IN THE SUPREME COURT OF FLORIDA

Case No. 63,217

THE TRIBUNE COMPANY; PAUL HOGAN; JOSEPH REGISTRATO; and WILLIAM SLOAT,

Petitioners,

vs.

LEONARD D. LEVIN; and GENERAL ENERGY DEVICES, INC.,

Respondents.

QUESTION OF GREAT PUBLIC IMPORTANCE CERTIFIED BY THE SECOND DISTRICT COURT OF APPEAL OF FLORIDA

INITIAL BRIEF OF PETITIONERS

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STATEMENT OF THE CASE

This is an action for review of the affirmance by the Second District Court of Appeal of a $380,000 jury verdict in favor of Respondents Leonard D. Levin ("Levin") and General Energy Devices, Inc. ("GED") in a defamation suit involving a matter of real public or general concern. This Court has jurisdiction pursuant to Article V, Section 3(b)(4) of the Florida Constitution and Rules 9.030(a)(2)(A)(v) and 9.125 of the Florida Rules of Appellate Procedure because the Second District certified that the negligence standard of liability it approved in affirming the jury verdict is a matter of "'great public importance". 7 Fla.L.W. 2549, 2550 (Fla. 2d DCA Dec. 1, 1982).

Petitioners, who were the defendants in the trial court, are The Tribune Company, publisher of *The Tampa Tribune,* Paul Hogan, the *Tribune's* Managing Editor, Joseph Registrato, its City Editor, and William Sloat, the reporter who wrote the two articles from which the suit arose (the "Articles"). (Petitioners will be collectively referred to as the "*Tribune*"). Levin and GED were the plaintiffs. The jury awarded only compensatory damages to Levin and both compensatory and punitive damages to GED. The trial judge struck the punitive damages award. Both sides appealed, and the Second District affirmed. After timely petitions for rehearing by both sides were denied, this appellate proceeding was commenced.

STATEMENT OF THE FACTS

The Subject Of The Articles—A Matter Of Real Public Or General Concern

By the late 1970's, with the country entering a deep recession in part because of its energy problems, the sources, costs, and politics of energy had become a priority of most Americans. Solar energy was viewed as a solution to prospective energy shortages. The President urged its development, Congress passed tax incentives to induce Americans to use it, and local power companies endorsed it. And inventive entrepreneurs sought to exploit it. One of those entrepreneurs was Levin, a Clearwater resident who in October 1978 had pled guilty to two counts of lying to the SEC in connection with an investigation of a defunct franchise operation called "Wicker World" and whose prior ventures in National Automotive Industries, Inc. and "Wicker World" resulted in bankruptcy and a SEC consent decree (App. 1; R. 1289, 1306-1307). Levin formed GED to manufacture solar heating equipment and established a distribution system for its products, which also

led directly to the bankruptcy court with creditors getting fifteen cents on the dollar (R. 1445; App. 43).

The Articles

On May 14, 1979, the *Tribune's* reporter, William Sloat, learned of GED's Chapter 11 petition in federal bankruptcy court in Tampa and began preparation of the Articles. After an investigation which included review of the bankruptcy proceedings and interviews of all the major figures involved in GED's problems, Sloat prepared the Articles, which were edited by City Editor Registrato and published on June 10, 1979. The Articles were of real public or general concern by virtue of the subject matter (*i.e.*, the fortunes of a new company in the solar energy business formed by an individual with prior SEC, criminal, and bankruptcy problems) and the local aspects of GED's operations (App. 1-5).

The 770.01 Notice

On October 11, 1979, five months after the Articles were published, Levin and GED wrote the *Tribune,* purportedly as the condition precedent to suit required by Section 770.01, Florida Statutes. At trial and in the Second District there was some controversy over whether Levin and GED had properly identified, sued upon, and recovered upon statements of fact actually appearing in the Articles.[1] The statements as published in the Articles, as

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1. Throughout this case the *Tribune* insisted that Levin and GED could not base their action on statements not contained in the statutory notice (R. 1487-1497, 1622-1625, 2207-2209, 2466-2478). The *Tribune's* requested Jury Instruction No. 4 to that effect was refused by the trial court (R. 2475-2479), although the court indicated at the charge conference that the statute would be read to the jury (R. 2475, 2477). However, when the *Tribune's* counsel stated the requirements of the statute in the course of final argument to the jury, he was stopped by the lower court and cautioned that if he referred to the statute again in argument, its provisions would not be read as a part of the instructions to the jury (R. 2620-2622).

well as the statements *alleged* to be in the Articles *and on which the $380,000 award was based,* are set forth below:

What the Notice Stated the Articles Said	Text of the Articles
(1) GED had "swindled" the Southern National Bank out of $12,000 of goods by issuing a "check that bounced";	A Birmingham, Ala., bank has filed suit in Tampa federal court claiming GED swindled it out of $12,000 worth of solar heating material by moving the goods to Florida, then paying the bank with a check that bounced.
(2) GED through the efforts of the undersigned, "sold about 250 distributorships," receiving an average of $11,000 in return for "an exclusive license to sell GED solar products in his (the distributor's) territory";	Through an aggressive marketing effort, the company had sold about 250 distributorships, at prices ranging from $5,000 - $18,000, in at least 38 states. Each distributorship received an exclusive license to sell GED solar products in its territory. Levin said the average cost of a distributorship was $11,000, meaning the firm took in about $2.8 million.
(3) GED, through the efforts of the undersigned, "had sought protection... from more than 100 of its distributors, in federal bankruptcy court";	But today the distributor network is in disarray, and GED, admitting severe financial problems, has sought protection from its creditors, including

What the Notice Stated the Articles Said	Text of the Articles
	more than 100 of its distributors, in federal bankruptcy court in Tampa.
(4) distributors had "paid in advance and hadn't received any goods";	The bankruptcy court records show that GED owes its distributors nearly $200,000 worth of undelivered merchandise. They paid in advance and hadn't received any goods.
(5) Floyd Groff had "complained about (GED's) business tactics" and had sued GED for $10,000 claiming that it had failed to deliver merchandise for which he had paid;	Floyd Groff, a 69-year-old retired Baptist missionary from Fort Myers, has taken the company to court demanding a $10,000 refund, claiming the company hasn't delivered merchandise he bought when he became a distributor in Southwest Florida.
(6) GED had ignored a court order to pay $10,000 to Mr. Groff;	Groff won the suit and GED was ordered to pay him back $10,000. It never did.
(7) Alfred G. Larson had resigned as a GED distributor because of GED's failure to deliver merchandise for which he had paid;	Alfred G. (Al) Larson, 48, was the GED distributor in Clearwater until last October, when he quit selling the firm's products. "It just got to the point we couldn't get anything delivered from them, and

What the Notice Stated the Articles Said	Text of the Articles
	you could get the same performance from other manufacturers' products at a lower price," said Larson.
(8) GED's products are plagued with inherent defects which ultimately lead to malfunction;	No similar language appears in the story.
(9) that Leonard Levin unexplainedly "borrowed more than $158,000" from GED and another corporation;	Levin, according to the records, borrowed more than $158,000 from National Automotive and GED during a period beginning in November 1977 and ending last October. None of the loans was explained in the court records.
(10) that the closing of a GED distributorship precludes customers from "receiving authorized dealer maintenance and repair work under General Energy Devices' promised 10-year guarantee for its products";	Now that Clark's company has vanished, customers have no way of receiving authorized dealer maintenance and repair work under General Energy Devices' promised 10-year guarantee for its products.
(11) that GED, through its president, had lied to the Florida Attorney General's	Hodges also accused GED of lying to the state Attorney General's Office.

What the Notice Stated the Articles Said	Text of the Articles
Office about a particular customer's satisfaction.	"The state of Florida sent me a letter saying they were looking into the matter. I sent back a sworn deposition detailing my complaints. Then I received a letter from the state of Florida that GED had sent them a letter that I was satisfied. I am not satisfied.

Levin's Testimony At Trial[2]

Levin and GED claimed each of the 11 statements it attributed to the Articles was false. In fact, one (Statement 8) did not appear in the Articles, and the remaining ten were admitted by Levin to be true or substantially true. Thus, Levin himself admitted the check referred to in Statement 1 was returned with the legend "check not good at this time" (R. 1348; App. 14) and that the bank had sued for willful or fraudulent conversion, which was "similar" to "swindle" (R. 1359; App. 25). Respondents' expert conceded "swindle" was accurate terminology (R. 1841-1842). Statements 2, 3 and 4, none of which refer to Levin, and none of which defame GED, a corporation in Chapter 11, were all admitted to be true by Levin (R. 1353-1355, 1358-1361; App. 17-19, 22-25). Statements 5 and 6 were also admitted by Levin (R. 1364-1366; App. 28-30).

2. While the entire decision was certified to this Court, and the Record contains substantially more evidence with which to show no falsity was proven, the *Tribune* has not presented the remainder because of the special nature of this appellate proceeding, and notes its counsel ably argued this in the briefs below.

When confronted with Statement 7, Levin said he did not know whether it was true or false. Statement 8 did not appear in the Articles. Levin admitted the $158,000 in loans referred to in Statement 9 (R. 1373; App. 37). Statement 10 says nothing about Levin and nothing defamatory about GED. Statement 11, the final statement, makes no references to Levin, and Levin admitted he did not know whether in fact Hodges said what was reported he said to the Attorney General (R. 1377; App. 41).

Application Of The Negligence Standard And The Damages Instructions

The trial judge authorized recovery for proof of simple negligence, instructing the jurors they could return a compensatory damage award if the *Tribune* or its employees "were negligent in publishing the matter complained of" (R. 2539; App. 59). The trial judge also instructed the jury it could award punitive damages if the *Tribune* "acted maliciously", meaning publishing a false statement "with the knowledge of its falsity or with reckless disregard of its truth or falsity" (R. 2542; App. 62). The court also permitted recovery of presumed damages.[3]

The Verdict, Judgment, And The Second District's Decision

The jury returned separate verdicts for Levin and GED. The jury also answered special interrogatories in which they found the *Tribune* had committed no "malicious" act (R. 2518-2519; App. 79-80). Thus, although there was no malice by the *Tribune* (meaning no common law "express malice" *and* no constitutional "actual malice", that

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3. After the Supreme Court's decision in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974), there can be no lawful recovery for presumed damage. The trial judge permitted it here nevertheless (R. 2541-2542; App. 61-62, 64).

is, "knowing or reckless falsehood") the jury awarded GED, a corporation in Chapter 11 *with no demonstrable losses or injury*, $250,000 in punitive damages. They also awarded Levin $100,000 and GED $280,000 in compensatory damages, although there was no credible evidence at trial of how GED was or could have been harmed by the Articles. The trial judge struck the punitive damage award, but entered a final judgment on the $380,000 and both sides unsuccessfully appealed. In affirming the trial judge, and noting the certification by the Third District in *Miami Herald Publishing Company v. Ane,* 423 So.2d 376 (Fla. 3d DCA 1982), the Second District certified its decision in this case to this Court:

> We certify to the Supreme Court that our decision approving that same standard of negligence as a basis for recovery by private individuals in defamation actions is an issue of "great public importance."

Thus, the Second District has certified to this Court a decision in which a jury applying a negligence standard for liability awarded a bankrupt corporation whose creditors received fifteen cents on the dollar and its president, a man involved with a SEC consent decree, two other bankruptcies, and a plea of guilty to criminal charges, $380,000 in compensatory damages for defamation.

ISSUE BEFORE THIS COURT

The issue before this Court is:

WHAT DEGREE OF "FAULT" SHOULD BE REQUIRED OF A PERSON, WHO IS NEITHER A "PUBLIC OFFICIAL" NOR A "PUBLIC FIGURE" SUING THE PRESS FOR PUBLICATION OF A DEFAMATORY FALSEHOOD WHICH INJURES THAT PERSON AND WHICH RELATES TO A MATTER OF REAL PUBLIC OR GENERAL CONCERN.

ARGUMENT

THIS COURT SHOULD HOLD THAT WHERE A PERSON SUES THE PRESS FOR PUBLISHING A DEFAMATORY FALSEHOOD IN CONNECTION WITH A MATTER OF REAL PUBLIC OR GENERAL CONCERN, THAT PERSON MUST PROVE THE PUBLISHER EITHER KNEW THE STATEMENT WAS FALSE AT THE TIME OF PUBLICATION OR PUBLISHED WITH RECKLESS DISREGARD OF THE STATEMENT'S TRUTH OR FALSITY.

I. ADOPTION OF A NEGLIGENCE STANDARD WOULD BE INCONSISTENT WITH FREE SPEECH AND FLORIDA'S COMMITMENT TO ROBUST EXPRESSION

A. While Appropriate To Some Torts, Negligence Is Inappropriate In A Speech Context Because It Would Protect Only "Reasonable Speech", Not "Free Speech".

While negligence has been usefully employed in adjudicating certain legal controversies, most notably those involving physical torts, it is unsuitable in cases relating to speech or expression. Although society is willing to countenance only "reasonable drivers" or "reasonable manufacturers", such is not the case with speech and speakers. Our society cherishes and nurtures the "unreasonable speaker". As a society, we can accept some drivers not driving, and some machines not being manufactured in order to steer clear of liability for unreasonable conduct. But the danger in encouraging a policy of "steering clear" with regard to expression is that the flow of information to the public would be constricted. We, as a society, "are less willing to have [free speech] inhibited. It is a special kind of activity in our society. That, in

brief, is what the traditions of the First Amendment are all about - a special sensitivity to the risks of inhibiting communication activity and services." Kalven, *The Reasonable Man and the First Amendment,* 1967 SUP.CT.REV. 267, 301 (1967).

When "properly viewed, there is in the world of the First Amendment no place for 'the reasonable prudent man' ". Kalven, *supra* at 303. By its nature, a negligence standard protects only speech uttered by "reasonable prudent men" - the reasonableness of which is determined much later by a "finder" of "fact". As Justice Douglas once noted concerning the imposition of such "reasonable" restrictions, "I fear that it may well be the reasonable man who refrains from speaking." *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 360 (1974) (Douglas, J., dissenting).

B. A Negligence Standard Is Inimical To Florida's Commitment To Wide-Open And Robust Expression.

It has always been the policy of Florida to foster open discussion relating to public issues. Our public records,[4] meetings,[5] and courts[6] are all as open as any in America. The commitment of this State, and the promise of *New York Times v. Sullivan,* 376 U.S. 254 (1964), is to the unfettered discussion of *public issues,* not simply *public officials. Gibson v. Maloney,* 231 So.2d 823, 826 (Fla. 1970), *quoting New York Times v. Sullivan.*

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4. Chapter 119, Fla. Stat.

5. Section 286.011, Fla. Stat.

6. *The Miami Herald Publishing Company v. Lewis,* 7 Fla.L.W. 385, ... So.2d ... (Case No. 59,392, Sept. 2, 1982); *Chandler v. Florida,* 366 So.2d 64 (Fla. 3d DCA 1978), *cert. denied* 376 So.2d 1157 (Fla. 1979), *affirmed* 449 U.S. 560 (1981).

Moreover, Florida courts have long recognized Florida's interest in informing its citizens on public matters through the free dissemination of news. As this Court noted in *Ross v. Gore,* 48 So.2d 412 (Fla. 1950) (*en banc*):

> The public has an interest in the free dissemination of news. This interest was well stated by that great American, Thomas Jefferson, in the following words: "The only security of all is in a free press. . ."
>
> . . . since the preservation of our American democracy depends upon the public's receiving information speedily—particularly upon getting news on pending matters while there still is time for public opinion to form and be felt—it is vital that no unreasonable restraints be placed upon the working news reporter or the editorial writer.

48 So.2d at 415. Most recently, the Third District in *Miami Herald Publishing Company v. Ane,* 423 So.2d 376 (Fla. 3d DCA 1982) (hereafter "*Ane*"), observed "that the constitutional free press and free speech guarantees at stake in this area of law are absolute preconditions to a free society and deserve the most vigilant and wide ranging protection" and recognized the need for newspapers "to sustain an enlightened, informed citizenry." 423 So.2d at 386.

Adoption of the negligence standard would frustrate Florida's long-standing commitment to free speech and a free press, and in fact will generate a "chilling" effect on expression alien to Florida's traditional solicitude for freedom of expression and robust debate of public issues. Florida courts over the years have adopted many absolute and qualified privileges which afford various types of speech and speakers protection for negligent and even deliberate defamatory misstatements of fact. *See,* Section

II-A, *infra*. With a negligence rule, news articles relating to matters of general or public importance would become the least protected speech under Florida law. *See*, Sections II-C, IV-B, *infra*.

C. A Negligence Standard Would Discourage Diversity Of Expression And Impose An Orthodoxy Of Expression.

A negligence standard establishes a "reasonable man-reasonable speech" standard which is contrary to our commitment to expression by speakers with divergent, unpopular, or unorthodox points of view and to publications which "take a side", or take a risk to inform the public. Our society is committed to a plurality of speech, the encouragement of the disbeliever and the dissenter, and the toleration of the unorthodox. It is a *free* press to which we are committed, not a *fair* or *reasonable* press. *Miami Herald Publishing Company v. Tornillo,* 418 U.S. 241 (1974).

The reasonable speech standard leaves for juries the decision of what speech is acceptable, and would involve jury "guesstimates" as to what proper conventional mainstream journalists would do under the circumstances of the cases presented to them. Juries will, as they normally do, judge on the basis of what is normal or reasonable. The negligence standard is designed to have juries do just that - identify the norm and then apply it. Undeniably, that process is appropriate for common torts where no constitutional freedom is involved. But defamation is different. Freedom of speech and the press exist to protect abnormal speech, speech the majority may not like. Speech must not be governed by an orthodoxy standard:

> A "responsible publishers" standard would discriminate unjustifiably against media or outlets whose

> philosophies and methods deviate from those of the mainstream. Fundamental disagreements exist within the profession concerning what constitutes responsible journalism. The conventional view is that a "responsible" journalist must strive to separate fact from opinion, and to report the former "objectively"; a significant segment of the profession now maintains that to avoid taking a position is irresponsible. . . . Although some deplore extensive editorial second-guessing and advocate maximum freedom for individual writers, others view the best journalism as a team effort by reporters, writers, and editors. . . . Some press outlets feel a responsibility to suppress items whose veracity they are unable to ascertain, but others assert that the press has no more right than the government to deny information to the public unless it is demonstrably false.

Anderson, *Libel and Press Censorship,* 53 TEXAS L. REV. 422, 455-456 (1975).

D. A Negligence Standard Would Produce Self-Censorship And Constrict The Flow Of Information And Ideas To And Through The Public.

Reasonable publishers will simply steer clear of publishing news of which they are not "certain" or which may not be "safe", if faced with an essentially undefined standard to be decided *ad hoc* by juries on a case-by-case basis in decisions largely insulated from appellate review. *See, e.g., Helman v. Seaboard Coast Line R. Co.,* 349 So.2d 1187 (Fla. 1977). "It is not simply the possibility of a judgment for damages that results in self-censorship. The possibility of having to engage in litigation, an expensive and protracted process, is threat enough to cause discussion and

debate to 'steer far wider of the unlawful zone' thereby keeping protected discussion from public countenance." *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 52-53 (1971).

The "separation of legitimate from illegitimate speech calls for . . . sensitive tools." *Speiser v. Randall*, 357 U.S. 513, 525 (1958). *See, also, United States v. O'Brien*, 391 U.S. 367, 376-377 (1968). "And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." *Speiser v. Randall*, 357 U.S. at 521. Failure to employ "sensitive tools" leads to less freedom of expression. There can be no empirical verification, but self-censorship is the inevitable result of a negligence standard. As was noted by Professor Anderson: "Even after *N.Y. Times v. Sullivan* self-censorship remains. Its full extent is impossible to determine. Much of it is inherently unmeasurable; it occurs whenever a reporter or editor omits a word, a passage, or an entire story not for journalistic reasons but because of the possible legal implications." Anderson, *supra* at 430. A pamphlet described as "must" reading for Associated Press journalists, The Associated Press, *The Dangers of Libel* (1964), states that if a statement is defamatory and not "provably true", "there is only one course of action to be followed: KILL IT AT ONCE." If, after *New York Times v. Sullivan*, one could have such a perception, self-censorship can only be worse under a negligence standard:

> A negligence test would place on the press the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it to verify the accuracy of every reference to a name, picture or portrait.
>
> In this context, sanctions against either innocent or negligent misstatement would present a grave hazard of

> discouraging the press from exercising the constitutional guarantees.

Time, Inc. v. Hill, 385 U.S. 374, 389 (1967). The Colorado Supreme Court likewise focused on the potential harm to the public interest of adoption of a negligence standard when faced with the same choice as is before this Court:

> Our ruling here results simply from our conclusion that a simple negligence rule would cast such a chilling effect upon the news media that it would print insufficient facts in order to protect itself against libel actions; and that this insufficiency would be more harmful to the public interest than the possibility of lack of adequate compensation to a defamation-injured private individual.

Walker v. Colorado Springs Sun, Inc., 538 P.2d 450, 458 (Colo. 1975), *cert. denied sub nom. Woestendiek v. Walker,* 423 U.S. 1025 (1975). *See also, Aafco Heating and Air Conditioning Company v. Northwest Publications, Inc.,* 321 N.E.2d 580, 588 (Ind.Ct.App. 1974), *cert. denied* 424 U.S. 913 (1976). In *Diversified Management v. Denver Post, Inc.,* 653 P.2d 1103 (Colo. 1982), the Colorado Supreme Court was urged to reject its position in *Walker* because of the adoption of negligence by a number of other states after *Walker.* But unlike the Second District here and the Third District in *Ane,* the Colorado Supreme Court reaffirmed its commitment to the public interest and reaffired the test the *Tribune* urges here. 653 P.2d at 1106.

Our freedoms of expression were not created to protect the press for itself; they were created to benefit the public at large and the structure of our society. *Time, Inc. v. Hill,* 385 U.S. at 389; *Miami Herald Publishing Company v. Tornillo,* 418 U.S. at 251, n.17. The press has a special privilege and duty in our democratic society - to process and communicate information to the public. Each

limitation on a free press is a limitation of information available to the public. Thus, "whatever is added to the field of libel is taken from the field of free debate." *Sweeney v. Patterson,* 128 F.2d 457, 458 (D.C.Cir. 1974), *cert. denied* 317 U.S. 678 (1942).

II. A NEGLIGENCE STANDARD IS CONTRARY TO EXISTING AND PRE-GERTZ FLORIDA LAW GOVERNING SPEECH RELATING TO MATTERS OF REAL PUBLIC OR GENERAL CONCERN TO WHICH FLORIDA HAS ALWAYS IMPOSED A STANDARD OF LIABILITY MORE PROTECTIVE OF EXPRESSION THAN NEGLIGENCE

While it may well be argued, as was done in *The Miami Herald's* briefs to the Third District in *Ane,* and in Judge Hendry's dissent in that case, that this Court adopted a knowing or reckless falsity test in *Firestone v. Time, Inc.,* 271 So.2d 745 (Fla. 1972), or even earlier in *Gibson v. Maloney, supra,* it must be conceded this issue has not definitely been settled and an authoritative statement by this Court is sorely needed. Adoption of a knowing or reckless falsity standard for matters of public interest would be more in accord with Florida's past treatment of speech on subjects recognized to be in the public interest.

A. Existing And Pre-*Gertz* Florida Law Consistently Protected Non-Media and News Media Speakers Alike From Liability For Negligent Speech, While Recognizing The Unique Role Of The Press In Informing The Public.

In a wide variety of contexts, involving an imposing array of speakers and subjects, Florida law protects speak-

ers from liability for negligent misstatements, where the speech serves or relates to subjects which are valued by society. For example, a host of "absolute privileges" have been extended in the context of speech by executive, judicial and legislative officials, which render nonactionable defamatory falsehoods uttered in connection with the discharge of their official duties.[7] A wide variety of "qualified privileges" in startling diverse contexts in both the private and public sector have also evolved which expose the speaker to defamation liability only if falsehoods are uttered with "express malice" (*i.e.*, ill will, spite, or an intent to defame). Each privilege reflects Florida's recognition of the value speech plays in matters of real public or general concern in Florida society, either by shielding false and defamatory statements entirely or by making falsehoods actionable only if the speaker maliciously intended harm.

In essence, speech is privileged whenever made without "express malice" by one with a genuine interest in the speech to another person of like concern. The general rule was announced in *Abraham v. Baldwin,* 52 Fla. 151, 42 So. 591 (Fla. 1906):

> A communication, although it contains criminating matter, is privileged when made in good faith upon any subject in which the party communicating has an interest, or in reference to which he has a right or duty, if made to a person having a corresponding interest, right, or duty, and made upon an occasion to properly serve such right, interest, or duty, and in a manner and under circumstances fairly warranted by the occasion and the duty, right, or interest, and not

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7. *See McNayr v. Kelly,* 184 So.2d 428 (Fla. 1966) ("However false or malicious or badly motivated the accusation may be, no action will lie therefor in this state").

> so made as to unnecessarily or unduly injure another, or to show express malice.

42 So. at 592. This privilege has been applied equally regardless of the size of the audience. *Compare Abram v. Odham,* 89 So.2d 334 (Fla. 1956) (readers of newspapers and those who attended a rally), *with Coogler v. Rhodes,* 38 Fla. 240, 21 So. 109 (1897) (letter to governor). And it has been recognized in the context of a wide variety of subjects and involving many different types of speakers.[8]

The privilege has also been applied to protect speech communicating matters of real public or general concern to the public. *Gibson v. Maloney,* 231 So.2d 823 (Fla. 1970), *cert. denied* 398 U.S. 951 (1970); *Abram v. Odham,*

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8. Among the types of speech found to be worthy of protection from liability based on negligence are defamatory statements circulated among members of professional organizations, *Frieder v. Prince,* 308 So.2d 132 (Fla. 3d DCA 1975), and *Rush-Hampton Industries, Inc. v. Home Ventilating Institute,* 419 F.Supp. 19 (M.D.Fla. 1976); defamatory statements circulated among members of religious organizations, *Loeb v. Geronemus,* 66 So.2d 241 (Fla. 1953); a private citizen's letters to a city manager charging zoning violations, *Moody v. Crist,* 287 So.2d 412 (Fla. 2d DCA 1973); communications to a government official impugning the qualifications of an individual to be appointed to public office, *Coogler v. Rhodes,* 38 Fla. 240, 21 So. 109 (1897); statements by a high school administrator and teacher to a parent charging drug trafficking at a particular store, *Chapman v. Furlough,* 334 So.2d 293 (Fla. 1st DCA 1976); false statements made in connection with the discharge of a statutory duty, *Brandwein v. Gustman,* 367 So.2d 725 (Fla. 3d DCA 1979); and falsehoods in communications which are required by statute. *See Hartley & Parker, Inc. v. Copeland,* 51 So.2d 789 (Fla. 1951). Negligent falsehoods communicated in the course of daily business are also routinely subject to privilege and are not actionable. *See Johnson v. Finance Acceptance Co. of Georgia,* 118 Fla. 397, 159 So. 364 (1935) (letter from loan company to customer charging bad ethics of competitor is privileged "trade talk"); *Montgomery v. Knox,* 23 Fla. 595, 3 So. 211 (1887) (statement in insurance association newsletter about a fire not being accidental is privileged). Defamatory statements about the qualifications or conduct of employees between interested parties are also protected. *Appell v. Dickinson,* 73 So.2d 824 (Fla. 1954); *Leonard v. Wilson,* 150 Fla. 503, 8 So.2d 12 (1942); *Briggs v. Brown,* 55 Fla. 417, 46 So. 325 (1908).

89 So.2d 334 (Fla. 1956). In *Abram,* Odham responded to Abram's negative pre-election poll by attacking Abram's reliability and integrity during a political rally. These remarks were repeated by the co-defendant newspaper. This Court held Odham's statements were covered by the qualified privilege because Odham had an interest in addressing Abram's poll and the public had a corresponding interest in hearing Odham:

> The defendant Odham had an interest in defending and a right to defend his candidacy, and his remarks in rebuttal to those of [Abram] were directed to persons having a corresponding interest, right or duty, within the rule of *Abraham v. Baldwin,* . . . as to qualifiedly privileged communications.

89 So.2d at 336 (citations omitted). The *Abram* court also recognized the public's interest in being informed by the press as to a matter of general or public concern (*i.e.,* a gubernatorial campaign), characterizing the newspaper's conduct as an exercise of its "qualified privilege to publish matters of great public interest." 89 So.2d at 336. *Accord, Gibson v. Maloney, supra.* The privilege was extended to a press report on local news in *Cooper v. Miami Herald Publishing Company,* 159 Fla. 296, 31 So.2d 382 (Fla. 1947), where this Court again recognized a local newspaper's daily responsibility of reporting events in the community, and concluded the article there "simply reflects an incident of public interest." 31 So.2d at 384.

In light of the broad language in *Abram v. Odham* and *Gibson v. Maloney,* one might argue this Court has already decided the certified issue in favor of the "actual malice" standard. But even if *Abram* and *Gibson* are distinguishable, they are evidence that Florida at common law extended the privilege for speech when speakers and listeners share a common interest with respect to press-public communications.

Adoption of a rule creating press liability for negligent falsehoods thus would be a departure from Florida's past treatment of similar speech. In every other instance of speech in which the public has interest, negligent falsehood is insufficient. Requiring proof of knowing or reckless falsehood in matters of general or public concern would strike the balance of competing interests of individuals and society in a manner which is consistent with the way Florida has always synthesized such interests. *See Diversified Management v. Denver Post, Inc.*, 653 P.2d at 1110.

B. Other States With Similar Standards For Non-Publishers Have Adopted Post-*Gertz* Standards Protecting Publishers From Liability For Negligent Speech.

A number of states have adopted a negligence standard for libel following *Gertz*, but few state courts have actually addressed the certified issue or had it briefed. Where the issue has been considered carefully against the backdrop of common law privileges similar to those found in Florida, the knowing or reckless falsehood standard herein proposed has been adopted. In *Peisner v. Detroit Free Press, Inc.*, 266 N.W.2d 693 (Mich.Ct.App. 1978), the Michigan Court of Appeals adopted an actual malice test in part because of that state's qualified privilege regarding speech, which is very similar to Florida's. *See Abram v. Odham, supra; Gibson v. Maloney, supra; compare Walker v. Colorado Springs Sun, Inc., supra, with Melcher v. Beeler*, 48 Colo. 233, 241, 110 P. 181, 184-5 (1910). The Michigan privilege "extends to all communications made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty to a person having a corresponding interest or duty." *Peisner v. Detroit Free Press, Inc.*, 266 N.W.2d at 697; *see*

also, Comment, *Defamation, The Private Individual and Matters of Public Concern, A Proposed Resolution for Florida,* 32 U.FLA.L.REV. 545 (1980).

C. Extending Less Protection To Speech By The Press Than That Accorded Other Privileged Speech Would Greatly Undervalue The Important Public Functions Served By The Press.

The press should be accorded protection which corresponds to its role in Florida society. Failure to accord the press the protection of a knowing or reckless falsity standard would illogically undervalue the press' role in informing the public. Statements by certain persons in the legislative, judicial, and executive branches are accorded absolute immunity, regardless of malice, *see McNayr v. Kelly,* 184 So.2d 428 (Fla. 1966), but press reporting on matters of similar significance would be judged by a mere negligence standard, unless given the protection fitting to the societal function served by the press. Thus, for example, conferring absolute immunity to defamatory statements made by public servants in recognition of the importance of such speech to society while making the press liable for negligent misstatements, illogically undermines the value of the contribution of press speech *vis-a-vis* society's interest in government speech as reflected in the existing privileges. As Justice Stewart has noted:

> The publishing business is, in short, the only organized private business that is given explicit constitutional protection.

Stewart, "Or of the Press", *Symposium,* 26 HASTINGS L. J. 631, 633 (1975).

Certainly some of the interests presently protected by qualified privilege deserve less protection than press communications to the public on matters of real public or general concern. One need look no further than Judge Hubbart's opinion in *Sussman v. Damian,* 355 So.2d 809 (Fla. 3d DCA 1977), which imposed a common law "express malice" standard in a suit over a lawyer's defamation of another lawyer in a courthouse elevator, with no connection to a pending judicial proceeding.

One simply cannot equate the interests in *Sussman* to those in this or similar press cases. In the instant case, the reporter spoke after investigation, bore the subjects no personal malice, and arguably (at least) attempted to verify his facts while trying to report to the public about a matter of admitted public concern. The lawyer in *Sussman* spoke out of anger and spite in an elevator in front of strangers to any judicial proceeding, with no investigation, and for no public purpose.

III. A NEGLIGENCE STANDARD WOULD NOT BE WORKABLE

A. The Unique Nature Of The Publishing Business Is Simply Unsuitable To Review By Juries Applying A Negligence Standard.

A comparison of this Court's opinion in *Firestone v. Time, Inc.,* 305 So.2d 172 (Fla. 1974), with that of the Fourth District Court of Appeal provides an excellent illustration of the impracticability of using a negligence standard when speech is concerned. The Fourth District was impressed by the Time's attempts to assure accuracy:

> There were checks and double checks, quite extensive in scope considering the obvious press of time forced by journalistic deadlines. Nowhere was there proof

> *Time* was even negligent, much less intentionally false or in reckless disregard of the truth.
>
> * * *
>
> In addition to *Time's* rational interpretation of the pleadings, testimony and decree, it investigated independently at length. It contacted its Miami bureau and its Palm Beach stringer several times by wire and phone to substantiate information. Plaintiff's attorney and the judge were called for verification.

Time, Inc. v. Firestone, 254 So.2d 386, 389-390 (Fla. 4th DCA 1971). This Court, reviewing the same record, said "this erroneous reporting is clear and convincing evidence of the negligence in certain segments of the news media in gathering the news." *Firestone v. Time, Inc.,* 305 So.2d at 178.

When distinguished judges of two appellate courts in *this State,* looking at the *same* facts, can be so utterly at odds on what constitutes journalistic negligence, one cannot accept the implicit assurance and blind faith in the decision below that a rational and predictable pattern will emerge piecemeal from case-by-case adjudication by juries. The preceding comparison is probably the clearest example of why just the opposite is the only logical expectation.

> On the contrary, the more likely result is that judges and juries will simply impose their own widely divergent ideas about journalism . . . The Florida court's attitude toward negligence suggests an unfair, but basically accurate, restatement of Professor Robertson's argument: though no one can define journalistic negligence, judges and juries will know it when they see it.

Anderson, *A Response to Professor Robertson: The Issue is Control of Press Power,* 54 TEXAS L. REV. 271, 276 (1976).

As Justice Harlan said in an analogous context, "Any nation which counts the *Scopes* trial as part of its heritage cannot . . . readily expose ideas to sanctions on a jury finding of falsity." *Time, Inc. v. Hill*, 385 U.S. at 406 (Harlan, J.). Another reason why appellate courts and juries cannot be expected to create a workable "standard of care" for publishing news is that the decision to publish a particular article is composed of a myriad of discreet editorial and reportorial judgments made under unique time pressures and based upon years of experience in journalism. There is never a clear answer to questions regarding the need for further verification of a fact or source, the reliability of a source, the "fairness" of the point of view of a story, or the balancing of the public's need to know some news now against the greater delay accuracy might bring. The knowing or reckless falsity standard is not identical to Florida's common law privilege requiring proof of an intent to injure by publication of defamatory falsehood. However, the two standards are quite similar and are both wholly dissimilar from liability for simple negligence. Thus, this Court should require a plaintiff seeking recovery for a defamatory falsehood relating to a subject of general or public concern to prove that the publisher acted with knowledge or reckless disregard of the falsity.

B. The Unique Status Of The Press Makes It Especially Vulnerable To Jury Prejudice.

Because one of our most precious freedoms is at stake, a negligence standard in a defamation case has significantly different consequences than a negligence standard in the ordinary tort case. While juries perform satisfactorily at balancing the equities before them in a case with no special rights involved, they cannot be entrusted to disregard individual prejudices against unpopular speech and speakers. *See*, H. KALVEN & H. ZEISEL,

THE AMERICAN JURY 495 (1966) (juries are "non-rule minded; they will move where the equities are"); *cf.*, MCCORMICK, MCCORMICK ON EVIDENCE § 53 at 121 (2d ed. 1972) (the judge rather than the jury determines preliminary questions of fact that govern admissibility of evidence, since juries are insensitive to the broader policies underlying exclusionary rules of evidence). As was noted by the court in *Aafco, supra,* even though *Gertz* abolished "presumed damages" and required "actual damage", the "expansive" definition of "actual damage" in *Gertz* essentially maintains the risk of capricious jury verdicts, and will not deter a jury from punishing the publisher of unpopular ideas. 321 N.E.2d at 589. *See also Monitor Patriot v. Roy,* 401 U.S. 265, 277 (1971).

There is an enormous hostility by the public toward the press or on particular subjects reported or covered by the press. The reasons for such hostility are unclear, but its existence is clear, and the virtually unreviewable nature of a negligence verdict, *see, e.g., Helman v. Seaboard Coast Line R. Co.,* 349 So.2d 1187 (Fla. 1977), leaves little protection against it. Florida courts have long recognized that mistakes and errors are inevitable and unavoidable in the reporting of news, given the time pressures and enormity of the task of keeping the public informed of important events every day of the year. *Ross v. Gore, supra.*

Moreover, negligence doctrines such as comparative negligence simply will not work when applied in the context of the freedom of the press and the newspaper business. *See Hoffman v. Jones,* 280 So.2d 431 (Fla. 1973), and its progeny. Is a "no comment" response to a reporter's quest for information a failure to mitigate? Is it a failure to avoid avoidable consequences? *See* 17 Fla. Jur.2d *Damages* § 22; *State ex rel. Dresskell v. Miami,* 153 Fla. 90, 13 So.2d 707 (1943). Having a jury parcel out

comparative fault is particularly inappropriate to the exercise of freedom of the press:

> A publisher's fear of guessing wrong about juror assessment of the reasonableness of the news gathering procedure he employs would inevitably deter "protected" speech.

Walker, 538 P.2d at 458, *quoting Aafco,* 321 N.E.2d at 588.

C. The Editorial Process Will Be Irreparably Injured By A Negligence Standard.

A negligence standard, through self-censorship and related actions, will influence the content of the newspaper. Yet "the choice of material to go into a newspaper, and the decision made as to limitation on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment". *Miami Herald Publishing Company v. Tornillo,* 418 U.S. at 258. *See also, Gertz v. Welch,* 418 U.S. at 366-368 (Brennan, J., dissenting). A negligence standard will simply substitute juries for the editorial staff of every newspaper as the final arbiter of the "reasonably printable". Negligence will become the vehicle for invading what has traditionally been the most highly protected First Amendment activity.

D. The Costs Associated With A Negligence Standard Will Be Substantial.

The press is not a monolith; there are small publishers who make large profits; there are small publishers who make no profits; there are large publishers who make large profits; and there are large publishers who make no profits. But the rule of liability adopted by this Court will apply to all of them, and the financial burden it will create

will be enormous. The foreseeable result will be fewer publishers and more expensive publications. Thus, expression will be contracted in two ways: there will be fewer voices in the marketplace of ideas and those voices which remain will be heard by fewer listeners as those unable or unwilling to afford the increased cost of newspapers simply discontinue their subscription. The costs of libel defense and jury verdicts are a real threat to the continued viability of many publishers. One small newspaper publisher has already had to file a Chapter 11 proceeding because the judgment against it - for words it never published - was so large. *Green v. Alton Telegraph Printing Co.*, 107 Ill.App.3d 755, 438 N.E.2d 203 (Ill.Ct. App. 1982).

1. The costs will be substantial.

Adoption of the negligence standard would increase the costs of free speech in three basic ways. First, fewer cases could be disposed summarily prior to trial. Chilling effects on expression caused by the costs of merely defending libel suits through trial have long been recognized:

> The threat of being put to the defense of a lawsuit brought by a popular public official may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself, especially to advocates of unpopular causes.

Washington Post Company v. Keogh, 365 F.2d 965 (D.C. Cir. 1966), *cert. denied* 385 U.S. 1011 (1967). Because of such chilling effect, summary judgment is the "rule, not the exception" in defamation cases. *Guitar v. Westinghouse Electric Corporation*, 396 F.Supp. 1042, 1053 (S.D. N.Y. 1975), *affirmed* 538 F.2d 309 (2d Cir. 1976).

Second, because negligence is a lower standard of care and less susceptible to appellate supervision, a great many more verdicts can stand unchallengeable against the press. Thus, a greater cost and consequent chill will flow from the increased number of verdicts.

Third, the negligence standard by its nature is an expensive standard by which to adjudicate cases of any kind. It is heavily fact-dependent and lends itself to lengthy trials and substantial discovery costs. Thus, aside from its tending to send more cases to the jury and its propensity for generating unfavorable jury verdicts, it is an inherently expensive standard to use in litigation.

2. The costs should not be passed on to the public.

In other areas of the law there need be little concern with increasing the cost of doing business by attaching liability for negligent acts. If such increased costs drive some companies out of business, we accept that as normal operation of the commercial marketplace, as only the efficient businesses should survive. If the price of the product sold increases with the "passing on" of these costs to the consumer, there is little concern if some people can no longer afford to purchase the product and must either find a cheaper substitute or do without. These results, however, are not acceptable in the marketplace of ideas. We value a variety of voices and diversity of expression irrespective of their "economic efficiency". The public loses its access to ideas and information each time a publication disappears for economic reasons. The economic burden created by adoption of the negligence test would be as constitutionally obnoxious as a business tax on the distribution of newspapers, *i.e.*, a tax on knowledge.

Finally, the adoption of the negligence test with respect to manufactured goods or automobile driving creates a disincentive for negligent manufacturing or careless driving. Since these activities have limited social value, it is an appropriate disincentive. However, the publication of negligent falsehood frequently results in the discovery of truth in the marketplace of ideas. *See New York Times v. Sullivan,* 376 U.S. 254, 271 (1964). Moreover, negligent falsehood is often embedded in a good deal of truth. Consequently negligent falsehood, unlike careless driving, may have significant social value. Placing an economic disincentive on such falsehood could result in substantial (and unnecessary) social costs.

E. *Gertz* Did Not Determine The Standard For Defamation Liability Under Florida Law And Provides No Basis For Adoption Of A Negligence Standard.

The Supreme Court's decision in *Gertz v. Robert Welch, Inc., supra,* set no standard of fault. It held "the States may define for themselves the appropriate standard" "so long as they do not impose liability without fault". 418 U.S. at 346. Nevertheless, the Second District in this case, 7 Fla.L.W. at 2550, the Third District in *Ane,* the First District in *Helton v. United Press International,* 303 So.2d 650 (Fla. 1st DCA 1974), and numerous courts outside Florida have "adopted" or "followed" the "*Gertz* standard of negligence." See *Ane,* 423 So.2d at 384, 385 n.3, and 386 n.4. This Court should not make the same mistake. *Gertz* set no standard: it left that task to this Court.

In establishing the standard of liability for real public or general concern defamation cases, this Court should recognize that *Gertz* provides no basis for adoption of a

negligence standard. First, Justice Blackmun's fifth vote was cast only to create a majority while maintaining a belief in the "illogic" of the majority opinion. 418 U.S. at 353. Second, the two premises upon which *Gertz* concluded *Rosenbloom* should be abandoned, *i.e.*, that public persons have greater access to the press to rebut press defamation and public persons have voluntarily exposed themselves to the risk of press defamation, are false premises. Third, the *Gertz* rationale itself, in distinguishing between plaintiffs, resorts to a subject matter test, the same type of test the *Tribune* asks the Court to adopt.

1. Justice Blackmun's fifth vote in *Gertz* was cast merely to create a majority, despite the "illogic" of Justice Powell's majority opinion.

The *Gertz* "majority" opinion was only able to command four votes. Justice Blackmun provided the fifth vote, but in describing the decision he had joined, he conceded the *Rosenbloom* standard was his choice and was more logical: "As my joinder in Rosenbloom's plurality opinion would intimate, I sense some illogic in [the majority's decision]". 418 U.S. at 353. While he believed *Gertz* provided assistance in some ways to the relieving of self-censorship, he made it clear he voted with the other four solely to create a majority: "If my vote were not needed to create a majority, I would adhere to my prior view [*Rosenbloom*]. A definitive ruling, however, is paramount." 418 U.S. at 354.

Justice Backmun is not the only one to detect the illogic of distinguishing between statements in public issues involving public and private individuals. *See, e.g.*, Cohen, *A New Niche For The Fault Principle: A Forthcoming Newsworthiness Privilege In Libel Cases*, 18 U.C.L.A. L.

REV. 371 (1970); Comment, *The Expanding Constitutional Protection for the News Media for Liability for Defamation: Predictability and the New Synthesis,* 70 MICH.L.REV. 1547 (1972).

The Justices' views as articulated in *Gertz* provide an interesting contrast to the views of the *Rosenbloom* Justices, in that five Justices on the Court at that time agreed that, *at a minimum,* knowing or reckless falsehood should be the proper standard for media reports about private individuals involved in matters of real public concern. In *Rosenbloom,* Justices Brennan, Blackmun and Burger joined in the plurality opinion in favor of an actual malice standard. Justice Black concurred in the decision while maintaining the First Amendment does not permit recovery against the news media even where statements are broadcast with knowledge that they are false. 403 U.S. at 57 (Black, J., concurring). While Justice Douglas took no part in *Rosenbloom,* he agreed with Justice Black. *See, e.g., Gertz v. Welch,* 418 U.S. at 356.

2. The *Gertz* Court's conclusion was based on two false premises unrelated to Florida's interest in free expression and will lead to anomalous results.

The *Gertz* Court's rationale for permitting a state to sanction levels of fault depending on whether one is a "public" or "private" person is based on two premises: (i) public persons have greater access to the press for rebuttal of press defamations, and (ii) public persons voluntarily assume the risk of press defamation and thus are less "deserving" of protection than are private persons. Generally speaking, both premises are false. Moreover, neither is related to Florida's interest in free expression. Finally, when the competing interests are analyzed, the

Gertz test creates the potential for anomalous results which imperfectly address both the individual's reputation interest and society's interest in robust debate.

(a) *Gertz's* false premises in support of the public/private figure distinction fail to justify adoption of a negligence standard.

The *Gertz* public person/private person distinction for determining whether the knowing or reckless falsity test is to be applied rests on only two premises, which both fail. The distinction must therefore be rejected. *Gertz* reasons that the reputations of "private" individuals are worthy of greater protection than those of public persons because (i) a "public" person has greater access to channels of communication to defend himself and (ii) a public person, in essence, has "voluntarily injected" himself into the "vortex" of a public issue. *Gertz,* 418 U.S. at 344, 345. Although the Court justifies its distinction largely because "public" individuals have assumed the risk of attention and comment, each premise is incorrect.

First, the "access to channels of communication" premise fails because (i) the *New York Times v. Sullivan* standard even applies to numerous lower echelon public employees who, for varying reasons, command public interest, *see, e.g., Grzelak v. Calumet Publishing Co.,* 543 F.2d 579 (7th Cir. 1975), yet have no special access to the press; (ii) very few people classified as public figures in the *Gertz* definition are of such "general fame and notoriety" to command access to the media at will, *see Gertz,* 418 U.S. at 351; (iii) the access to media channels for those without general fame and notoriety is dependent totally on how "hot" the news is, *see Gertz,* 418 U.S. at 363 (Brennan, J., dissenting); (iv) under *Miami Herald Publishing Company*

v. Tornillo, supra, neither public officials nor private figures have any right of access to the press; and (v) the premise flatly ignores the issue of whether the individual who was the subject of the allegel libel was *in fact* given an opportunity to respond or whether he refused to comment. "In the vast majority of libels involving public officials or public figures, the ability to respond will depend on the same complex factors on which the ability of a private individual depends: the unpredictable event of the media's continuing interest in the story." *Rosenbloom v. Metromedia, Inc.,* 403 U.S. at 46 (Brennan, J.). Virtually all persons classified as public figures therefore have no appreciably greater access to the media than "private" individuals involved in matters of public interest. Both receive access concomitant with the "unpredictable event of the media's continuing interest in the story." *Id.* Therefore, common sense dictates the same standard of liability in cases involving matters of real general or public concern whether the subject of the report be a "private figure," a "public official" or a "public figure." *See Diversified Management v. Denver Post, Inc.,* 653 P.2d at 1110.

Second, Florida has long rejected the notion that liability for the publication of news should depend upon an individual's "voluntary injection" into a public controversy:

> Where one, whether willingly or not, becomes an actor in an occurrence of public or general interest, he emerges from his seclusion, and it is not an invasion of his "right of privacy" to publish his photograph with an account of such occurrence.

Jacova v. Southern Radio and Television Company, 83 So.2d 34, 36 (Fla. 1955).

Since Florida does not look to "assumption of risk" in privacy actions, it need hardly be argued that such an approach would be appropriate in a "private figure" libel suit. *See Gibson v. Maloney,* 231 So.2d at 825; *see also, Cape Publications, Inc. v. Bridges,* 423 So.2d 426 (Fla. 5th DCA 1982). The "assumption of risk" rationale should be rejected because it "bears little relationship" to protecting statements subject to legitimate public concern or debate. *See Gertz v. Welch,* 418 U.S. at 364 (Brennan, J., dissenting). The interest in avoiding publicity is not determinative when public issues are involved. "Exposure of the self to others in varying degrees is a concomitant of life in a civilized community." *Time, Inc. v. Hill,* 385 U.S. at 388.

The absurdity of this prong of the *Gertz* rationale can be simply shown by contrasting the facts in *Time, Inc. v. Firestone,* 424 U.S. 448 (1976), with *Brewer v. Memphis Publishing Company,* 626 F.2d 1238 (5th Cir. 1980), *cert. denied* 452 U.S. 962 (1981). Mrs. Firestone was held to be a "private figure" "although she was a prominent member of Palm Beach Society whose activities had received constant media attention antedating her divorce trial; the trial itself had been fully reported in Miami newspapers, and Mrs. Firestone held several press conferences during the proceedings." TRIBE, AMERICAN CONSTITUTIONAL LAW at 645 (1978). Anita Brewer was a former pop singer who had a relationship with Elvis Presley in the late 1950's and who returned to private life in the middle 1960's. In a suit brought almost twenty years after her relationship with Presley over a news item stating that she had divorced her husband and implicating her in an affair with Presley, the Court held Mrs. Brewer to be a "public figure."

(b) The *Gertz* public/private figure distinction is unworkable and in part dependent upon a determination of the public significance of the subject matter involved.

Besides being of limited utility in balancing individual reputational interests with society's interests in robust debate, the *Gertz* public/private figure distinction is difficult to apply, and frequently it results in the court having to pass on the "public" nature of the matter involved when deciding whether a plaintiff is a "public figure."

As noted in *Rosanova v. Playboy Enterprises, Inc.*, 411 F.Supp. 440 (S.D.Ga. 1976), "How and where do we draw a line between public figures and private individuals? They are nebulous concepts. Defining public figures is much like trying to nail a jelly fish to the wall." 411 F.Supp. at 443. *Gertz* also calls upon trial judges to decide whether the issues involved are "of general or public interest", despite the Court's fear of entrusting judges with such determinations. On one hand, *Gertz* claims to "doubt the wisdom of committing this task to trial judges". 418 U.S. at 346. On the other, *Gertz* asks trial courts to determine who are "public figures", by deciding whether the plaintiffs have "voluntarily injected themselves into a public controversy. . ." A trial court in determining a public figure must reach an issue substantially identical to the forbidden general or public interest test, *i.e.*, (i) that *there is a "public controversy"* and (ii) the nature and extent of "voluntary injection". 418 U.S. at 323. Even the determination of who is a public official is in part dependent on the public interest. *See Rosenblatt v. Baer*, 383 U.S. 75, 81 (1966), which defines a public official as one whose "position in government has an independent

interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees".

The *Gertz* test therefore unavoidably asks judges to pass on the nature of the subject matter of the publication. Such is the only explanation for the anomalous results in *Time, Inc. v. Firestone,* 424 U.S. 448 (1976), and *Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin,* 418 U.S. 264 (1974). Contrasted to Mrs. Firestone's notoriety are three non-union mailmen in *Old Dominion, supra,* who were each described in a union newsletter as a *"scab"* and *"a traitor to his God, his country, his family, and his class."* 418 U.S. at 268 (emphasis in original). Although the mailmen recovered substantial damages in the Virginia courts, the Supreme Court reversed and held the knowing or reckless standard applicable because the statements were made in connection with a "labor dispute". 418 U.S. at 282.

The *Firestone* and *Old Dominion* cases illustrate examples of the Supreme Court deciding cases based upon subject matter despite its decision in *Gertz.* To characterize *Old Dominion* as just a labor dispute, is to "accept without qualm a 'legal resolution under which speech is freer in the context of a labor dispute than in one of the paradigmatic first amendment situations - political disputes among private citizens' . . . As a matter of logic, not only speech about politics but also about foreign policy and subjects such as securities regulation *and consumer protection* must be given the same protection." Christie, *Underlying Contradictions in the Supreme Court's Classification of Defamation,* 1981 DUKE L. J. 811, 817 (1981) (emphasis added). Professor Tribe has suggested the only way to reconcile the *Firestone* result with its facts "is that the *Firestone*

majority decided that gossip about the rich and famous is not a matter of legimate public interest." *See* TRIBE, AMERICAN CONSTITUTIONAL LAW at 645 (1978).

(c) The *Gertz* distinction creates results which could fail to protect speech of critical public significance.

Once it is recognized that it is the public's interest in an issue of real general or public concern which must be analyzed in balancing the competing interests noted in *Gertz,* it becomes apparent that strict application of the *Gertz* public/private figure distinction creates some unintended results. The following illustration was advanced by one commentator:

> Assume that Lee Harvey Oswald lived to be acquitted of the assassination of President Kennedy and thereafter brought defamation suits against the media in respect of their reporting on his activities prior to the assassination. . . Or consider some of the theretofore private persons who became the subject of intense media interest when they were drawn much against their wills into the "vortex" of Watergate: John J. Caulfield, James W. McCord, Jr., Herbert L. Porter, Hugh W. Sloan, Sr., Gordon C. Strachon, Anthony T. Ulasewicz.

Hill, *Defamation and Privacy Under the First Amendment,* 76 COLUM.L.REV. 1205, 1215 (1976).

The above mentioned situations illustrate scenarios where the subject matter of news reports would be of central concern to the public, yet would be denied *New York Times* protection under the *Gertz* formulation. "It is a peculiar construction of the first amendment which would encourage the media to roar like lions at college

football coaches, *see Curtis Publishing Co. v. Butts,* 388 U.S. 130 (1967), and recreation area supervisors, *see Rosenblatt v. Baer,* 383 U.S. 75 (1966), while requiring substantially greater circumspection in the type of cases mentioned". Hill, *supra* at 1215.

IV. A KNOWING OR RECKLESS FALSITY STANDARD STRIKES THE PROPER BALANCE BETWEEN FREEDOM OF SPEECH AND REPUTATIONAL INTERESTS

In *Walker v. Colorado Springs Sun, Inc.,* 538 P.2d 450, 457, one of the early post-*Gertz* cases to consider the standard of liability to apply, the Supreme Court of Colorado adopted the knowing or reckless falsity standard:

> We hold that, when a defamatory statement has been published concerning one who is not a public official or a public figure, but the matter involved is of public or general concern, the publisher of the statement will be liable to the person defamed if, and only if, he knew the statement to be false or made the statement with reckless disregard for whether it was true or not.

Id. at 457. In *Diversified Management v. Denver Post, Inc.,* 653 P.2d 1103 (Colo. 1982), decided a month after *Ane,* and faced with the "overwhelming weight of authority in the country" which has "followed" the "*Gertz* negligence standard", *see Ane,* 423 So.2d at 385, the Colorado Supreme Court refused to recede. "We reached that result because we believed that a simple negligence rule would have a chilling effect on the press that would be more harmful to the public interest than the possibility that a defamed private individual would go uncompensated." 653 P.2d at 1106.

A. The Knowing Or Reckless Falsity Standard Accounts For The Need For Freedom Of Expression And Has Law Already In Place And Working.

The United States Supreme Court long before *New York Times* had stressed the principle of "wide-open" discussion of public issues, and the need for "breathing space" if free expression on such issues is to survive. These concerns have echoed over and over again in cases involving the freedoms of speech and press. In *Thornhill v. Alabama,* 310 U.S. 88, 101-02 (1940), the Court stated:

> The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment . . . . Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.

Id. at 101-02 (footnotes omitted). Likewise, this Court, has long recognized the importance of free expression on public issues. *See, e.g., Ross v. Gore, supra.* As noted in *Rosenbloom v. Metromedia*:

> Self-governance in the United States presupposes far more than knowledge and debate about the strictly official activities of various levels of government.
>
> * * *
>
> "[T]he Founders . . . felt that a free press would advance 'truth, science, morality, and arts in general' as well as responsible government."

403 U.S. at 41-42, *quoting Curtis Publishing Co. v. Butts*, 388 U.S. at 147 (Harlan, J.). Moreover, the value of speech does not depend on the public or private status of the individuals involved:

> If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not "voluntarily" choose to become involved. The public's primary interest is in the event; the public focus is on the conduct of the participant and the content, effect and significance of the conduct, not the participant's prior anonymity or notoriety.

403 U.S. at 43 (Brennan, J.).

Unlike a negligent falsehood standard, the knowing or reckless falsity standard and the real public or general concern definition have a sizeable body of law in place. "The contention that the judiciary will prove inadequate for such a role would be more persuasive were it not for the sizeable body of federal and state cases that have employed the concept of a matter of general or public interest to reach decisions in libel cases involving private citizens." *Aafco Heating and Air Conditioning Company v. Northwest Publications, Inc.*, 321 N.E.2d at 590. *See Firestone v. Time, Inc.*, 271 So.2d 745 (Fla. 1972).

B. The Knowing Or Reckless Disregard Standard Is The Only Test Consistent With The Array Of Common Law Privileges Recognized In Florida.

The knowing or reckless disregard standard is the only standard consistent with the policies of prior decisional law in which Florida courts have balanced competing societal interests in determining the scope of the

"liberty of speech or of the press" and of the "respons[ibility] for abuse of that right". Art. I, §4, Fla. Const.

Florida courts (as have the courts in Colorado and Michigan, even to the extent of using similar language) have traditionally held that society's interest in the communication outweighs, at least to the extent of a qualified privilege, the individual's interest in reputation. *See* Section II-A, *supra*. In *Gertz*, the Supreme Court held there must be a false statement, *see* 418 U.S. at 339, and it is the plaintiff's burden to prove falsity. *Id. Wilson v. Scripps-Howard Broadcasting Co.*, 642 F.2d 371, 376 (6th Cir. 1981); *Medico v. Time, Inc.*, 643 F.2d 134, 146 n.40 (3d Cir. 1981), *cert. denied* 454 U.S. 836 (1981); RESTATEMENT (SECOND) OF TORTS § 613, comment j and § 580(B). A combination of *Gertz's* requirement of proof of falsity with Florida's traditional requirement of common law "express malice" (*i.e.*, intent to defame), leads to the knowing (or reckless) falsity standard that the *Tribune* proposes. While the combination may not be a perfect fit, the negligence standard is entirely inappropriate as the negligence standard would be alien to Florida's system of privileges. And of course, in each case in Florida, it is the occasion—the subject matter—which determines whether the privilege applies. "Our reason for adopting *Rosenbloom* was that the public is primarily interested in the event, rather than the actors, and that the press should not be hindered in its reporting of matters of legitimate public interest by fear of libel actions." *Diversified Management v. Denver Post, Inc.*, 653 P.2d at 1110. *See Aafco*, 321 N.E.2d at 588; *Peisner v. Detroit Free Press, Inc.*, 266 N.W.2d at 697; *Schultz v. Readers Digest Ass'n*, 468 F.Supp. 551, 561 (E.D.Mich. 1979); *Rollenhagen v. City of Orange*, 172 Cal. Rptr. 49, 53 (Cal.Ct.App. 1981).

Moreover, the "knowing or reckless" standard treats all citizens alike. As noted earlier in this brief, the two premises underlying the distinction between public and private plaintiffs are false. Access to the press is determined not by whether one is a public person or a private person. It is determined by the nature of the subject matter of the press report. Similarly, one can hardly say that by accepting a job as a recreation director, *see Rosenblatt v. Baer, supra,* one has voluntarily accepted the risk of being defamed. The standard the *Tribune* urges is consistent; it not only is consistent with existing Florida law regarding privileges; it is also consistent in its treatment of Florida's citizens. Thus, this Court should hold that:

> Drawing a distinction between "public" and "private" figures makes no sense in terms of our constitutional guarantee of free speech and press . . . The reputations of public figures and public officials merit the same question of protection as those of private citizens.

Aafco, 321 N.E.2d at 587. *See also, Jacova v. Southern Radio and Television Company,* 83 So.2d 34, 36 (Fla. 1955). Moreover, the standard will also prevent the strange results noted by Professor Hill. *See* Section III-E(2)(c), *supra.* Thus trivia and gossip, protected by the rigid *Gertz* public/private distinction, will not be protected, while all reports of matters of real public or general concern, many of which are left unprotected by *Gertz* regardless of the public/private status of the participants, will be protected. *See Peisner,* 266 N.W.2d at 697.

C. The Knowing Or Reckless Falsity Standard Minimizes The Chilling Effect Of Libel Suits And The Risks Of Self-Censorship And Jury Prejudices.

Even the possibility or threat of a libel suit carries with it a certain chilling effect or inducement to self-censorship. A negligence standard increases such dangers tremendously. *See* Section I-C, *supra*. While the knowing or reckless falsity test does not eliminate them (the Supreme Court observed in *New York Times v. Sullivan* that even if a statement is true and one believes it to be true, one may not publish "because of doubt of whether it can be proved in court or fear of the expense of having to do so", 376 U.S. at 279), the knowing or reckless falsehood standard minimizes the dangers. *Aafco,* 321 N.E.2d at 589. *See also, Gertz v. Welch,* 418 U.S. at 361 (Brennan, J., dissenting)

V. APPLICATION OF THE KNOWING OR RECKLESS FALSITY STANDARD REQUIRES REVERSAL

The trial judge in this case defined "malice" as including, among other things, publication of "false matters concerning another in the knowledge of its falsity or with reckless disregard of its truth or falsity" (R. 2542; App. 62). The jury rendered a special interrogatory verdict in which it found, as a matter of fact, that there had been no malice, that is, no knowing or reckless falsity (R. 373-374; App. 79-80). Thus this Court, after it adopts the knowing or reckless falsity standard, must reverse with directions to instruct the trial court to enter judgment for the *Tribune*.

CONCLUSION

For the reasons set forth above, this Court should (i) hold that, when a defamatory statement of fact is published about one who is not a public official or public figure, but relates to a matter of real public or general concern, the publisher is liable only if at time of publication, the publisher knew the statement was false or published with reckless disregard of falsity, and (ii) reverse the decision of the Second District Court of Appeal, with instructions to enter judgment for the *Tribune*.

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CERTIFICATE OF SERVICE

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