IN THE SUPREME COURT OF FLORIDA

Case No. 63,217

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

Petitioners,

vs.

LEONARD LEVIN; and GENERAL ENERGY DEVICES, INC.,

Respondents.

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

REPLY BRIEF OF PETITIONERS

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INTRODUCTORY STATEMENT

In their lengthy and vituperative statement of the facts, Respondents Leonard Levin and his company, General Energy Devices, Inc. (collectively, "Levin"), provide no identification of the statements alleged to be libelous, the facts in the Record showing those statements to be false, or the facts demonstrating journalistic negligence. Instead, in a transparent attempt both to avoid and to "color" the legal issue actually presented here, Levin resorts to misrepresentations of the Record.

Beginning with Levin's false assertion, without Record citation, that the *Tribune's* reporter "knew that the articles were false", a statement contrary to the evidence and the jury verdict Levin seeks to uphold, Levin attempts to mislead this Court into believing that the *Tribune* seeks the knowing or reckless falsity standard as a haven for malicious acts.

The *Tribune* respectfully requests this Court's patience in reviewing the point-by-point refutation of Levin's "facts" which is presented below. Moreover, the *Tribune* hopes that this will illustrate the ease with which complex facts were manipulated by a clever plaintiff's counsel to obtain a large jury verdict and will provide a powerful additional reason for rejecting negligence as the standard for adjudicating suits involving freedom of expression.

The fundamental question presented by this case is what standard of fault Florida should adopt to adjudicate libel suits involving reports of matters of "real public or general concern". This Court must choose a standard which is sufficiently clear to provide the press with adequate guidance as to when its speech will be regarded as

actionable, yet "sensitive" enough to free speech rights so that protected expression as to matters of "real or public concern" is not deterred, "chilled", or prohibited. Negligence provides no such guidance or sensitivity. It provides no standard for a reporter to determine when he has gathered enough facts for publication of a news article to be deemed "reasonable", and it does not inform the editor whether a decision not to await further factual development is "unreasonable". It is almost always possible to try to obtain more facts or to delay publication. But more important, the decision as to whether the article as a whole is "true" or "reasonably" grounded in the facts, is a matter of professional judgment frequently made under the most trying circumstances. As this Court has noted, "it frequently takes a legal tribunal months of diligent searching to determine the facts a reporter is expected to determine in a matter of hours or minutes." *Ross v. Gore,* 48 So.2d 412, 415 (Fla. 1950).

RESTATEMENT OF FACTS

Levin Grossly Distorts Reporter Sloat's Investigation

In the twenty-five sentences used to describe the preparation, editing and content of the Articles (Ans. Br. 2-6), Levin nowhere states which facts in the Record show which statements published in the Articles are false or are negligently published, and he makes no fewer than eleven distortions, misrepresentations, or outright fabrications. For example, Levin contends the editorial review was inadequate because, notwithstanding use of the words "lied", "swindle", and "mislead" in the Articles, the *Tribune* con-

ducted no special editorial review (Ans. Br. 5). The Record belies Levin's contention. The Articles accurately reported Levin's conviction for "lying" to the SEC, a fact he admitted at trial (R. 1225). The Articles also reported a bank sued General Energy Devices, Inc. ("GED"), claiming GED "swindled" the bank, a fact Levin also admitted at trial (R. 1359; Br. App. 25). Finally, the Articles reported that some GED distributors "believe they were misled" by GED, but Levin did not even sue on this statement. Levin's other misrepresentations of the Record are legion:

What Levin Represents	*What The Record Shows*
1. Levin asserts that the Articles showed GED "sold intangible marketing rights to unsuspecting distributors for exorbitant fees"; it "manufactured an inferior product"; its "actions were understandable . . . because the company was operated by Levin, a man with a prior criminal conviction"; and "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" (Ans. Br. 6).	No such language appeared in the Articles (Br. App. 1-5).

What Levin Represents	*What The Record Shows*
2. "Unfortunately for the petitioners, reporter Sloat knew that the articles were false" (Ans. Br. 7).	The jury flatly rejected this statement, finding that Petitioners did *not* publish with knowledge of falsity or reckless disregard for the truth (Br. App. 79, 80).
3. "Sloat contacted then current and former GED distributors and told them he was writing an 'expose' on the company" (Ans. Br. 3).	The testimony at R. 1632 states that one distributor, Mr. Larson, was advised that Sloat was preparing an "expose".
4. "[A] state official had reviewed [John V.] Happle's defective equipment claims and determined them to be without merit" (Ans. Br. 3, citing R. 300, DX 22F).	The cited letter makes no such determination.
5. With respect to Levin borrowing money from companies owned by him and on the verge of Chapter 11, "[Levin's] companies usually owed Levin money" (Ans. Br. 4).	Chapter 11 Petitions of GED and National Automotive, Inc. (another Levin bankrupt company) show that from January 18, 1978, Levin at all times owed the companies up to $39,950.13, and owed $20,968.41 on the date of the Chapter 11 Petitions (R. 219 DDEE, 220 NN; Pl. Ex. 19 DDEE, 20 NN).

What Levin Represents	*What The Record Shows*
6. "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" (Ans. Br. 4, *citing Sloat's testimony*).	In fact Sloat testified that he told Levin that he was writing an article about GED (R. 878).
7. Sloat's notes of his interview with Levin had been "destroyed" prior to the action (Ans. Br. 4).	Over 100 pages of notes were preserved and *introduced into evidence by Levin* (R. 203-208, 210-211, 213-215; P. Ex. 3-8, 10-11, 13-15). As the *Tribune* had no notice of anyone's intention to file suit on the Articles for more than four months after their publication, a portion of Sloat's notes had been thrown away.
8. "Sloat failed to raise with Levin much of what was already in the draft articles, including . . . the $158,000 in 'unexplained' borrowings from GED and National Automotive, a Securities and Exchange Commission civil suit against Levin for $136,000 and a suit by Southern National Bank against GED" (Ans. Br. 4, 5).	Sloat testified he asked Levin about the loans in connection with the bankruptcies, and Levin's "response was that it was all perfectly normal and was all taken care of" (R. 883-884). Moreover, Levin freely admits the truth of the SEC civil suit (R. 1256) and the Southern National Bank suit (R. 1261).

What Levin Represents	*What The Record Shows*
9. "Registrato testified that he cannot swear to ever having sat down with Sloat to review the articles" (Ans. Br. 5).	Registrato testified that "I can swear that I read the story several times, and that I then talked with Mr. Sloat about it" (R. 1116).

ARGUMENT

Levin's Answer Brief offers four fundamental legal arguments in support of the verdict in the trial court: (i) Petitioners have not preserved the certified question for review by this Court, (ii) the Articles in question did not relate to a matter of general or public concern, (iii) existing Florida law requires a negligence standard for matters of public concern, and (iv) adoption of a negligence standard is consistent with Florida's commitment to freedom of expression. As shown below, each of these contentions fails.

I. THE QUESTION CERTIFIED BY THE SECOND DISTRICT IS PROPERLY BEFORE THIS COURT.

Four times Levin argued to the Second District that the *Tribune* had failed to preserve for appeal its right to urge the knowing or reckless falsity standard. Levin repeated the same argument in his answer brief (at 41-43), his cross reply brief (at 2-3), his entire motion for rehearing, and his reply to the *Tribune's* motion for rehearing (at 4-6). In fact, the *Tribune* did preserve the issue. It pled the issue as an affirmative defense, it requested a knowing or reckless falsehood instruction, and it argued the *Rosenbloom* decision and rationale. As the *Tribune* noted in its Response to Appellees' Motion For Rehearing, "it was pointed out to the court that Appellees had helped to make solar heating a matter of great general and public concern, requiring that actual malice be proved under the doctrine of *Rosenbloom*" (Supplementary Appendix, hereinafter "Supp. App." 2-3). The Second District, having heard the parties' arguments and reviewed the Record, rejected

Levin's arguments and certified to this Court this question of great public importance.

Regardless, when as here, a case concerns rights to free expression and a free press, a court possesses a special duty to review the facts in the record for itself. This Court has noted that these rights are central to "the preservation of our American democracy." *Ross v. Gore, supra* at 415. Such rights warrant a full examination of the record by a reviewing court. Thus, in *Beckley Newspapers Corp. v. Hanks,* 389 U.S. 81, 82 (1967), the United States Supreme Court held that when the jury in a libel case had been incorrectly instructed, "an independent examination of the record as a whole" was appropriate, despite the fact that the publisher in that case had failed to timely object to—indeed, had offered—the instructions which misstated the law. 389 U.S. at 82. *See also Long v. Arcell,* 618 F.2d 1145, 1147 (5th Cir.), *cert. denied* 449 U.S. 1083 (1981); *Vandenburg v. Newsweek, Inc.,* 507 F.2d 1024, 1026-27 (5th Cir. 1975); *Firestone v. Time, Inc.,* 460 F.2d 712, 717-18 (5th Cir.), *cert. denied* 409 U.S. 875 (1972).

In any event, whether because it found no waiver or because it exercised its *Beckley* duty, the Second District properly considered and certified the question as one of great public importance. As the Second District noted, the *Tribune* should have "the same opportunity" as *The Miami Herald.* 7 Fla.L.W. at 2550.

II. THE RECORD SHOWS THE ARTICLES WERE MATTERS OF GENERAL OR PUBLIC CONCERN AS DEFINED BY THIS COURT IN FIRESTONE v. TIME, INC.

Levin's assertions that the Articles describing his business activities did not report matters of general or

public concern because (i) the issue was supposedly not raised at trial and (ii) Levin and GED were unknown to the public prior to the publication of the Articles, are without merit.

First, the issue was preserved, as has been shown above, *supra* at Argument I; *see also* Supp. App. 2-3, 5.

Second, Levin's assertion that the Articles could not involve a matter of real or public concern because he and GED were "unknown" to the public proves too much. If Levin's assertion were valid, then no conspiracy of persons otherwise unknown to the public would be a matter of real or public concern, no matter how serious the conspiracy. Levin's attempt to make this issue turn on the notoriety of the conspirators rather than whether their activities affect the public is fundamentally wrong.

Finally, the Record conclusively shows the Articles involved a matter of real public or general concern under the guidelines set forth by this Court in *Firestone v. Time, Inc.*, 271 So.2d 745 (Fla. 1972) ("*Firestone I*"). Under *Firestone I*, a news report of a company and its president seeking public patronage for distributorships and products, while being subjected to consumer complaints, while under investigation by various regulatory agencies, and while engaging in possible fraudulent or other unlawful conduct, is a legitimate matter of concern to the public. As Levin's own counsel stated at trial, GED occupied "one of the leading positions in the [solar energy] industry in the United States" (R. 631); it advertised nationwide in the *Wall Street Journal;* it had "more than 200 distributorships across the United States"; it received "as many as 400 calls a week from people around the country"; and its product was "regarded as one of the outstanding products in the market" (R. 632).

Firestone I distinguished between a divorce, with primary significance only for the family involved, and other events with real ramifications for the public as a whole. Under the guidelines of *Firestone I* the public is entitled to know about issues involving (i) the marketing of a possibly defective product (ii) in a scientific field of interest to a conservation minded public (iii) involving possible fraudulent or other unlawful conduct in connection with the marketing of distributorships to investors. 271 So.2d at 749. *Firestone I* expressly held that issues relating to the sciences, fraudulent conduct and individual crime are among those which are of general or public concern. *Id.* Also, Levin's business dealings, which solicit the public, properly make his activities matters of general or public concern under *Firestone I.* This Court observed, "one . . . who makes his living by dealing with the public or otherwise seeks public patronage, submits his private character to the scrutiny of those whose patronage he implores". 271 So.2d at 750.

III. OTHER THAN THE CASES CERTIFYING THE INSTANT QUESTION TO THIS COURT, NO FLORIDA COURT HAS HELD A NEGLIGENCE STANDARD IS APPROPRIATE FOR A MATTER OF GENERAL OR PUBLIC CONCERN.

A. This Court Has Never Adopted A Negligence Standard For Matters Of General Or Public Concern.

In arguing that this Court has already adopted a negligence standard, Levin relies heavily upon this Court's rulings in the various *Firestone* cases, upon three other Florida appellate cases which "assume" the negligence standard exists, and upon the Florida Standard Jury Instruction purportedly "incorporating a negligence stan-

dard for defamation actions" (Ans. Br. 25). Such reliance is misplaced.

First, the *Firestone* cases do *not* hold that Florida has adopted a negligence standard for purposes of the certified question because this Court expressly held in *Firestone I* that the Firestone divorce was *not* a matter of real or public concern. 271 So.2d at 752. The analysis in each subsequent *Firestone* case turned largely upon whether Mrs. Firestone was a "public figure". *Time, Inc. v. Firestone,* 424 U.S. 448 (1976); *Firestone v. Time, Inc.,* 305 So.2d 172 (Fla. 1974).

Second, the cases of *Karp v. Miami Herald Publishing Company,* 359 So.2d 580 (Fla. 3d DCA 1978); *Helton v. United Press International,* 303 So.2d 650 (Fla. 1st DCA 1974); and *Gadsden County Times v. Horne,* 382 So.2d 347 (Fla. 1st DCA 1980), provide no support for Levin's position. In *Karp,* the court affirmed a summary judgment for the defendants, finding they had acted without fault where the parties had for the purposes of the litigation stipulated to a simple negligence standard. In *Helton* the court simply misread *Gertz* as having precluded the actual malice test for private figure plaintiffs. And *Gadsden* involved a denial of petition for a writ of common law certiorari seeking to review a finding that a legislator was not a "public figure"; the "real or public concern" test was not at issue or mentioned.

Finally, Levin's reliance on the Florida Standard Jury Instructions in support of Florida's supposedly settled negligence standard is especially specious. In the Notes on Use, the Florida Supreme Court Committee on Standard Jury Instructions in Civil Cases states:

> The Florida Supreme Court has not since decided whether the previous First Amendment standard, *see*

> *Gibson v. Maloney,* 231 So.2d 823 (Fla. 1970) continues as a matter of state law, *requiring actual malice for press liability to a non public figure involved* in an occurrence of public or general interest.

Florida Standard Jury Instructions, Notes on Use for Instruction MI 4.3 (November, 1980) (emphasis added).

B. Levin Misconstrues Florida's Common Law Privileges And Their Application To This Case.

In its Initial Brief, the *Tribune* showed the knowing or reckless falsity standard, although not identical to Florida common law, is consistent with such law. Levin says the *Tribune* is wrong for two reasons. First, he declares the knowing or reckless falsity standard to be a "concept very different" from the common law express malice standard, a proposition which does not withstand scrutiny. Second, he argues the *Tribune* would have been subject to strict liability before *Gertz,* a proposition which is irrelevant as well as based on basic misstatements of Florida law.

1. The knowing or reckless falsity standard is closely akin to common law express malice.

The only difference between publication of a falsehood with ill will, spite or intent to defame ("express malice") and publication with knowledge that it was false or with "serious doubts" as to its truth ("actual malice") is the degree to which knowledge of falsity is required. Both "actual malice" and "express malice" share heavy scienter requirements. Under the former, high subjective awareness of falsity is required; under the latter, a mali-

cious intent to injure by defamation is essential. As noted in the Initial Brief, some Florida common law cases even speak in terms of "fraud", which can only mean knowledge of falsity.

Moreover, regardless of the real or perceived distinctions between "express" and "actual" malice, Florida has never held mere negligence sufficient to overcome privileges adopted for categories of speech where the public has an interest in free expression. *Gibson v. Maloney,* 231 So.2d 823 (Fla. 1970), *cert. denied* 398 U.S. 951 (1970); *Abram v. Odham,* 89 So.2d 334 (Fla. 1956); *Cooper v. Miami Herald Publishing Company,* 159 Fla. 296, 31 So.2d 382 (Fla. 1947). This Court should not so hold here.

2. Levin mistakenly argues that under common law the Tribune would have been strictly liable for the Articles.

Levin next argues this Court should not adopt the knowing or reckless falsity standard because the *Tribune,* on the facts of this case, would have been strictly liable under pre-*New York Times* Florida law. His argument fails for two reasons: (i) he misunderstands Florida common law, and (ii) he misunderstands the issue before this Court.

Levin's discussion of Florida common law privileges makes three erroneous claims. First, he mistakenly asserts "the qualified privilege to report on matters of public interest" "is lost when . . . the report is not fair and accurate" (Ans. Br. 28). The case he cites—*Miami Herald Publishing Company v. Brautigam,* 127 So.2d 718 (Fla. 3d DCA), *cert. denied* 135 So.2d 741 (Fla.), *cert. denied* 369 U.S. 821 (1962)—has nothing to do with such a privilege, and the "fair and accurate" requirement itself,

which is unrelated to this case, is limited to reports of judicial and other official proceedings, which may or may not be of "public or general concern". *Compare Shiell v. Metropolis Co.*, 102 Fla. 794, 136 So. 537 (1931), *with Firestone I.*

Second, Levin misstates the holdings of *Gibson v. Maloney, supra,* and *Abram v. Odham, supra,* to be limited to "fair comment". Each case also stands for extension of a qualified privilege for speech when speakers and listeners share a common interest in the subject matter of the communication.

Third, Levin's conception of how qualified privileges are defeated by express malice is backwards. Citing *Axelrod v. Califano,* 357 So.2d 1048 (Fla. 1st DCA 1978), Levin argues that the presumption of "express malice" which accompanies the utterance of a libelous *per se* statement automatically defeats a qualified privilege. In *Axelrod,* after noting that "malice may be presumed here by the actionable *per se* nature of the alleged publication", the court observes:

> The issue of malice is critical because *in cases in which a qualified privilege exists, the essential element of malice may not be imputed.* Rather, in order to recover the plaintiff must *prove* express malice or malice in fact.

Axelrod v. Califano, supra at 357 So.2d 1050 (emphasis added).

More importantly, whether the *Tribune* would have been strictly liable in 1963, or after *New York Times, Rosenbloom, Gertz,* or the *Firestone* cases is irrelevant. The issue is whether the chilling effect associated with a negligence standard can be justified in light of Florida's

constitutional commitment to free speech and free press guarantees, as well as Florida's historical common law treatment of privileged speech, for a plaintiff suing over a report of his involvement in a matter of real public or general concern.

IV. A KNOWING OR RECKLESS FALSITY STANDARD FOR MATTERS OF REAL PUBLIC OR GENERAL CONCERN FAIRLY BALANCES THE CHILLING EFFECT ON THE PRESS' DUTY TO INFORM THE PUBLIC AND POSSIBLE PREJUDICE TO A LIBEL PLAINTIFF'S ABILITY TO RECOVER AT TRIAL.

In Part IV of his brief, Levin asserts the negligence standard should be adopted because (i) the knowing or reckless standard amounts to press immunity, (ii) the negligence standard will cause no discernable economic harm to the press, (iii) the negligence standard will not result in a reasonable speech standard, and (iv) a negligence standard is "eminently workable". Each argument fails.

A. Adoption Of The Knowing Or Reckless Falsity Standard Will Not Mean Immunity From Libel For The Press.

Levin baldly asserts, without citation, that "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 proving actual malice" (Ans. Br. 33). Even a cursory review of recent cases shows plaintiffs have proved "actual malice" by the press to recover either punitive damages or compensatory damages. *See, e.g., Rogers v. Doubleday,*

No. 09-81-073-CV (Tex.Ct.App. 1982) (affirming a $2.5 million punitive damages verdict). Here in Florida, a plaintiff received $214,000, including $100,000 in punitive damages, ten years ago. *Cape Publications, Inc. v. Adams,* 336 So.2d 1197 (Fla. 4th DCA), *cert. denied* 348 So.2d 945 (Fla.), *cert. denied* 434 U.S. 943 (1977). Other awards have also been substantial. A study of eighteen recent jury awards in favor of libel plaintiffs shows eleven of the eighteen were at $100,000 or higher, three at $250,000 or more, two at approximately $500,000, and one at over $2 million. *Editor & Publisher,* April 16, 1983 at 12.[1]

B. Levin Misrepresents The Economic Chilling Effect On The Marketplace Of Ideas In Florida.

Levin's contention that the *Tribune* is crying "economic wolf" is meritless. First, Levin's claim of no shrinkage in the number of Florida's newspapers is rebutted in his own brief. As Levin notes, "the plain fact is that . . . the number of small independently owned papers is shrinking" (Ans. Br. 35). Second, while there has been shrinkage in the number of independents, almost 70% of Florida's weekly newspapers (average circulation approximately 5,000) *are* independent.[2] Increased costs

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1. Levin contends that a "private individual" like Levin cannot respond in the media, and offers as an example that he was not given the "courtesy" of a reply to his "retraction" request (Ans. Br. 32, 33). This contention is flawed. As noted by Justice Brennan, access to media channels is dependent totally on how "hot" the news is. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, at 363 (Brennan, J., dissenting). Levin first contacted the *Tribune* more than four months after the Articles' publication.

2. The Florida Press Association ("FPA") lists approximately 110 newspapers out of approximately 160 weeklies as not owned by large chains. According to FPA, approximately 15 of the state's 55 dailies are independent.

of defending libel cases through imposition of a standard which unpredictably imposes liability and frustrates pretrial disposition of cases will not only promote self-censorship but would accelerate the shrinkage observed by Respondents and leave *fewer* independent voices in the marketplace of ideas. In fact, smaller papers may be easier targets. As once noted by the editor of *Nation,* "It has been my experience that individuals and corporations will threaten - and actually sue - small journals of opinion when they would hesitate to threaten or sue the *New York Times* for the same material". *See* McWilliams, *Is Muckraking Coming Back?,* 9 COLUM. JOURNALISM REV., Fall 1970 at 815. Third, Levin's assurances that libel insurance is the answer to increased costs of libel defense is naive. As is readily observed in the case of medical malpractice insurance, premiums will rise with imposition of a negligence rule which increases losses through the unpredictability of exposure, protraction of dispute resolution, and the increased frequency of adverse jury verdicts. Fourth, the fact that some small newspapers are owned by large corporations or are part of groups of newspapers does not make those small papers more economically viable. If they cannot themselves generate sufficient revenues to cover libel defense costs or judgments, they will not be subsidized by corporate parents. Finally, Levin's reliance on Chapter 770, Florida Statutes, as a cost control for libel judgments is misplaced. Chapter 770 does nothing to control the costs of defending a protracted lawsuit, once brought, and it does not protect the publisher or broadcaster which mistakenly believes its reporting to be accurate. Perhaps there is no better example of the uselessness of Chapter 770 than this case, where Levin has never identified the statements in the Articles which he is suing on (Br. 3-7).

C. A Negligence Standard Is A Reasonable Speech Standard.

Contrary to Levin's argument, a negligence standard is a costly reasonable speech standard. Levin suggests that a plaintiff has "substantial" evidentiary obligations, besides the issue of fault, which protect the press from costly, prolonged litigation. He argues that "fault is but a single thread in the fabric of evidentiary burdens which must be borne successfully by a plaintiff" (Ans. Br. 43). Levin also observes that each of the elements he identifies, other than fault, is appropriate to permit entry of summary judgment prior to trial (Ans. Br. 43).

What Levin overlooks is, if the fault "thread" is negligence, that "thread" would normally preclude summary judgment and assure a jury trial. As opposed to the bright line test of whether a defendant knew a statement was false or entertained serious doubts as to its truth, *see Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858 (5th Cir. 1970); *Guitar v. Westinghouse Electric Corporation*, 396 F.Supp. 1042 (S.D.N.Y. 1975), *affirmed* 538 F.2d 309 (2d Cir. 1976), a judge faced with a negligence standard will ordinarily deny summary judgment because a determination of negligence has always been regarded as peculiarly within the competence of juries. "Even where there is no dispute as to the facts, it is usually for the jury to decide whether the conduct in question meets the reasonable man standard." *See generally* Wright, Miller & Kane, FEDERAL PRACTICE AND PROCEDURE, Civil 2d § 2729.

More importantly, Levin's argument that the reasonableness of one's speech is not relevant to a libel action ignores the effect of controversial subjects on lay juries. The more controversial a subject that is presented to a jury, the more likely it is to spur an emotional reaction.

"It is indeed this type of speech which is the reason for the First Amendment since speech which arouses little emotion is little in need of protection." *Gertz v. Robert Welch, Inc.*, 418 U.S. at 359 (Douglas, J., dissenting). A "reasonable man" negligence standard not only leaves to the jury the question of reasonableness with respect to fault in failing to ascertain the falsity of a story, but gives a jury *carte blanche* to inject its views on whether (i) the subject of a story is "reasonable", (ii) the treatment of the subject is "reasonable", or (iii) the damage to a reputation (even if the story was true or substantially true) was "reasonable". Accordingly, the vagueness of the "reasonable man" test creates impermissible possibilities of *ad hoc* jury censorship diametrically opposed to free speech values.

D. A Negligence Standard Is Not Workable.

Although juries apply negligence every day in ordinary tort cases, a case-by-case "reasonableness" standard, while appropriate for "slip and fall" cases, fails to warn the publisher of the actionable falsehood that he did not either know of or entertain serious doubts of, and will cause a publisher not to report rather than take risks:

> If the common law concept of negligence is applied to defamation, the extent of a publisher's constitutional protection will depend on a jury's relatively unfettered, ex post facto appraisal of his conduct, and since the publisher has no way of knowing how large the jury will make the prohibited zone, he has no choice but to steer wide of it.

Anderson, *Libel and Press Censorship*, 53 TEXAS L. REV. 422, 461 (1975).

Levin's remaining arguments are wholly unpersuasive. As to the asserted absence of evidence that courts in the twenty-two states which have adopted negligence have had difficulty applying the test, it should be noted that no state has employed the test for more than seven years and many of these states have little experience with the test. Moreover, the studies show that the reversal rate in all libel cases has ranged from 64% to 74%. 6 Libel Defense Resource Center 2 (Winter, 1983). This hardly suggests workability. Second, the RESTATEMENT (SECOND) OF TORTS § 580 (B), Comment c, explicitly recognizes the states are free to adopt an "actual malice" test. Third, the "due care" test adopted by Section 770.04, Florida Statutes, applies only to the use of a broadcaster's facilities by "one other than the owner, licensee, operator, or general agent or employers thereof". Finally, the *Tribune* has challenged any use of a negligence standard by a jury in a libel suit, not its mere application in this case.

CONCLUSION

For the foregoing reasons, this Court should grant the relief requested in Petitioners' Initial Brief.

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I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Petitioners was served by mail this 7th day of June, 1983 upon the following:

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