IN THE SUPREME COURT OF FLORIDA

THE TRIBUNE COMPANY; PAUL HOGAN; JOSEPH REGISTRATO; and WILLIAM SLOAT, Petitioners, vs. LEONARD D. LEVIN and GENERAL ENERGY DEVICES, INC., Respondents.	CASE NO. 63,217

Petition Seeking Discretionary Review Of The Decision Of The Second District Court Of Appeal Of Florida

ANSWER BRIEF OF RESPONDENTS

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EXPLANATION OF REFERENCES

Petitioners The Tribune Company, Paul Hogan, Joseph Registrato and William Sloat will be referred to collectively as "the Tribune" or "the defendants." Leonard D. Levin and General Energy Devices, Inc., respondents herein, will sometimes be collectively referred to as "the plaintiffs."

The following symbols will be used throughout:

P.A.	-	Petitioners' Appendix
R.A.	-	Respondents' Appendix
I.B.	-	Petitioners' Initial Brief
R.	-	Record
P.X.	-	Plaintiffs' Trial Exhibit
D.X.	-	Defendants' Trial Exhibit

Respondents' Appendix contains the opinion of the Second District, a portion of the jury instruction conference before the trial judge, and relevant portions of argument before the trial judge.

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ANSWER BRIEF OF RESPONDENT

COUNTERSTATEMENT OF THE CASE

Petitioners seek discretionary review of the Second District Court of Appeals' affirmance of a $380,000 jury verdict in favor of Respondents Leonard D. Levin ("Levin") and General Energy Devices, Inc. ("GED"). The verdict was rendered in a defamation action brought by Levin and GED against The Tribune Company ("Tribune") and several of its employees. The trial, conducted from January 4 through January 14, 1981, was presided over by the Honorable James B. Sanderlin of the Circuit Court in and for Pinellas County, Florida. The suit was based upon the false and defamatory statements concerning Levin and GED contained in two newspaper articles published on June 10, 1979 in the Tampa

Tribune (P.A.1-5). The Second District Court of Appeal, unlike the Third District Court of Appeal in The Miami Herald Publishing Co. v. Ane, Case No. 63,114, did not find that the subject of the articles challenged by Levin and GED related to an event of public or general concern. The Second District did certify as a matter of "great public importance" suggesting review by this Court the issue of the propriety of a negligence standard in defamation cases brought by non-public figure plaintiffs. Contrary to petitioners' assertion (I.B. at 1), this Court has discretionary jurisdiction by virtue of Rule 9.030(a)(2)(A) (v), not Rule 9.125, of the Florida Rules of Appellate Procedure. 1/

COUNTERSTATEMENT OF THE FACTS

THE REPORTER'S "INVESTIGATION"

The record reveals that William Sloat, an experienced reporter, on May 14, 1979, his first day of employment by The Tribune Company (R.664), stumbled upon a Chapter 11 petition filed many months earlier in the Tampa United States Bankruptcy Court by GED, a Clearwater-based manufacturer of solar heating equipment (R.666-667). For a period of approximately two weeks, while working on four

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1/ The Second District Court of Appeal did not certify that any issue required immediate resolution by this Court.

other stories, Sloat conducted an "investigation" of GED and its president, Leonard Levin (R.694). During the period of Sloat's investigation, his supervisor was Joseph Registrato, City Editor of the Tribune (R.665).

During his investigation, Sloat told a Florida Assistant Attorney General he had discovered that Levin had pleaded guilty to two violations of the federal securities laws (R.301; D.X.22F). Sloat contacted then current and former GED distributors and told them he was writing an "expose" on the company (R.1632). He asked a lot of negative questions about GED (R.1204). Sloat telephoned and met personally with John V. Happle, an involuntarily terminated, former GED distributor who had complained to the State of Florida about the quality of GED's products (R.779, 730). Sloat learned, however, that a state-funded agency had certified GED's solar panels (R.725) and that a state official had reviewed Happle's defective equipment claims and determined them to be without merit (R.300; D.X.21HH). Sloat, by reviewing the Attorney General's investigative file, discovered that the Assistant Attorney General investigating GED had determined that there were only five unresolved complaints about the equipment, but it was impossible to determine whether even those complaints were properly against GED or the installer (R.2035).

Sloat took extensive notes from the Chapter 11 filings of GED and National Automotive Industries, Inc., another company operated by Levin (R.205; D.X.5D-5L; D.X.5SS-5YY).

The reporter's notes indicated that Levin had, over a period of time prior to the filing of the Chapter 11 petition, borrowed and repaid funds from both companies; Sloat's own notes indicated that those companies usually owed Levin money (R.205; D.X. 5 TT-5VV).

By May 30, 1979, Sloat had developed a draft of two articles concerning GED and Levin (R.751). This draft (R.216; P.X.16) contained no indication that Levin had been given the chance to respond to anything mentioned in the article; that would have been impossible because it was prepared prior to Sloat's interview of Levin (R.751). Registrato had two comments on Sloat's draft: it was too long and it needed something from Levin himself (R.903-904).

On or about June 4, 1979, Sloat interviewed Levin at the Clearwater offices of GED; the interview consumed approximately one and one-half hours, during which time Levin showed Sloat the company's offices, product, and training seminar room (R.1244-1245). Sloat told Levin, contrary to the contents of the already prepared draft articles, that he was doing an article on the solar industry, not one on GED or Levin himself (R.881, 1246). During the course of the interview, the notes of which have been "destroyed" (R.686), Sloat failed to raise with Levin much of what was already in the draft articles, including the state investigation of GED's products and advertising (R.1253, 1277), the Florida Solar Energy Center's certification of GED solar panels (R.1254), the

value of prepaid but undelivered GED merchandise (R.801), the $158,000 in "unexplained" borrowings from GED and National Automotive (R.249), a Securities and Exchange Commission civil suit against Levin for $136,000 (R.1256) and a suit by Southern National Bank against GED (R.783, 1257).

Sloat did raise the name of John Happle, the former GED distributor, and Levin responded by saying that Happle's installations had been inspected by GED and found totally inadequate; Levin offered Sloat a copy of a field report detailing the poor installation done by Happle on five solar systems (R.1267-1268;R.229;P.X.28aa-28xx).

THE "EDITORIAL PROCESS"

At some point prior to publication, Defendant Registrato edited the articles (R.1111). Registrato testified that he cannot swear to ever having sat down with Sloat to review the articles (R.1116). He specifically did not ask Sloat how he had questioned Plaintiff Levin (R.1137), although he admitted that a subject of a story such as this should have been informed of the article's accusations with sufficient specificity to permit a meaningful response (R.1104). Although he recognized that these articles contained certain words such as "lied," "swindle" and "mislead" (R.1131-1132), which words call for upgraded editorial review (R.1132-1133), Registrato testified that he gave the stories no "special

attention" (R.1130).

THE ARTICLES

On June 10, 1979 the Tampa Tribune published the two articles in question (R.199;P.A.1-5). Those articles, a primary story and an accompanying sidebar, falsely portray GED as a company which sold intangible marketing rights to unsuspecting distributors for exorbitant fees, failed to deliver merchandise to those distributors, and, with respect to that merchandise which it did deliver, manufactured an inferior product. GED's actions were understandable, according to the articles, because the company was operated by Levin, a man with a prior criminal conviction. The reader was led to believe, again falsely, that Levin had masterminded this scheme to defraud distributors and consumers alike by taking distributors' money, delivering no product, "borrowing" money from the company, and then taking the company into bankruptcy to avoid creditors.

The impact of the articles upon GED and Levin was immediate and overwhelming. The telephone at Levin's house started ringing off the hook (R.1867). GED's distributors were upset by the newspaper's description of the company and its product (R.1559, 1591). Levin was told by one distributor to sell the business or change its name (R.1593). Ultimately, the company's assets, valued at $360,000 (R. 1311), were sold for $80,000 worth of stock in another

company (R.1686, 1703). The owner of that company, who negotiated the transaction with Levin, knew that Levin was "hemmed in by circumstances" and had no choice other than to accept the reduced offer (R.1703-1704).

Levin himself became obsessed with the articles (R.1318, 1868); his business associates shunned him (R.1320, 1559-1563, 1593); finally, his wife of fifteen years left him and obtained a divorce (R.1871).

The articles written by reporter Sloat, edited by city editor Registrato and published by The Tribune Company humiliated an individual and destroyed that individual's business. The articles were not a report on the state of the solar energy industry. They were exactly what Sloat had represented them to to be: an expose of an individual and his company. Unfortunately for Mr. Levin and GED, the contents of the articles were false and defamatory. Unfortunately for the petitioners, reporter Sloat knew that the articles were false.

THE TRIAL

At the close of plaintiffs' case in chief, the defendants moved for a directed verdict, asserting that (1) the articles were true or substantially true, and (2) plaintiffs were public figures and had failed to adduce evidence of actual malice (R.A.5-6). The trial judge did not grant the motion (R.A.6). The defendants did not assert at that time

that plaintiffs, even as non-public figures, were required to establish actual malice.

At the conclusion of all the evidence, the trial court determined that, because the plaintiffs had not injected themselves into a matter of public controversy with a view toward influencing the outcome of that controversy, they were not "public figures" in the constitutional sense (R.A.11-13). The trial judge then heard argument, in chambers, on the parties' proposed instructions to the jury. As discussed in greater detail below, once the judge ruled that Levin and GED were not public figures, counsel for the Tribune proposed that the jury be instructed to apply a negligence standard to the actions of the defendants. The Tribune did not even suggest, much less propose, that an actual malice standard should apply to an action instituted by non-public figures.

After being instructed that "actual damages" could be awarded upon a finding of falsity, defamation and negligence (R.2539), the jury returned verdicts in favor of each plaintiff (R.373-374), thereby rejecting defendants' claims of substantial truth and fair comment. [2/] Specifically, the jury awarded plaintiff Levin $100,000 in compensatory damages

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[2/] Because the defendants failed to propound special interrogatories to the jury, no one can say today which, if less than all, of the alleged falsehoods the jury found to be false and, in the context of the story as a whole, libelous.

(R.374). Plaintiff GED was awarded $280,000 in compensatory damages and $250,000 in punitive damages (R. 373). [3/]

POST TRIAL MOTION

Defendants then filed a Motion to Set Aside the Verdict, arguing once again that the articles were true and not defamatory, and that the plaintiffs were public figures (R.429-441). Several new attacks were made at this point in the proceeding, however: it was argued that certain evidence was improperly admitted and that certain of defendants' proferred exhibits were improperly excluded by the trial judge. The Tribune also asserted error in the jury instructions. Once again, the Tribune's motion was denied (R.2683-2686).

Most noteworthy is the fact that the Tribune's Motion to Set Aside the Verdict did not include an argument that an actual malice standard should have been applied to non-public figure plaintiffs Levin and GED. Indeed, up to that point in the proceeding, the defendants had not even mentioned the concept of an "event of public or general concern."

[3/] The trial judge subsequently struck the award of punitive damages to GED.

APPEAL TO THE DISTRICT COURT

It was in their Initial Brief on appeal to the Second District that the petitioners first argued that an actual malice standard should have been applied to Levin and GED not because they were public figures, but because the articles involved a matter of real public or general concern. That argument, along with the substantial truth, evidentiary, jury charge and public figure arguments, was rejected by the Second District on both the Tribune's initial appeal and its Motion for Rehearing. [4/]

The Second District ruled that the negligence standard was the appropriate one for non-public figure plaintiffs in defamation actions. The Court did not find that the articles, investigative reports amounting to a false and defamatory expose of Levin and GED, involved matters of public or general concern. Noting that the negligence-actual malice issue had been certified to this Court by the Third District in the Ane case, however, the Second District panel also certified the issue as one of great public importance. The issue certified was never raised by the Tribune at the trial level; indeed, it is clear that, once Levin and GED were

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4/ Petitioners have never asserted at any stage of the appellate process that the evidence failed to establish that the articles in question were published negligently. Thus, the fact of negligent publication must be presumed at this juncture of the proceeding.

declared not to be public figures, counsel for the Tribune proposed that the jury be instructed to apply a negligence standard.

THE ANE CASE

In view of the repeated characterization by the Miami Herald Publishing Company, as amicus curiae in this proceeding, and by the Florida Press Association, as amicus curiae in the Ane case, of the Levin and Ane cases as "related cases," respondents are compelled to make clear the following fundamental factual and legal differences between the two proceedings:

1. At issue throughout the entire Ane proceeding [5/] was the proper standard, i.e., negligence or actual malice, to be applied to a non-public figure plaintiff claiming defamation flowing from the publication of an article reporting a matter of public or general concern. That issue was not raised by the Tribune until its appeal to the District Court from the jury verdicts in favor of Levin and GED.

2. The Third District found in Ane that the reporting at issue concerned a matter of public or general concern;

5/ The Ane defendants argued at the jury conference that an actual malice standard case was inappropriate even as to non-public figure plaintiffs (Ane, Petitioner's Appendix at 118).

the Second District in this proceeding made no similar finding.

3. The articles in Ane were written under the type of time pressure and deadlines associated with the reporting of ongoing or "hot" news. The Levin articles were investigative in nature and were published some four weeks after their conception, without any deadline pressure whatsoever.

4. The Miami Herald published a retraction prior to the Ane suit. The Tampa Tribune did not even respond to Levin's request for a retraction.

5. The petitioner in Ane has chosen to raise issues other than that certified by the Third District. The Tribune raises only the certified issue.

PETITIONERS' STATEMENT OF FACTS

Nothing in the rules of this Court precludes petitioners from raising formally the issues of substantial truth, evidentiary rulings, excluded evidence, the sufficiency of the retraction request or public figure. It is petitioners' realization that these arguments, having been rejected by the jury, the trial judge (twice) and the District Court of Appeal (also on two occasions), are meritless which has led them, at least formally, not to place those issues before this Court.

The Tribune's current course, however, is even more devious than that chosen by reporter Sloat when he wrote the

false and defamatory expose of Levin and GED. By ignoring, twisting and in some instances virtually falsifying the record, petitioners have attempted to convince this Court that Levin admitted his complaint to be false (I.B.7-8), that the trial judge improperly addressed the Tribune's counsel (I.B.3 n.1) and improperly instructed the jury (I.B.7 n.2), and that no damages had been proven (I.B.9). Each of these arguments has been raised and rejected at least five times. Respondents implore the Court not to be misled by petitioners' misstatements of fact.

Because these issues have been resolved in respondents' favor and are not challenged herein by petitioners, it must be assumed that the articles were false and defamatory, that petitioners were negligent, that damages were suffered as a result of the publication of the articles, and that the trial of this proceeding was conducted without prejudicial error. All of petitioners' clamorings to the contrary must be rejected.

ISSUES BEFORE THE COURT

The issues before this Court are four in number:

1. MAY A PETITIONER PREVAIL BY RAISING FOR THE FIRST TIME ON APPEAL AN ISSUE NOT RAISED, AND INDEED AFFIRMATIVELY WAIVED, BELOW?

2. DID THE ARTICLES AT ISSUE RELATE TO A MATTER OF PUBLIC OR GENERAL CONCERN?

3. ASSUMING ARGUENDO THAT THE ARTICLES DID RELATE TO A MATTER OF PUBLIC OR GENERAL CONCERN, HAS NOT THE STATE OF FLORIDA ALREADY ADOPTED A NEGLIGENCE STANDARD OF FAULT TO BE APPLIED TO DEFAMATION ACTIONS BROUGHT BY NON-PUBLIC FIGURES?

4. ASSUMING ARGUENDO THAT THE LAW OF FLORIDA IS UNCLEAR ON THIS ISSUE, WHAT STANDARD OF FAULT SHOULD BE APPLIED TO SUCH ACTIONS?

ARGUMENT

I. THE COURT SHOULD DECLINE TO REVIEW THE SECOND DISTRICT'S OPINION.

A. This Court May Decline Review of Decisions Certified Under Appellate Rule 9.030(a)(2)(A)(v).

Petitioners seek to invoke the discretionary jurisdiction of this Court pursuant to Rule 9.030(a)(2)(A)(v) of the Florida Rules of Appellate Procedure. Although separate briefs on jurisdiction are not permitted in such cases, Rule 9.120(d), it is axiomatic that the "discretionary" nature of the Court's jurisdictional grant permits the Court to decline to pass upon the merits of such a petition.

Respondents do not suggest that the Court should decline to review certified issues without just cause. Respondents do suggest that when, as here, an issue has been improvidently certified and the same issue is properly before the Court in another proceeding, the Court should exercise its discretion by declining to review the decision below.

B. Petitioners' Failure to Raise at Trial The Issue Certified Below Precludes Review By This Court.

The Second District Court of Appeal certified to this Court as an issue of "great public importance" their adoption of a negligence standard as the appropriate basis for recovery by private individuals in defamation actions (R.A. 1-4).

The Second District reasoned that the Tribune "should have the same opportunity" to raise this issue as was granted to the Miami Herald by the Third District in the Ane proceeding. Respondents respectfully suggest that the record of this case clearly requires a contrary conclusion: the Tribune does not deserve that opportunity because it was the Tribune itself which proposed that a negligence standard be applied to non-public figure plaintiffs in this defamation action. The record of the jury charge conference is unmistakably clear on this issue.

Immediately prior to that conference, counsel argued the "public figure" issue in the trial judge's chambers (R.2411-2449). Counsel for the Tribune asserted that GED and Levin were public figures and that, for that reason, the jury should have been instructed to apply an "actual malice" standard. During the course of that argument, counsel for the Tribune, attorney Rodgers, agreed that the actual malice standard did not apply to non-public figures:

> . . .but the [Supreme] Court receded from. . . Rosenbloom and got back on just a pure public figure situation. . .I am saying they [Levin and GED] have attained - they had already attained a public figure status with respect to the subject matter of these articles.

(R.A.8, 10).

The trial judge rejected the Tribune's argument that Levin and GED were limited purpose public figures and ruled that they were private, non-public figure plaintiffs (R.A.10). Immediately after that determination, argument was heard upon the parties' proposed jury instructions. The Tribune conceded that the negligence standard was appropriate in view of Judge Sanderlin's ruling that the plaintiffs were not public figures. Indeed, it was counsel for the Tribune who actually proposed that the jury be instructed to apply a negligence standard, stating ". . .[t]hat [the instruction on negligence] is the one that should be given." (R.A.16 1.4).

The Tribune had proposed alternative jury instructions, one incorporating a negligence standard (R.376) and one incorporating an actual malice standard (R.377). Counsel for the Tribune referred to these alternative proposals as the "non-public figure" and "public figure" instructions, respectively.

> MR. KELLY [Tribune Counsel]: The reason they [defendants' proposed jury instructions] are not numbered is that we

> necessarily prepared two sets, not knowing which one would be used. One on the public figure law [actual malice], and one on the non-public fugure law [negligence]. (R.A.14).
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> * * *
>
> MR. KELLY: The first one is the one that is applicable under the Court's ruling on public figures, which use the term "negligence is failure to use reasonable care."
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> THE COURT: Okay.
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> MR. KELLY: That is the one that should be given.
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> THE COURT: You have two of them here, don't you?
>
> MR. KELLY: Yes, sir. One for public figure and one for non-public figure. The first one is for non-public figure. "Negligence is the failure to use reasonable care." (R.A.15-16) (Emphasis supplied.)

Ultimately, the trial judge approved (R.A.15) the Tribune's Requested Jury Instruction Number 1 (R.376) and instructed the jury that GED and Levin could recover upon proof of negligent defamation by the Tribune (R.2539).

The issue certified for discretionary review is, in reality, a challenge to the propriety of the trial judge's charge on the negligence standard. The Tribune raised this challenge for the first time on appeal. The most painstaking search of the trial record will reveal not a single argument, not a single suggestion by the Tribune, that non-public figure plaintiffs are required to prove actual malice

in order to recover in a libel action.

Respondents respectfully suggest that because this issue was never raised at trial, because the petitioners actually proposed at trial the instruction which they now claim as error, the propriety of the negligence standard was not preserved as an appealable issue; as such, it was not properly before the Second District Court of Appeal and certainly is not proper for discretionary review by this Court. This Court has on many occasions held that issues not raised in a timely fashion are not preserved for apel-pellate review. In re Beverly, 342 So.2d 481, 489 (Fla. 1977); Mariani v. Schleman, 94 So.2d 829 (Fla. 1957); Jones v. Neibergall, 47 So.2d 605 (Fla. 1950); Hartford Fire Insurance Co. v. Hollis, 58 Fla. 268, 50 So. 985 (1909).

Contrary to the belief of the Second District, the petitioners should not be granted "the same opportunity" as the petitioner in Ane, for, unlike the Miami Herald in that case, the Tribune seeks review of an issue not raised below. 6/ As is unrebuttably demonstrated above, the Tribune proposed that the jury receive the very negligence instruction now challenged as error.

6/ Rather than resembling the Ane case, the instant proceeding is similar to Karp v. Miami Herald Publishing Co., 359 So.2d 580 (Fla.3d DCA 1980), and Helton v. United Press International, 303 So.2d 650 (Fla. 1st DCA 1974) in that, as is those proceedings, the standard of fault applicable to non-public figure plaintiffs was not at issue.

Respondents are of the view that the issue certified has already been decided by this Court (see Section III. below). If, however, the Court wishes to clarify once and for all the law of Florida in this area, the appropriate vehicle for doing so is the Ane case, a case in which the negligence - actual malice controversy was raised at trial and is therefore properly before the Court. The Tribune's failure to raise that issue in a timely fashion requires this Court to decline to review the instant petition.

II. BECAUSE THE ARTICLES DID NOT RELATE TO A MATTER OF PUBLIC OR GENERAL CONCERN, PETITIONERS' ARGUMENTS ARE WITHOUT EFFECT.

Petitioners assert that an actual malice standard should be applied in those defamation cases in which the plaintiff is not a public figure and the subject of the challenged publication is a matter of public or general concern. Even under petitioners' hypothesis, then, the negligence standard is appropriate in those situations in which the matter complained of does not relate to a matter of public or general concern. If the subject of the Tribune's articles was not a matter of public or general concern, then the underpinning for each of the Tribune's arguments collapses, rendering those arguments inapposite and requiring affirmance of the opinion of the Second District.

One would suppose that an issue so central to petitioners' position would be briefed in some detail. In this case, however, one finds that petitioners, without basis in fact or law, have merely assumed that the Tribune's articles reported matters of public or general concern. The only "discussion" of this issue is found on pages 2 and 3 of the Initial Brief. In fact, that "discussion" is a conclusory assertion unsupported by citation to the record.

This lack of record support is not surprising, however, for the "public or general concern" issue was never raised by petitioners at trial. Although this Court ruled, in applying the since rejected Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971) constitutional standard, that this issue was a matter of law to be determined by the court, Firestone v. Time, Inc., 271 So.2d 745, 751 (Fla. 1972), petitioners at no time requested such a ruling from the trial judge. Indeed, the only even remotely relevant ruling was Judge Sanderlin's determination that neither Levin nor GED had injected themselves into any public controversy (R.A.13). 7/

The fact of the matter is that no controversy, public or private, ever existed. Even a cursory review of the articles requires the conclusion that they are not a report

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7/ Respondents would note once again that, unlike the Third District in Ane, the Second District has made no finding with respect to the public interest or concern in the subject of the Tribune articles.

on the solar industry, but rather a vicious attack upon a small Clearwater company and its president. There is no record evidence of public interest or concern in GED. The evidence which is on the record leads to the contrary conclusion. Editor Registrato had never heard of either GED or Levin prior to reporter Sloat's article (R.1107, 1146). Sloat himself, who, immediately prior to joining the Tribune staff on May 14, 1979, had reported on business news in the southeast as Associate Editor for Tampa-based South magazine (R.664-665), testified that he too had never heard of Levin or GED prior to the development of his story (R.672-673, 910).

How was it, then, that this matter of assertedly public interest and concern came to light? The record reveals that, while perusing the files at the United States Bankruptcy Court in Tampa, Sloat stumbled upon a Chapter 11 reorganization petition which had been filed by GED some five months earlier in December, 1980 (R.666-667).

In ruling that the celebrated Firestone divorce, which had received national media coverage throughout its eighteen month course, was not a matter of public interest or concern under Rosenbloom, this Court stated:

> We either must determine when or at what point the private activities of a public or prominent figure become the real concern of the public; or alternatively, we must determine

> when conduct, or an event or series of events, or an historical occurrence or happening, or other noteworthy and recordable occasion, involves a subject of true concern.
>
> In either case, we 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.

Firestone, 271 So.2d at 751.

Judge Sanderlin's ruling on the public figure issue, combined with the absence of a finding of public concern by the Second District and the record evidence cited above, require the conclusion that nothing on the record of this case even suggests that there was a logical relationship between the subject matter of the articles, an unknown entrepreneur and his business, and the real concern of the public. Thus, even if petitioners succeed in convincing the Court that an actual malice standard should be applied in cases involving reports on matters of public or general concern, such a standard was not appropriate in this case. While the mere fact of publication presumably indicates that the Tribune considered the articles newsworthy, not all newsworthy items rise to a level of public interest or concern. Firestone, 271 So.2d at 752. Were it not so, the press, by choosing what to report and what not to report, could alone determine that with which the public should be concerned.

Because there is no basis in the record for determining that the Tribune's articles reported upon matters of true public concern, this Court must affirm the opinion of the Second District Court of Appeal.

III. EXISTING FLORIDA LAW REQUIRED THE APPLICATION OF A NEGLIGENCE STANDARD IN THE INSTANT PROCEEDING.

A. This Court Has Already Adopted A Negligence Standard For Non-Public Figure Plaintiffs.

When the Firestone case was decided by this Court for the first time in 1972, it was presumed that, pursuant to the Supreme Court's plurality opinion in Rosenbloom v. Metromedia, Inc., the New York Times "actual malice" standard should be applied to challenges to publications reporting upon matters of public interest or concern. Firestone, 271 So.2d at 748. This Court determined that the "Milestones" column in Time magazine had not reported upon a matter of public interest or concern. Thus, it was held that the actual malice standard did not apply and the matter was remanded to the District Court. The District Court subsequently adhered to its original position reversing the judgment for plaintiff.

The matter reappeared in this Court in 1974, after the Supreme Court's opinion in Gertz v. Robert Welch, Inc., 418

U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). [8/] This Court again reversed the District Court and, on that occasion, ordered that the jury verdict in plaintiff's favor be reinstated. Firestone v. Time, Inc., 305 So.2d 172 (Fla. 1974). In its opinion, the Court specifically recognized the Supreme Court's Gertz opinion, 305 So.2d at 176-178, and determined that Time had acted negligently.

> Furthermore, this erroneous reporting is clear and convincing evidence of the negligence in certain segments of the news media in gathering the news. Gertz v. Welch, Inc., supra. . .This is a flagrant example of "journalistic negligence."

Firestone, 305 So.2d at 178.

The case then made its way to the United States Supreme Court where this Court's order was vacated. Time, Inc. v. Firestone, 424 U.S. 448, 96 S.Ct. 958, 47 L.Ed.2d 154 (1976). The Supreme Court reasoned that, because no factfinder, i.e., the trial judge or the jury, had found the defendants at fault, the Gertz requirement had not been met. This Court then remanded the matter to the Circuit Court for

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[8/] In Gertz, the Court abandoned the "matter of public interest" standard in favor of a "public figure" analysis. After Gertz, the United States Constitution no longer required an actual malice standard to be applied to non-public figure plaintiffs challenging reports on matters of public interest. The Constitution did, however, preclude recovery for defamation in the absence of proof that the defendants were at fault.

Tribune, the Herald nor the Florida Press Association has demonstrated that the number of Florida newspapers has declined for that reason in that period of time. Perhaps more telling is the fact that, in the years prior to Gertz, when Florida plaintiffs (except public figures since 1964) were not required to offer any proof of fault, the number of Florida newspapers apparently did not decline.

Secondly, although we are told of the misfortune of a small newspaper in Illinois (I.B.28), [13/] we are not advised of the adverse economic impact of a negligence standard in the twenty-eight jurisdictions having adopted such a measure of fault. The plain fact is that while the number of small, independently-owned newspapers is shrinking, that shrinkage has nothing whatsoever to do with the standard of fault to which the press is held in defamation actions brought by non-public figure plaintiffs. This phenomenon is perhaps best described by Chief Justice Burger:

> Newspapers have become big business and there are far fewer of them to serve a larger literate population. Chains of newspapers, national newspapers, national wire and news services, and one-newspaper towns, are the dominant features of a press that has become noncompetitive and enormously powerful and influen-

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13/ Note that the Alton Telegraph has not gone out of business, but rather is seeking to reorganize under Chapter 11 of the Federal Bankruptcy Code.

further proceedings not inconsistent with the United States Supreme Court's opinion. Firestone v. Time, Inc., 332 So.2d 68 (Fla. 1976).

What emerges from the various opinions in the Firestone proceeding is the fact that, in 1974, after Rosenbloom and Gertz, this Court reinstated a jury verdict for Mrs. Firestone, a non-public figure, upon a finding that Time magazine had been guilty of negligence.

Since that opinion, Florida's trial courts have reasonably assumed that the negligence standard applies to defamation cases involving non-public figure plaintiffs. Indeed, much of the defense bar, including defense counsel in this case, Karp, Helton and Gadsden County-Times, Inc. v. Horne, 382 So.2d 347 (Fla. 1st DCA 1980), has assumed that the negligence standard was adopted by this Court in Firestone. 9/

This Court has previously determined that non-public figure plaintiffs in defamation cases must prove that the defendants negligently published a libelous statement. That the Tribune and its employees acted negligently in publishing material defamatory of Levin and GED is not at issue. Thus, the Second District's opinion must be affirmed.

9/ Perhaps one of the reasons for this assumption is the fact that the Florida Standard Jury Instructions, reviewed and approved by the Supreme Court Committee, incorporate a negligence standard for defamation actions.

B. An Actual Malice Standard Is Inconsistent With Existing And Pre- Gertz Florida Law Governing Libel Per Se.

Petitioners argue (I.B.17-23) that Florida law governing speech relating to matters of public or general concern is consistent with the imposition of an actual malice standard in libel cases and is inconsistent with a negligence standard. This argument is wholly without merit, for (1) an actual malice standard is foreign to the law of Florida, and (2) absent the constitutional prohibitions of Gertz, the law of Florida would have rendered the Tribune strictly liable to Levin and GED. In other words, even negligence is more than is required by Florida law in this case; the law of Florida would not have required the plaintiffs to prove that the Tribune was at all at fault.

1. Actual malice is a standard foreign to the law of Florida.

Actual malice is a federal constitutional standard first enunciated by the United States Supreme Court in New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). In that case the Court determined that a public official suing the press for libel could recover only upon proof that the newspaper had published the defamatory matter either knowing it to be false or with reckless disregard as to its truth or falsity. This most

onerous burden, which found its basis in the First Amendment right to freedom of speech, was extended to public figures and then, in Rosenbloom, to matters of public or general concern.

In Firestone I, this Court adopted an actual malice standard only as required by the federal constitution and Rosenbloom. Florida's own state law of libel has never required proof of constitutional actual malice or its equivalent. Florida law has required a plaintiff in a libel action to establish in some cases, either by proof or by presumption, that the defendant acted with "express malice," a concept very different from constitutional actual malice. 10/

Thus, contrary to petitioners' assertion (I.B.20), one may not argue that the Florida Supreme Court has already adopted an "actual malice" standard, for that standard is foreign to the common law of this state.

2. Florida law would have imposed strict liability upon the Tribune.

Prior to the New York Times decision in 1964, Florida and most other states imposed a strict liability standard in defamation actions. The plaintiff was required to prove that the material published was defamatory, that it referred to the plaintiff, and that, except in per se cases, its

10/ "Express malice" is also referred to as "legal malice."

publication damaged the plaintiff. Hartley & Parker, Inc. v. Copeland, 51 So.2d 789, 791 (Fla. 1951); Layne v. Tribune Co., 108 Fla. 177, 146 So. 234 (1933). Florida law never required a plaintiff to prove that the defendant acted negligently, much less with actual malice.

Petitioners assert that, because Florida recognizes certain qualified privileges as potential defenses to a libel action, this Court has already adopted the equivalent of an actual malice standard. Nothing could be further from the truth. Even if the articles in question had been potentially protected by the qualified privilege to report on matters of public interest, which they are not, [11/] Levin and GED would not have been required to prove actual malice. Moreover, had that privilege been available to the Tribune in this case, it was vitiated by abuse.

First, the privilege is lost where, as here, the report is not fair and accurate. Miami Herald Publishing Co. v. Brautigam, 127 So.2d 718, 723 (Fla.3d DCA), cert. denied, 135 So.2d 741 (Fla. 1961), cert. denied, 369 U.S. 821, 82 S.Ct. 828, 7 L.Ed.2d 786 (1962).

11/ The Gibson v. Maloney, 231 So.2d 823 (Fla. 1970), cert. denied, 398 U.S. 951 (1970) and Abram v. Odham, 89 So.2d 334 (Fla. 1956) cases cited by petitioners do not hold that a newspaper has a qualified privilege to report upon all matters of public interest. Those cases do stand for the proposition, inapplicable here, that a defamation defendant has a qualified privilege to publish a "fair comment" upon or a "fair account" of a public matter involving a public figure. Such is clearly not the case in this proceeding.

More importantly, and as recognized by petitioners (I.B.18), a qualified privilege fails as a defense if the plaintiff establishes, either by direct proof or presumption, that the defendant acted with "express malice," (i.e., ill will, spite or an intent to defame). It has long been the law of this state that "express malice" is presumed as a matter of law when the statements complained of are libelous per se. Axelrod v. Califano, 357 So.2d 1048, 1050 (Fla. 1st DCA 1978); Barry College v. Hull, 353 So.2d 575, 578 (Fla.3d DCA 1977); Brown v. Fawcett Publications, Inc., 196 So.2d 465 (Fla.2d DCA 1967).

A publication is libelous per se if it tends to subject one to distrust, ridicule or disgrace, or tends to injure one in his trade or profession, or if it imputes to another conduct or characteristics incompatible with the proper exercise of a lawful business. Richard v. Gray, 62 So.2d 597 (Fla. 1953). Petitioners concede at this stage of the proceeding the per se character of the defamatory statements contained in their articles concerning Levin and GED. Judge Sanderlin ruled properly that, if the statements complained of were false, those statements were libelous per se (R.2544). 12/ That ruling has not been challenged in this Court.

12/ Although the question of falsity was properly reserved for the jury, the court did determine, as a matter of law, that the statements challenged by the plaintiffs were, if false, libelous per se. Such a determination, in view of the ordinary and unambiguous meanings of the (continued.)

Thus, under the law of Florida, and without regard to the federal constitutional standard enunciated in Gertz, (1) the articles at issue were not qualifiedly privileged, (2) had the privilege ever attached, it was vitiated by the per se character of the libel, and (3) the Tribune would be strictly libel for its defamation.

Petitioners' argument that Florida's pre- Gertz law is consistent with an actual malice standard in this case is thus fatally flawed. Were it not for Gertz, Levin and GED would not have been required to prove any fault on the part of the Tribune. Thus, if Florida law is consistent with any fault standard, it is the lesser standard of negligence.

For either of the foregoing reasons ((1) the negligence standard was adopted post- Gertz in Firestone II, or (2) Florida's pre- Gertz law would not have required proof that the defendants were at fault), it is clear that the trial judge properly instructed the jury to apply a negligence standard in this proceeding. Because petitioners do not challenge the jury's determination that they were negligent, the Second District's opinion should therefore be affirmed.

(12/ continued.) challenged statements, was entirely appropriate. Owner's Adjustment Bureau, Inc. v. Ott, 402 So.2d 466, 470 (Fla.3d DCA 1981); Wolfson v Kirk, 273 So.2d 774 (Fla.4th DCA), cert. denied, 279 So.2d 32 (Fla. 1973); Prosser, Law of Torts § 106 at 765 (1963); Restatement (Second) of Torts § 614 (1976).

IV. ADOPTION OF A NEGLIGENCE STANDARD WOULD BE CONSISTENT WITH FLORIDA'S COMMITMENT BOTH TO FREEDOM OF EXPRESSION AND TO PROTECTION FROM ABUSE OF THAT FREEDOM.

A. Adoption Of An Actual Malice Standard Would Leave The Press Immune From Responsibility For Its Actions.

Should the Court determine that it has not already enunciated a negligence standard, it should, recognizing Florida's longstanding commitment to protection of reputational interests from abuses of freedom of speech, adopt such a standard at this time. While petitioners brazenly state that "negligent falsehood is often embedded in a good deal of truth" and "may have significant social value" (I.B.30), they do so without citation to any authority in the State of Florida. This absence of authority is not surprising, however, for history establishes beyond doubt that the Florida Constitution does not protect common law defamation. The free speech portion of the Florida Constitution provides:

> Every person may speak, write and publish his sentiments on all subjects but shall be responsible for the abuse of that right. . . .

Florida Constitution, Article I, Section 4 (1968).

While this Court recognizes and supports the freedom of the press to inform the citizenry, it has on numerous

occasions held that freedom not to be unlimited. Freedom of the press in Florida does not carry with it freedom from responsibility for misuse of that right. See Ross v. Gore, 48 So.2d 412 (Fla. 1950); Pennekamp v. State of Florida, 328 U.S. 331, 66 S.Ct. 1029, 90 L.Ed. 1295 (1946). As stated in Miami Herald Publishing Co. v. Brautigam, 127 So.2d at 722, 723:

> . . .The [constitutional] rights of free speech and press were designed primarily to prevent interference by the government with a man's speech or writing but not to obviate his responsibility for what has been published.
>
> * * *
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> The press, while guaranteed the right to publish the truth supported by good motives, has no right to publish falsehoods to the injury of others.

Adoption of an actual malice standard for non-public figure plaintiffs is therefore fundamentally inconsistent with Florida's commitment to protect its citizens from abuses by an otherwise unrestrained press. Contrary to petitioners' claims, a private individual such as Mr. Levin, or a small company such as GED, cannot respond in the media to false accusations made by the Tampa Tribune. Levin and GED are not, in and of themselves, newsworthy entities able to command access to the media. In this case, the plaintiffs sought a retraction from the newspaper, but

none was forthcoming; indeed, Levin and GED did not even receive the courtesy of a reply to their request for a retraction.

The sole avenue of recourse available to the non-public figure who has been defamed is the libel action. Petitioners would require plaintiffs to prove that the publisher of the defamatory material either knew that the material was false or actually entertained serious doubt as to the truth of the publication. This "actual malice" standard is the virtual equivalent of absolute immunity from responsibility for the publication of libel. A review of libel cases decided since the inception of the actual malice standard in 1964 reveals that, although many plaintiffs have proven defamation, few have been successful in establishing actual malice.

Petitioners state that actual malice "strikes the proper balance" between freedom of speech and a person's interest in maintaining his good name (I.B.39). The only "balance" which will exist if actual malice is chosen by this Court is a balance tipped decidedly in favor of the press; the individual will be left totally unprotected. That is precisely what petitioners seek. They seek freedom from virtually any responsibility for damage caused by their negligent, or even grossly negligent, publication of defamatory matter. They make no distinction between statements, such as those made concerning Levin and GED, which are per

se libelous and those which are not defamatory on their face. Their desire, completely at odds with this State's commitment to protect individuals from abuses by the press, must not be permitted to become reality. This Court must reject either an individual's interest in his reputation or the plea of a powerful press to be free from responsibility for their negligent infliction of damage. Respondents urge the Court to reject the latter and to adopt a negligence standard in libel cases brought by non-public figure plaintiffs.

B. Petitioners' Prediction of Widespread Economic Destruction Within The Publishing Industry Is Both Unfounded And Inconsistent With Economic Realty.

Petitioners assert, again without support, that adoption of a negligence standard will impose such an "onerous" financial burden upon Florida's publishers that their number will decrease and their publications will increase in price (I.B.27-29). This, according to the Florida Press Assocation, " amicus curiae " in the Ane proceeding and co-represented therein by the Tribune's counsel and house counsel for the Miami Herald, will occur as a direct result of the increased judgments against newspapers which can be expected to accompany the negligence standard.

First, the negligence standard has been applied in Florida during the nine years since Gertz. Neither the

> tial in its capacity to manipulate popular opinion and change the course of events
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> * * *
>
> The elimination of competing newspapers in most of our large cities, and the concentration of control of media that results from the only newspaper's being owned by the same interests which own a television station and a radio station, are important components of this trend toward concentration of control of outlets to inform the public.
>
> The result of these vast changes has been to place in a few hands the power to inform the American people and shape public opinion.
>
> * * *
>
> The abuses of bias and manipulative reportage are, likewise, said to be the result of the vast accumulation of unreviewable power in the modern media empires. In effect, it is claimed, the public has lost any ability to respond or to contribute in a meaningful way to the debate on issues. The monopoly of the means of communication allows for little or no critical analysis of the media except in professional journals of very limited readership.

Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 248-250, 94 S.Ct. 2831, 41 L.Ed.2d 730, 736-737 (1974).

Petitioners argue that the "marketplace of ideas" must be protected; in reality, however, no such marketplace exists. In its place is a monopoly controlled by the owners of the

market - the media. [14]

Both petitioners and the Florida Press Association posit a potential financial squeeze upon the small daily newspaper were a negligence standard to be adopted. Such a blatant attempt to mislead this Court should not be tolerated.

The Tribune Company, publisher of the newspaper whose articles defamed the respondents in this proceeding, with assets of $37,974,295, had a net worth of $30,252,392 as of September 30, 1980. Of that net worth figure, $29,252,392 was in retained earnings. In that year, the Tribune's net after tax income on revenues of $45,657,892 was $3,755,671. In 1979, the company had net after tax income of $5,187,173 while the comparable figure for 1978 was $4,884,147 (R.279). It cannot seriously be postulated that the Tribune would be in danger of financial collapse were a negligence standard to be adopted by this Court.

As is pointed out by petitioners, not all of Florida's newspapers are as large as the Tampa Tribune. The Court is asked to consider the potential plight of the Jackson County Floridian, cited by the FPA (amicus brief at 2) as Florida's smallest daily newspaper. While petitioners would like the

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[14] This monopolistic media "market" was affirmatively sought by the newspapers themselves. They persuaded Congress to enact the Newspaper Preservation Act, 15 U.S.C. § 1801, et seq., which grants failing newspapers the right to engage in joint operations even if the federal antitrust laws would otherwise be violated.

Court to take pity upon the Floridian, it is hardly a defenseless business entity. It is owned by Thomson Newspapers, a company which owns four newspapers in Florida and seventy-seven nationwide. Thus, behind the Floridian stands one of the largest concentrations of newspaper ownership in the United States.

Indeed, of the forty-three daily newspapers in the State of Florida, [15/] thirty-five are owned by large newspaper chains and one of the eight independents is the St. Petersburg Times, the second largest paper in the state. The "chains," the financial resources of each which are substantial, include: Media General, Inc. (owner of numerous newspapers, including the Tampa Tribune, as well as radio and television stations located primarily in the Southeast), Knight-Ridder Newspapers, Inc. (owner of four Florida newspapers including the Miami Herald and the Tallahassee Democrat), Gannett Newspapers (owner of three Florida newspapers and scores of others nationwide), Cox Enterprises (owner of two newspapers in Florida and thirty-five nation-

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15/ Respondents apologize to the Court for the fact that their Florida newspaper statistics are not in the record of this proceeding. That is so primarily because the actual malice-negligence issue was never raised by petitioners below. Nevertheless, because petitioners and the FPA have chosen to attempt to sway this Court's opinion by the use of misleading statistics, respondents are compelled to set the record straight. Respondents' figures are taken directly from the 1982 Editor & Publisher International Yearbook, published by Editor & Publisher magazine. Respondents doubt that petitioners will question the accuracy of the figures contained in the Yearbook.

wide), the New York Times Publishing Company (owner of six newspapers in Florida and numerous others throughout the country), and the Tribune Company of Chicago (owner of the Orlando Sentinel Star and the Ft. Lauderdale Sun - Sentinel News). 16/

It is preposterous for any knowledgable person, and presumably the Florida Press Association has knowledge of the ownership of its membership, to assert that a negligence standard poses a threat to the very existence of these "small" daily newspapers.

The third reason petitioners' "economic" argument fails is one of which a jury is never informed, but of which this Court should take notice in assessing matters of state policy: the availablity and prevasive use of libel insurance. The typical libel insurance policy, and the policy covering the Tribune in this proceeding, provides that the insurer will pay for the investigation and defense of any claim of libel, as well as for any amount paid in settlement or in satisfaction of a judgment; punitive damages are, in most cases, covered. The size of a newspaper's annual premium depends primarily upon the paper's circulation and the

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16/ According to the Yearbook, the six large metropolitan dailies plus the smaller chain-owned dailies accounted for 2,653,243 (or 91.86%) of the 2,888,156 newspapers sold each day in the state in 1982.

amount of coverage desired. [17/] Respondents submit that all of the newspapers in Florida are able to afford libel insurance. The "costs" which petitioners claim will be borne by the news media and passed on to the public are already included in the cost of operating a newspaper in Florida.

Finally, there is no realistic probability that a negligence standard will result in increased amounts of awards in defamation cases. Florida law already restricts recoveries against publishers or broadcasters to actual damages when a defamation is "published in good faith" and the publisher issues a retraction. Fla. Stat. § 770.02 (1982). This statute also precludes the recovery of presumed or punitive damages in those cases in which the newspaper published in good faith, even if that publication was made negligently. Thus, if newspapers wish to control their "costs," that may easily be accomplished by refraining from bad faith publications and by publishing retractions when, through a failure to exercise reasonable care, a defamation has occurred. The answer to newspapers' problem of cost containment is not the adoption of an actual malice standard.

[17/] The Tampa Tribune paid $3,733.00 for its 1980-1981 libel insurance policy. That policy's coverage limit was $1 million per occurrence, with a $10,000 deductible.

Petitioners' cries of economic "wolf" are without substance. Florida's newspapers are primarily large and/or owned by large newspaper chains. Many of those newspapers are monopolies in their areas of circulation. All have access to libel insurance and all are protected from presumed and punitive damages in cases of negligent publication by § 770.02 of the Florida Statutes. Petitioners' claim of imminent financial ruin and of entitlement to an actual malice standard must therefore be rejected.

C. Adoption Of A Negligence Standard Would Not Result In A "Reasonable Speech" Standard.

1. A libel plaintiff's burden is not restricted to proof of fault.

Petitioners' brief would lead the casual reader to believe that the judge, jury and appellate court in this proceeding had approved an award to GED and Levin solely upon a finding that the Tribune and its employees had been negligent. It is said that a determination of negligence is so easily made that adoption of a negligence standard will result in punishment, by means of libel judgments, for all but "reasonable speech." Petitioners' argument is so devoid of merit that a response may be made swiftly.

Whereas prior to 1974 truth was an affirmative defense to a libel suit, the Supreme Court's opinion in Gertz

shifted the burden to the plaintiff to prove that the statements complained of were false. Petitioners recognize this component of a plaintiff's burden (I.B.42), but that burden is even more onerous. A defendant in a libel action is held only to a standard of "substantial truth"; thus, a plaintiff cannot prevail if the language complained of is false but nevertheless substantially true. Put another way, if the article's meaning with the allegedly defamatory matter excised is not substantially different from its meaning with that matter included, the article is not actionable. McCormick v. Miami Herald Publishing Co., 139 So.2d 197 (Fla. 2d DCA 1962).

In addition to proving that a publication is not substantially true, a plaintiff must establish that the matter complained of was defamatory, was not an expression of opinion and resulted in damage. In the absence of proof of actual malice, neither presumed nor punitive damages are recoverable.

In the face of a plaintiff's substantial obligations, petitioners nevertheless express a fear that juries will punish the media for speech they find unpopular. First, respondents submit that a policy decision such as that presently before the Court should not turn upon the press's paranoiac perception of juries; it simply cannot be presumed either that a jury will act on the basis of individual prejudice contrary to the Court's instructions or that the public maintains a hostile view toward the press.

Secondly, as petitioners are well aware, it is the Court which will determine initially whether the publication complained of is capable of conveying a defamatory meaning; if it is not, the matter is most often disposed of on defendant's motion to dismiss. Wolfson v. Kirk, supra.

Even more important from a defendant's perspective, and as recognized correctly by petitioners (I.B.28), summary judgment for the defendant is the "rule, not the exception" in defamation cases. Guitar v. Westinghouse Electric Corporation, 396 F.Supp. 1042, 1053 (S.D.N.Y. 1975), aff'd, 538 F.2d 309 (2d Cir. 1976). If a plaintiff is unable to offer proof of each of the elements critical to his case, the judge will grant a defendant's motion and the matter will never reach a jury.

Thus, it cannot be said that a negligence standard would expose the media to increased liability, for fault is but a single thread in the fabric of evidentiary burdens which must be borne successfully by a plaintiff. Irrespective of the degree of fault required to be attributed to a defendant in a libel action, the plaintiff will never recover and, in most cases will never even get his case to the jury, unless he can prove falsity, defamatory meaning and resulting injury.

2. A negligence standard requires only that defendant's conduct, not defendant's speech, be reasonable.

As noted above, the reasonableness of one's speech is not relevant in a libel action. Once the speech is proven to be false and defamatory, then the Supreme Court's Gertz decision requires proof that the defendant's conduct was such that it can be said that the defendant was at fault.

Respondents submit that, in view of the other substantial burdens placed upon a non-public figure plaintiff, as well as the substantial protection against large damage awards already afforded to defendants by reason of Fla. Stat. § 770.02, requiring a plaintiff to prove that the defendant failed to exercise reasonable care in publishing defamatory matter sufficiently encourages the press to exercise their constitutional freedoms. At the same time, a negligence standard offers protection to those who have been damaged as a result of the abuse of those freedoms. A negligence standard will not deter unreasonable speech, but it should and will deter unreasonable conduct which results in the publication of defamatory falsehood.

D. A Negligence Standard Is Eminently "Workable."

Petitioners ask this Court to rule that a negligence standard is inappropriate in the context of the publishing business because neither courts nor juries are capable of

determining what constitutes journalistic negligence (I.B. 23-25). Such a proposition, unsupported as it is, requires rejection for any one of the following reasons: (1) the standard of negligence, fundamental to tort law, is routinely applied by juries on a daily basis; (2) petitioners offer no evidence that courts in any of the twenty-eight jurisdictions applying a negligence standard post- Gertz have encountered difficulty in the application of that standard; [18] (3) negligence has been adopted as appropriate in the non-public figure context by the authors of the Restatement of Torts; [19] (4) the Florida legislature, in extending the principles of common law libel to the broadcast media, in effect adopted a negligence standard by limiting recovery of damages to those plaintiffs who can establish that the radio or television station "failed to exercise due care" in broadcasting the defamation; [20] and (5) most importantly, the Tribune evidently did not feel that the jury had improperly applied the negligence standard in this case, for the jury's finding of negligence has not been challenged on appeal.

In the instant proceeding, the elements of "journalistic due care" were testified to, and basically agreed

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[18] The states applying a negligence standard are set forth in footnote 3 to Chief Judge Hubbart's opinion in the Ane case.

[19] Restatement (Second) of Torts § 580B (1977).

[20] Fla. Stat. § 770.04.

upon, by both plaintiffs' and defendants' expert witnesses. Plaintiff's expert, Professor Philip Robbins, and defendants' expert, Robert Stiff, both agreed that, in order to exercise due care, a newspaper reporter is required:

(a) to be fair, balanced, accurate and complete (Robbins-R.1747; Stiff-R.2148, 2195);

(b) in reporting about pending litigation, to report both a plaintiff's allegations and a defendant's responses thereto (Robbins-R.1843; Stiff-R.2212-2213);

(c) to give the subject of the story an opportunity to respond to accusations which will be included in the report (Robbins-R.1754, 1777, 1780, 1799, 1813-1814; Stiff-R.2151);

(d) in reporting the contents of court records, to report current information (Robbins-R.1800; Stiff-R.2218, 2224); and

(e) to avoid reporting literally true statements out of context in such a fashion as to convey a falsehood (Stiff-R.2210).

It may fairly be said, then, that plaintiffs' and defendants' experts agreed upon the standards of conduct by which the actions of a reporter are to be judged. The record evidence demonstrated that reporter Sloat violated each of these rules of responsible journalism (failure to report both sides of pending litigation - R.199, 782, 783; failure to afford Levin an opportunity to respond to accu-

sations - R.1253-1257; failure to report current information in court records - R.804, 809, 811, 1285; taking statements out of context - R.1061, 1066, 1068).

Both experts also agreed that an editor's responsibilities included:

(a) maintaining daily contact with a reporter to ensure that the resulting story is balanced (Robbins-R.1815; Stiff-R.2191-2192);

(b) giving an upgraded review to articles containing, as did the Tribune articles at issue, inflammatory words (Stiff-R.2229); and

(c) never ordering that a complex story be shortened if the result would be a compromise of truthfulness or fairness (Stiff-R.2196).

Again, the evidence demonstrated that city editor Registrato "failed" in his duty to act reasonably (R.2192) by not maintaining daily contact with reporter Sloat (R. 900-901, 1116), by failing to review these articles any more critically than any other story (R.1130), and by directing Sloat to shorten his draft of the story (R.903-904). 21/

It must be concluded that the negligence standard presented no problems to the jury in this proceeding.

21/ When told by Registrato to shorten the articles, Sloat deleted only passages which contained information favorable to GED. Compare P.A.1-5 with R.216.

Before the jury was an undisputed view of what the journalism industry expects of reporters and editors. Applying that view, the jury properly determined that the petitioners were negligent. That determination was never challenged by petitioners. Respondents fail to comprehend how petitioners can in good faith argue to this Court that a negligence standard is not workable.

CONCLUSION

Petitioners first ask this Court to ignore the fact that, once the trial judge ruled that Levin and GED were not public figures, the petitioners themselves proposed that the jury be instructed to apply a negligence standard. Next, the Court is asked to assume, without any basis in the record, that the false and defamatory attack upon Levin and GED was a matter of public interest and concern. Thirdly, petitioners would have the Court turn its eyes away both from Florida's tacit adoption of a negligence standard in Firestone II and from Florida's pre- Gertz standard of strict liability for publication of defamatory falsehood. Then it is absurdly argued that adoption of a negligence standard would wreak economic havoc upon an already insured, largely chain-owned, geographically monopolistic Florida publishing industry.

Next we are told, contrary to fact and law, that juries will ignore court instructions and that judges will fail to

exercise their considerable powers to prevent meritless cases from reaching those juries. Finally, although the negligence standard was exceedingly "workable" in this case, and has presented no problems of fair application in twenty-eight other jurisdictions, the Court is urged to find such a standard "unworkable" in the State of Florida.

Respondents respectfully submit that the approximately 127 pages of argument filed by the petitioners and their friend the Florida Press Association in this and the Ane proceeding are, when analyzed carefully, nothing more than a blatant attempt by the press to become virtually immune from responsibility for publication of defamatory material of and concerning this and other states' private citizenry. Such a result would bastardize the true meaning of freedom of the press and should not be permitted to come to pass.

For the foregoing reasons, the opinion of the Second District Court of Appeal should be affirmed immediately. Since the single issue raised by petitioners springs from an improvident certification below, the Court should decline review and affirm per curiam without delay.

Respectfully submitted,

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I hereby certify that a true copy of the foregoing Answer Brief of Respondents, together with Respondents' Appendix, has been served by mail this 5th day of May, 1983, upon the following:

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