2d at 825
> (emphasis added).

The cases relied upon by Ane are not to the contrary and in fact support the argument of the petitioner. Ane misconstrues three decisions from this Court: *Layne v. Tribune Company,* 108 Fla. 177, 146 So. 234 (1933); *Hartley & Parker, Inc. v. Copeland,* 51 So.2d 789 (Fla. 1951), and *Metropolis Company v. Croasdell,* 145 Fla. 455, 199 So. 568 (1941). The *Layne* case specifically pointed out that a qualified privilege carries "an implied rebuttal of any presumption of malice." 146 So. at 238. In *Copeland,* the publication was not privileged and therefore proof of express malice was unnecessary to support the verdict. The Court impliedly held such proof would be necessary if the publication were privileged even though the publication was defamatory per se. The *Croasdell* case did not deal with the qualified privilege issue in any way whatsoever and in any event upheld the verdict against the defendant only after finding it was supported by "evidence of actual malice on the part of the defendant." 199 So. at 570.

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6. *See also White v. Fletcher,* 90 So.2d 129, 131 (Fla. 1956) (plaintiff cannot recover where he fails to overcome qualified privilege with proof of malice); *Loeb v. Geronemus,* 66 So.2d 241 (Fla. 1953) ("malice which vitiates a qualified privilege must be actual and not merely inferred from falsity"); *Leonard v. Wilson,* 150 Fla. 503, 8 So.2d 12, 13 (Fla. 1942) ("if the communication was privileged, the presumption is it was without malice"); *Myers v. Hodges,* 53 Fla. 197, 44 So. 357, 363 (1907).

The respondent also relies on three decisions from the district courts of appeal in support of his analysis of Florida common law. None of them supports his position.[7]

The common law privileges which have protected free speech on public matters in Florida provide a compelling basis for finding the actual malice standard of fault applicable in all defamation actions involving matters of public concern.[8] Because the respondent cannot dispute the case law, his tactic is to ignore the controlling cases, apparently with the hope that this Court will abandon the traditions of free speech in Florida when it determines the applicable standard of fault.

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.

Ane argues that this Court adopted a simple negligence standard in *Firestone v. Time, Inc.*, 271 So.2d 745 (Fla. 1972)—a case which this Court expressly held did *not* involve a matter of real public or general concern. (Respondent's Brief at 21-24). Even if Ane were correct,

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7. In *Axelrod v. Califano*, 357 So.2d 1048, 1050 (Fla. 1st DCA 1978), the District Court of Appeal found the presumption of malice raised by the defamatory per se nature of a publication would not defeat a qualified privilege. The decision in *Barry College v. Hull*, 353 So.2d 575 (Fla. 3d DCA 1977), involved libel per quod, not libel per se. Finally, the respondent relies on *Brown v. Fawcett Publications, Inc.*, 196 So.2d 465 (Fla. 2d DCA), *cert. denied*, 201 So.2d 557 (Fla. 1967) for his interpretation of Florida's common law, which involved solely the issue of the proof required to sustain a punitive damage award.

8. *See generally* Note, *Defamation, The Private Individual and Matters of Public Concern: A Proposed Resolution for Florida*, 32 U.Fla.L.Rev. 545 (1980).

the Court did not adopt such a standard for non-public figure defamation cases based on matters of real public or general concern, and Ane does not even advance such an argument. Under Florida law, whenever a libel action is based on a news article regarding a matter of public or general concern, no matter what the status of the plaintiff, actual malice must be proven. This was the announcement of this Court in *Firestone* and *Gibson v. Maloney*, 231 So.2d 823 (Fla.), *cert. denied*, 398 U.S. 951 (1970). The subsequent decision of the United States Supreme Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), that the first amendment of the United States Constitution does not require application of the actual malice standard in non-public figure cases, did not alter this Court's prior interpretation of Florida law.

The respondent relies on *Helton v. United Press International*, 303 So.2d 650 (Fla. 1st DCA 1974), and *Holter v. WLCY-TV, Inc.*, 366 So.2d 445 (Fla. 2d DCA 1978), *cert. denied*, 373 So.2d 462 (Fla. 1979), as examples of appellate decisions which have "assumed" the simple negligence standard is applicable in private figure defamation cases. The holding of *Helton* was corrected by the First District Court of Appeal itself in *From v. Tallahassee Democrat, Inc.*, 400 So.2d 52 (Fla. 1st DCA 1981), *pet. denied*, 412 So.2d 465 (Fla. 1982). The *From* Court said that *Helton*:

> correctly notes that *Gertz* does not require an actual malice standard for publications involving matters of public interest or concern. What it fails to note is that while *Gertz* no longer requires an actual malice standard as a matter of constitutional principle under the First Amendment, it does not foreclose the state courts from choosing an actual malice standard.
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> 400 So.2d at 56.

Ane's interpretation of *Helton* as holding that "the doctrine of public or general issue is no longer available to the media as a defense" (Brief at 9) is clearly wrong.

Holter is accurately cited by Ane for the principle that "Florida Courts are to be guided by the decisions of the United States Supreme Court," (Brief at 10), but then Ane improperly distorts this rule to contend Florida courts "follow the precedent established by the U.S. Supreme Court in *Gertz v. Robert Welsh, Inc.* (sic), *supra,* that a private individual in a defamation suit is not required to show actual malice." This misstates both Florida law and the holding in *Gertz* that "the States may determine for themselves the appropriate standard of liability for a publisher . . . of defamatory falsehood injurious to a private individual." 418 U.S. at 347.

In determining the appropriate standard for expression involving reports of real public concern, a state should look to its own historical treatment of defamation actions.[9]

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9. Judge Hubbart looking at the law of other states found the simple negligence standard supported by the "overwhelming weight of authority in the country." 423 So.2d at 385. The majority of the cases cited by him as expressly adopting the simple negligence standard in public issues cases do not, however, in fact do so. Three of the state decisions cited by Judge Hubbart clearly do not decide what standard of fault should be applied in cases involving matters of real public or general concern, *Wilson v. Capital City Press,* 315 So.2d 393 (La. App.), *cert denied,* 320 So.2d 203 (La. 1975) (determining private plaintiff must prove fault but not what level of fault); *Jacron Sales Co., Inc. v. Sindorf,* 276 Md. 580, 350 A.2d 688 (1976) (determining simple negligence standard is applicable in libel action by private figure which is *not* based on matter of public concern); *Madison v. Yunker,* 589 P.2d 126 (Mont. 1978) (determining private plaintiff must prove fault but not what level of fault). One of Judge Hubbart's state decisions, *Thomas H. Maloney & Sons, Inc. v. E. W. Scripps Co.,* 43 Ohio App. 2d 105, 334 N.E.2d 494 (Ct. App. 1974), *cert. denied,* 423 U.S. 883 (1975), erroneously appears to conclude that *Gertz* mandates application of a simple negligence standard in all private figure cases. Five of the state decisions from Judge Hubbart's collection of cases simply

(Continued on following page)

In this state, the courts have, for many years, held that Florida has a far greater interest in free and open debate of all issues of real public or general concern than in providing a legal mechanism for guaranteeing compensation to individuals aggrieved by statements made about them.

III.

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

Under any standard of fault, including a simple negligence standard, The Miami Herald is entitled to a verdict. Ane relies on a tortured and extreme interpretation of the articles to show defamatory meaning, misinterprets the facts to demonstrate the reporter acted unreasonably, and cites no competent evidence of actual injury. (Respondent's Brief at 12-21).

A. The Respondent Relies on a Tortured and Extreme Interpretation to Show Defamatory Meaning.

The respondent argues the language of the first *Miami Herald* article is defamatory because it:

(1) States Monroe County Sheriff's officials said the truck had been sold to him (Brief at 13), and

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Footnote continued—

follow the discredited rationale of *Gertz* itself—even though *Gertz* invites the states to determine the applicable standard of fault for themselves based on their historical interests in free speech. *Dodrill v. Arkansas Democrat Co.*, 265 Ark. 628, 590 S.W.2d 840 (1979), *cert. denied*, 444 U.S. 1076 (1980); *Troman v. Wood*, 62 Ill. 2d 184, 340 N.E.2d 292 (1975); *Stone v. Essex County Newspapers, Inc.*, 367 Mass. 849, 330 N.E.2d 161 (1975); *Jones v. Sun Publishing Co.*, 292 S.E.2d 23 (S.C.), *cert. denied*, ... U.S. ....., 74 L.Ed. 2d 201 (1982).

(2) "[P]lainly attributes to the plaintiff, Ane, [a] criminal offense amounting to a felony, trafficking in large quantities of marijuana." (Brief at 14).

Both of these interpretations of the two articles sued upon are tortured and extreme and should be rejected by this Court as a matter of law. *Valentine v. CBS, Inc.*, 698 F.2d 430 (11th Cir. 1983) (interpreting Florida law).

Although the first paragraph of the initial article, read out of context and in isolation might be read as erroneously attributing to sheriff's officials the statement that the truck was sold to the Old Milwaukee beer distributor,[10] this reading is shown to be incorrect by the remainder of the article which explicitly states the sheriff's officials said they did not know who owned the truck. Significantly, the remainder of the first article must be read to determine that the Old Milwaukee beer distributor is in fact Aurelio Ane. Long-standing principles of law require that the Court must consider the entire article. As the Fourth District Court of Appeal has recently stated in an opinion reversing a jury verdict, *Byrd v. Hustler*

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10. In *Time, Inc. v. Pape*, 401 U.S. 279, *reh. denied*, 401 U.S. 1015 (1971), the Supreme Court examined a similar problem involving an apparently erroneous attribution of a statement to an authoritative source. In that case, *Time* magazine reported that a document published by the United States Civil Rights Commission alleged the plaintiff, a police officer, had committed certain acts of brutality. In fact, the document only made mention of allegations being made by witnesses and did not explicitly conclude the plaintiff had committed the acts. In reinstating a directed verdict for the defendant, the Supreme Court rejected the plaintiff's claim that the article should be held libelous because of erroneous attribution of true allegations to an authoritative source. The plaintiff in the instant case tries to make a similar claim by construing *The Miami Herald* article as attributing to sheriff's officials a statement which undisputedly was made by Marvin Kimmel. The *Pape* case demonstrates that even if the Court accepts this interpretation of the articles, the defendant should not be found liable.

Magazine, Inc., ... So.2d ....., 8 Fla. L.W. 1595, 1596 (4th DCA 1983):

> [A] publication must be considered in its totality. "The court must consider all the words used, not merely a particular phrase or sentence."

The petitioner demonstrated in its initial brief at pages 44-46 that the respondent's second interpretation of the article also is not possible. Neither of the articles accused Aurelio Ane of any criminal conduct whatsoever. At most, they *accurately* quote an identified, reliable source who stated the truck was sold to Ane earlier.[11] It is not reasonable to interpret the articles as saying either that Ane definitely owned the truck or that he was involved with the crime. The trial judge erred in allowing the jury to impose liability against the defendant for publication of words not reasonably susceptible to a defamatory meaning. *Cooper v. Miami Herald Publishing Company*, 159 Fla. 296, 31 So.2d 382 (1947).

B. The Respondent Misrepresents the Facts in an Attempt to Show That the Reporter Acted Unreasonably.

Ane's effort to demonstrate some fault provides the Court with an opportunity to focus on the factual context

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11. The respondent relies heavily on an analysis of *Belli v. Orlando Daily Newspapers, Inc.*, 389 F.2d 579 (5th Cir. 1967), *cert. denied*, 393 U.S. 825 (1968), for his argument that the trial judge in this case properly left to the jury the issue of whether the two articles were in fact defamatory of the plaintiff. The plaintiff in that case, the well known attorney Melvin Belli, alleged he had been defamed by reports that he deliberately tried to "take" the Florida Bar for hundreds of dollars by charging clothing purchases to his hotel bill while in Florida at the bar association's expense. The instant case, in contrast, does not involve language that imputes to the plaintiff any acts that a jury reasonably could conclude accused Ane of anything other than *possible* ownership of a beer truck.

of this case and test the concept of "negligence" in the context of a news story. Ane first asserts that "Kerstein (sic) knew from two independent sources . . . that the owner of the truck was Lillian Fernandez," (Respondent's Brief, at 17) yet, the undisputed facts are that the investigation was still going on and *no one knew who owned the truck.* The article reports that the sheriff's office was "just starting" the investigation and reports the sheriff's office observation that the ownership of such vehicles frequently changed. The full news article carefully reports all facts—the Kimmel statement and facts which cast doubt on the Kimmel statement.

Ane is also mistaken when he states, "Kerstein (sic) then made absolutely no attempts to verify this unreliable hearsay[12] by contacting the people from Island Leasing." (Respondent's Brief, at 18). In fact, the reporter had called Island Leasing *before* calling Kimmel and had been told by Island Leasing that he must talk to Kimmel at Universal Brands for further information (T. 57). This was the second instance in which the reporter had been referred to Universal Brands, the first having come from the state beverage authorities (T. 54). Kirstein made a remarkable number of attempts to collect facts for the news article and the evidence demonstrates that he accurately reported all the information gathered. This record does not establish any fault whatsoever.

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12. The catch-phrase, "unreliable hearsay" does not accurately summarize the statement of Marvin Kimmel, the President of Universal Brands. Kimmel made efforts to get answers for the reporter's questions (T. 58, 59). Because the reporter had been twice referred to Universal Brands,—by Island Leasing and by the state beverage authorities—it is not surprising that he placed credence in the statements of the President of that company. Kimmel's statement was no more "hearsay" than any other statement.

C. The Plaintiff's Testimony Is Not Competent Evidence of Actual Injury.

Gertz requires that "all awards must be supported by competent evidence of actual injury." 418 U.S. at 350. None of the evidence cited by the respondent—all his own unpersuasive testimony—is evidence of actual injury: (T. 98, 269, 273-84, 297, 303-05). The cited pages of the record are attached to this brief as an appendix. A review of this testimony reveals no injury.

CONCLUSION

The Court should adopt the actual malice standard for reports of matters of public concern, the decision of the Third District Court of Appeal should be quashed, and entry of judgment for the defendant should be directed.

Respectfully submitted,

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