O/A 2-13-84

IN THE SUPREME COURT OF FLORIDA

CASE NO. 63,724

JOSEPH J. NODAR,

Petitioner,

v.

PATRICIA GALBREATH,

Respondent.

AMICUS CURIAE BRIEF OF THE MIAMI HERALD PUBLISHING COMPANY AND TIMES PUBLISHING COMPANY

ON ORDER ACCEPTING DISCRETIONARY JURISDICTION
TO REVIEW A DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA,
FOURTH DISTRICT

Richard J. Ovelmen
General Counsel
The Miami Herald
Publishing Co.
One Herald Plaza
Miami, Florida 33101
(305) 350-2204

Talbot D'Alemberte
L. Martin Reeder, Jr.
Thomas R. Julin
STEEL HECTOR & DAVIS
1400 Southeast Bank Bldg.
Miami, Florida 33131
(305) 577-2816

Attorneys for The Miami Herald Publishing Company

George Rahdert
RAHDERT, ANDERSON & RICHARDSON
Post Office Box 960
St. Petersburg, Florida 33731
(813) 823-4191

Attorney for Times Publishing Company

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Attorney for Times Publishing Company

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INTRODUCTION

The Miami Herald Publishing Company and Times Publishing Company support the petitioner, Joseph J. Nodar, and urge the Court to quash the misleading and erroneous decision of the Fourth District Court of Appeal.[1] 429 So.2d 715. Amici have no direct interest in this case but are concerned with the protections accorded to the free speech rights of all citizens. The amici have not briefed each of the issues briefed by the petitioner but they support each of the petitioner's arguments.

STATEMENT OF THE FACTS AND THE CASE

The argument of the amici draws on the facts of this case in a somewhat different way than does the argument of the petitioner and, therefore, this Statement

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1. The Court granted The Miami Herald's motion to file this amicus brief November 21, 1983. The Times Publishing Company filed a motion with this brief for leave to join The Miami Herald's brief.

of the Facts and the Case is included. There is no disagreement with the petitioner's statement.

The plaintiff, a tenured public school teacher, sued the father of one of her students for slander. The alleged defamation was made during an official meeting of the Broward County School Board to which the parent had been invited to voice his criticism.

The Run-On Sentence

Problems between the teacher, Patricia Galbreath, and the parent, Joseph Nodar, began in November, 1979. Joseph Nodar's son, also named Joseph, received a "B-/F" grade on a paper he had written in Mrs. Galbreath's gifted student's English course at Nova High School. The paper contained a single run-on sentence. Mrs. Galbreath testified that she grades every paper containing a run-on sentence as an "automatic F" and that she had graded Joseph's paper accordingly.[2] (T. 145). Only this grade on this paper prevented Joseph from receiving an "A" in the course. (T. 250). Thus, an honors student, who had never received a grade other than an "A," was deprived of an "A" in this course because he wrote one run-on sentence during the term.

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2. The grade appeared as a "B-/F" because students enrolled in "gifted classes" may not be given an official grade of less than "B-" according to a school policy which attempts to reflect the difficulty of the gifted class curriculum in the students' grades.

The Parents' Investigation

Each evening at supper, it was the Nodar family's tradition to have family members discuss their activities of the day. (T. 330). The son was very upset about his English grade and so informed his parents. He also told his parents that he was being harassed in class[3] (T. 301) and that he did not understand his grades. (T. 303, 315-318). Mrs. Nodar began to keep a log from her son's reports about the things the children did in class and their academic work.[4] (T. 315).

At their son's request (T. 296, 308), the Nodars began to inquire about Mrs. Galbreath's class, about the grading practices and about the curriculum. They commenced their search for an answer to their son's problem by asking Mrs. Galbreath directly about their son's grade.[5] Mrs. Nodar first telephoned Mrs.

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3. The son testified: "[Mrs. Galbreath] began to harass me and - in front of the class. She would criticize my work and insult my intelligence, embarass me in front of the class, make me the object of the class's laughter at times. And I began to feel that she didn't want me in the class at all, and I was beginning to regret going." (T. 301).

4. Although the case was brought solely against Mr. Nodar, the action of Mrs. Nodar in keeping this record figured prominently in the case.

5. The description which follows of the Nodars' attempts to obtain some answers from the school system is based on the testimony in the record given by various witnesses who did not recall events in exactly the same way. Nevertheless, the amici believe that the description, if not precisely accurate, fairly summarizes the facts.

Galbreath. (T. 323). The phone call was not welcomed by Mrs. Galbreath who, according to Mrs. Nodar, was angry and unresponsive to her inquiries. (T. 323). Mrs. Nodar next telephoned the principal, Mr. Dobbs. (T. 325-26). The phone conversation with Mr. Dobbs was unenlightening. (T. 326). Mr. Nodar then wrote a note to Mrs. Galbreath asking to see his son's work. (T. 254). She responsed by indicating she could not send the paper to him but that she would meet with him to discuss the problem. Mr. Nodar was unable to meet with Mrs. Galbreath immediately, however, because of the time constraints of his job. (T. 255).

He then wrote a letter to the superintendent of schools (T. 255), but received no response. He sent a follow up letter to the superintendent and again received no response. (T. 255). Frustrated by the lack of attention given him by local officials, Mr. Nodar wrote to the governor about the problem. (T. 256). Mr. Nodar received no response from the governor. He sent a second letter to the governor and again received no response.[6]

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6. Eventually Mrs. Harrington of the governor's office spoke with Mrs. Nodar by phone, suggesting that the Nodars should take their grievance to a meeting of the school board. (T. 258). In February, 1980, the Nodars received a letter from Charles Reed, Governor Graham's assistant for educational policy, responding to their two letters and their phone contact with the Governor's office. Like Mrs. Harrington, Mr. Reed suggested that the proper forum for the Nodars was before the local elected officials in charge of schools -- the Broward County School Board. (Plaintiff's Exhibit B.)

Finally, Mr. Nodar wrote the school board, but this letter too went unanswered. (T. 256).

Acting on the advice he eventually received from the governor's office, Mr. Nodar telephoned the school board (T. 334-335) and the Nodars were invited by the board to appear at one of its meetings (at an agenda item called "delegations"). Mr. Nodar accepted the invitation. (T. 336). Thus, this is not a case in which a diligent attempt to investigate the facts was not made by the defendant.

The Communication to the School Board

The sole claim of defamation arose from Mr. Nodar's statement at the school board meeting. Acting on information from his son, Mr. Nodar had this to say to the Broward County School Board:[7]

NODAR:

1. You were mentioning about the gifted program. I have a log here for gifted English 10th grade, of my son's class, if anybody would like to see this. This is a typical log, a daily log of what had been done in this class since December of 1979. If anybody would like to see it, I would like to pass it around.

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7. This text is taken from Plaintiff's Exhibit A attached to the complaint. The text has been paragraphed and the paragraphs have been numbered for ease of reference.

2. I am here as a dual purpose. I found out about this meeting last night, and I am really not prepared for the type of speech that Mrs. Mendlebaum gave you. Originally, I was here to speak on behalf of my son. My son is a 10th grade student at Nova High School.

3. After many months of frustration and trying to get someone in the school system to look into and correct and resolve the problems my son is having at Nova with his gifted English and AP Chemistry class teachers, I am here tonight to speak about it and ask you for your help. I wrote to Dr. McFatter two certified letters, one in November and one again in December, of which I received no reply at all, neither phone call nor letter.

4. In March, Mr. Todd, the area superintendent, called a meeting with Mr. Dodge, who is the principal of Nova High. My wife and I attended the meeting. The two teachers involved were there, Mrs. Dennard was there, the gifted coordinator and Mrs. Radow, who is the head of the English Department.

5. We expressed our concerns about the curriculum of the English class, the gifted English class, explained to them what was going on in the way of an education for these children, including my son, the harassment my son has been receiving from this particular teacher, because of our investigation or inquiry as to his grades and why his grades are going down. He has been harassed since then, he has been abused by her verbally, and his grades have been dropping.

6. Right after that, we had difficulty with his Chemistry teacher, his AP Chemistry teacher. She has allowed children in class, who were caught cheating on a test, complete the test, receive an A for their grade for the balance of the term, be exempt from taking a mid-term test - my son had to take a mid-term test. He received 100% on his Chemistry mid-term test and

received a B in his grade. Whereas, these children who cheated received an A, without even having to take a mid-term test. These are some of the problems that are happening in these particular classes. I think that this sort of coincides with Mrs. Mendlebaum's report. My son is being victimized by these two teachers.

7. We brought these facts out to Mr. Dobbs and Mrs. Todd at the meeting. They done nothing about it, they were not concerned. The only thing Mr. Dobbs said was that my son's doctor's note was not updated. He found that my son's fault to exclude him from P.E., which we had redated. That is the only thing that Mr. Dobbs has found in this investigation. Currently we contacted Dr. McFatter's office again. I believe my wife spoke to Mrs. Harrington. Mrs. Harrington here? We got in touch with Dr. Orr. It's been three weeks, we have received no word from them at all about this matter. We have had investigations by Mrs. Dennard, now an investigation by Dr. Orr, and still nothing is being done.

8. This English program that they have at Nova is strictly a literature class. They do nothing but reading and class discussion. There is no grammar, no mechanics of composition, nothing that will enable these children to take a SAT test or any college examination that would give them a chance to score in the high grade. There is nothing there that will do this.

9. I have never come before a meeting of people with such results, but as a parent, I found it my duty to my son and to the other children at Nova, that someone should be here to advise you people that you should look into this matter and see to it that these children get every opportunity to get an education, because it is not very far off that they will have to step out into the adult world and find their way and all of us may be guilty if we do not try to help them now.

10. Now, there is a lot of money funded for this program and, for example, my son, we pay for his books that he has to bring into class to read, we pay for his pencils, we pay for his paper, and the only thing he gets is an unqualified teacher, that's all he's got, and that's all the rest of the children in that class have - an unqualified teacher.

11. Now, I have before me a program guide for gifted children. I am sure you are all familiar with this and it specifies a lot of things in here that are guidelines for the gifted class, as far as grading procedures, curriculum, etc. - none of these are being followed. I believe this is put out by the School Board. It says "The School Board of Broward County, Florida". This teacher in AP Chemistry grades my son and the rest of the students in the class on a curve. A curve based against these very same children who receive A's, the ones that cheat and it states here, that if grades are used in a special group of gifted students, they should be given as if the children were being compared to the total school population, since the whole concept of grading is based on relative standing. If gifted students are measured on the basis of their real achievement, it is likely that they will receive A's. If a program is good and the students are interested they should be producing and their grades should be high. In no case is grading the gifted on the curve justified when in a special group.

Board Member: Mr. Nodar, I'm sorry (we're out of time). I appreciate your presentation. Does any member of the Board wish to say anything? I don't know if you understand or not, but we don't act on delegations.

[Nodar:] I realize that, I just want to speak on behalf of my son and the rest of the children and may I just ask Dr. McFatter one thing, if he doesn't mind? Have you heard anything about my complaint as yet?

Dr. McFatter: When I receive letters such as that, Mr. Nodar, I immediately refer them to the area superintendent, because that is the proper place to have those kind of uh.....

[Nodar:] Would that be Mrs. Todd?

Dr. McFatter: Issues investigated, and I know that she has met with you, and I know that Dr. Gore and others have met with you and tried to resolve this problem.

Board Member: I talked with him many times. Mrs. Todd took 3 months before she called the meeting. Thank you very much.

Board Member: We are now at the end of delegations.

Mrs. Galbreath was not named in this statement and the plaintiff's claim of defamation apparently relates only to paragraphs 5 and 10, and possibly the last sentence of paragraph 6.

The Slander Complaint

Mrs. Galbreath sued Mr. Nodar for slander on a strict liability theory. Her complaint did not allege that any of Mr. Nodar's statements were false, did not allege that Mr. Nodar was at fault in publishing the statements, and did not allege that Mr. Nodar knew of the falsity of any of his statements or that he acted in reckless disregard of the truth or falsity of any of his statements to the school board. Although the Fourth District's opinion makes reference to four particular statements within Mr. Nodar's presentation to the school

board, the complaint itself does not specify these statements as false or defamatory. Instead, the complaint attached a transcript of Mr. Nodar's entire statement to the school board as an exhibit and alleged that the transcript contained unspecified defamatory statements.

The Evidence of the Defendant's State of Mind

At trial, the court would not allow Mr. Nodar to testify about information he received from his son (T. 254) or his wife (T. 251-52) and, even when Mr. Nodar's counsel pointed out that the defense was dependent on proving the state of mind and motivation of the speaker, the court still would not allow the testimony.[8] (T. 253). Mr. Nodar did testify that he believed in the reports his son gave him (T. 60,71,354) and that he appeared before the school board for the purpose of criticizing the program and arguing for his son.[9] (T. 259, 276). No testimony or documentary evidence in either the plaintiff's or the defendant's case suggested that the defendant held any

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8. At one point the court even lectured defense counsel in front of the jury about counsel's attempt to bring in this "hearsay." (T. 262).

9. The statement which is the basis of this case did not even name Mrs. Galbreath. Mr. Nodar's statement does nothing more than repeat statements which were made by his son to him and voice a general concern about the adequacy of instruction in the school system.

sort of ill will toward the plaintiff or that the defendant entertained any doubts about the truth of the statements he made to the school board. The evidence shows the defendant was motivated solely by a desire to protect his son from what he perceived to be an unfair educational system and by a desire to improve that system for the benefit of all the students at Nova High School.

The Damage Evidence

The sole evidence on damages relates to Mrs. Galbreath's hurt feelings. Although Mrs. Galbreath was offended by Mr. Nodar's statement, she was unable to testify to any tangible damage caused by the statement. She did not testify to any medical problem, to any change in her duties, nor to any loss of pay resulting from this statement.[10] As a tenured teacher, she has contractual job security (T. 226) so the parent's statement could not have damaged the plaintiff's job security.

Moreover, no witness testified that Mrs. Galbreath's reputation was in any way damaged by the statement. No one testified that they or anyone else thought any less of Mrs. Galbreath because of Mr. Nodar's

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10. Mrs. Galbreath candidly acknowledged she had no evidence of tangible injury (T. 230-31), no medical expenses (T. 231), and could not prove that any failure to get assignments was in any way connected to Nodar's statement. (T. 136).

statement. In fact, only eight witnesses testified in the case and, excluding Mrs. Galbreath, the Nodars and a records custodian, only three witnesses were even in a position to give testimony on that subject. Each of these witnesses supported Mrs. Galbreath and condemned Mr. and Mrs. Nodar, but none of the three stated a single word which could be interpreted as evidence supporting injury to reputation.[11]

The Jury Instructions

Because of the complexity of defamation law, the jury instructions are a critical part of the trial. Close review of the jury instructions in this case is essential. (Citations following the quoted material below are to the March 4, 1982, transcript of the judge's charge to the jury).

The trial judge ruled the plaintiff is not a "public official" as a matter of law, and that the plaintiff need not prove constitutional "actual malice" to establish liability. Consequently, the jury did not receive an

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11. A review of the testimony of these three witnesses, all of them employees of the Broward County school system, demonstrates that they are hostile to the Nodars and fully supportive of Mrs. Galbreath. There is nothing to indicate that they believed Mr. Nodar's opinion that Mrs. Galbreath was "unqualified." See testimony of Rhoda Radow (T. 3-25, especially T. 20 where she states that Mrs. Galbreath is competent), Imogene Todd (T. 192-200, especially T. 207 which refers to Mr. Nodar's "harangue") and Dorothy J. Orr (T. 209-217).

instruction that it must find actual malice to return a verdict against the defendant. The trial judge also refused to rule that a common law privilege protected the defendant's speech, but did instruct the jury it could find that such a privilege existed.

The trial judge failed to instruct the jury on any standard of fault. Various standards of fault have been held applicable in different types of defamation cases -- for example, the actual malice standard, the gross negligence standard, and the simple negligence standard -- but the trial judge gave no instruction on any standard and no instruction that the jury must find that the defendant breached the applicable standard.[12] The trial court essentially allowed the jury to find for the plaintiff on the strict liability theory of the complaint.

Regarding malice essential to establish liability, the trial judge instructed the jury as follows:

> It is malicious to make a false statement concerning another with ill will, hostility, or evil intention to defame and injure. If you find by the greater weight of the evidence that the statement was not made with malice, then your verdict should be for the Defendant. However, if you find by the

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12. As will be shown in the argument below, the trial judge should have determined which of the standards of care applied and should have instructed the jury on the applicable standard.

> greater weight of the evidence that the statement was made with malice, then your verdict should be for the Plaintiff and against the Defendant.
>
> (T. 47).

As will be discussed in the argument, this instruction related to the common law express malice requirement and not to the constitutional fault requirement.

Regarding punitive damages, the trial court gave the jury a dual set of instructions allowing it to award such damages upon finding either common law express malice or constitutional actual malice. Initially, the court told the jurors a finding of ill will would be sufficient to support an award of punitive damages. The court instructed the jury:

> Now, the plaintiff in this matter has sought both compensatory and punitive damages. The general rule that the purpose of punitive damages is not to compensate, but only to serve as a deterrent to others inclined to commit a similar offense. Such damage is being characterized as an allowance for malice, moral turpitude, wantoness, outrageousness in the commission of a tort finds application in defamation cases.
>
> Accordingly, in a suit for slander, although no special damage may have been proved, the Plaintiff may recover what is known as exemplary or punitive damages on a showing that the publication, the communication was made with malice or ill will toward the Plaintiff.
>
> (T. 50)(emphasis added).

After giving another page and a half of instructions, the trial judge gave the jury an alternative standard for awarding punitive damages as follows:

> If you find for Patricial (sic) Galbreath, then find only that Joseph Nodar acted maliciously, you may in your discretion assess punitive damages against Joseph Nodar as punishment and as a deterrent to others. It is malicious to make a false statement concerning another with knowledge of its falsity or with reckless disregard of its truth or falsity.
>
> (T. 51-52).

Note that this latter instruction did not require the jury to find "knowledge of its falsity or with reckless disregard of its falsity" as a prerequisite to awarding punitive damages. This instruction merely gave one definition of "malicious" and, as indicated, the court had provided the jury with other definitions of malicious. It therefore is unclear whether the jury based its punitive damage award on a finding of "express malice" (ill will, hatred, etc.) or "actual malice" (knowledge of falsity, etc.)

Although the judge ruled that the case was one of slander per quod and not slander per se,[13] the jury was not instructed that it must find the plaintiff suffered

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13. The judge adhered to this ruling when the plaintiff's counsel urged him to reconsider it. (T. 21)

any special damages. Worse, the court instructed the jury it could presume damages:

> Defamation is such in these cases that it -- that in its natural and proximate consequence it will necessarily cause injury to the person concerned in her personal, social, official, or business relationship of life, so that legal injury may be presumed or implied from the bare facts of the publication or communication.
>
> (T. 48)(emphasis added).

The Jury's Verdict & Interrogatory Answers

The jury returned a verdict for the precise amounts requested by the plaintiff -- $5,000 compensatory damages and $5,000 punitive damages. The transcript of the jury's return is significant because it has not been accurately reflected in the opinion of the Fourth District Court of Appeal. The full return reads:

> "We, the jury, find as follows:
>
> "1. Are the comments that were made by the Defendant, Joseph J. Nodar, about the Plaintiff, Patricia Galbreath, at the School Board meeting on May 15, 1980, subject to a qualified privilege?"
>
> Answer, "Yes."
>
> "2. Were the comments that were made by the Defendant, Joseph J. Nodar, about the Plaintiff, Patricia Galbreath, at the School Board meeting on May 15, 1980, made by him with malice?"
>
> Answer, "Yes."

"3. Are the comments that were made by the Defendant, Joseph J. Nodar, about the Plaintiff, Patricia Galbreath, at the School Board meeting on May 15, 1980, opinions or allegations of fact?"

Answer, "Allegations of fact."

"4. Defendant, Joseph J. Nodar, shall pay the Plaintiff, Patricia Galbreath, a sum of $5,000.00 as and for compensatory damages."

"5. Defendant, Joseph J. Nodar, shall pay the Plaintiff, Patricia Galbreath, a sum of $5,000.00 as and for punitive damages."

It should be noted that these interrogatory answers do not reach a finding of falsity, a finding that the defendant acted with fault of any kind, or a finding that the defendant acted with knowledge of falsity or reckless disregard of truth or falsity.

The defendant moved for a new trial and the trial judge denied the motion.

The Fourth District's Decision

The Fourth District Court of Appeal affirmed the jury's verdict, stating that it made no real difference whether the court found the plaintiff was a public official:

> Defendant was not prejudiced by the court's refusal to declare the plaintiff school teacher a public official, a determination of which would have required plaintiff to prove malice, as defendant still had the protection

> of the qualified privilege which required the same showing of malice.
>
> 429 So.2d at 717 (emphasis added).

The Fourth District then erroneously analyzed the findings that the jury made, stating:

> The jury answered specific questions in this regard and concluded that a qualified privilege did exist but that the defendant's statements were untrue and uttered with actual malice.
>
> Id.

The Fourth District thus affirmed a slander verdict, which included punitive damages, for a public school teacher against a parent for impersonal remarks made in an official school board meeting even though the case was tried on a strict liability theory, falsity, negligence and actual malice were neither alleged nor proven, and no damage to reputation was shown. It is this result which this Court must address.

ARGUMENT

Speech by a parent to a school board which is critical of a public school teacher enjoys protection both by constitutional principles which require the plaintiff to plead and prove fault and by common law privileges which require the plaintiff to plead and prove express malice. In this case, the trial court and the Fourth District Court of Appeal have so confused the law of defamation that, instead of according the defendant parent

the protections of the constitutional fault standard and the common law privilege, the defendant was deprived of both types of protection. There was no evidence or finding of fault and no evidence to support the finding of express malice. Whether the plaintiff is considered a public official or a private individual, reversal is required because of these errors. This is the subject of Point I of the argument below.

Point II demonstrates that public school teachers, as individuals with extraordinary governmental powers, are public officials who, like other public officials, are required to tolerate a great measure of public criticism. In this case, there was no clear and convincing evidence of actual malice which would support a verdict against the defendant.

Point III addresses an issue which has been largely ignored by the parties: punitive damages. It emphasizes that this Court may not allow the punitive damage award to stand because there was no clear and convincing evidence of actual malice.

I.

The Damage Award Violates Both the First Amendment and the Common Law

In affirming the decision of the trial court, the Fourth District Court of Appeal demonstrated a misunderstanding of the fundamentals of the common law tort of defamation and the constitutional modification of the tort. This misunderstanding led the court to confuse the terms

"express malice" and "actual malice," terms which have distinct origins and which serve distinct purposes. The confusion of those terms resulted in elimination of the protection for speech which the United States Supreme Court has held the First and Fourteenth Amendments afford every defendant in every action for defamation. It also resulted in the elimination of the protection which the common law provides for speech under the circumstances present in this case.

A. The Applicable Common Law and Constitutional Principles.

Because of the Fourth District's confusion, it is essential to dwell for a moment on the basic common law and constitutional principles applicable to the tort of defamation. At common law, the plaintiff could establish a prima facie case of defamation by showing the defendant had published a statement:

(1) to a third party,

(2) of and concerning the plaintiff,

(3) which was defamatory in that it tended to subject the plaintiff to contempt, hatred, ridicule, being shunned, or being injured in business,

(4) with malicious intent, meaning ill will, spite, or hatred and intent to injure and defame (bad motive), and

(5) which damaged the plaintiff.

Layne v. Tribune Co., 108 Fla. 177, 146 So. 234 (1933); 19 Fla. Jur. 2d Defamation and Privacy §1 (1980).

If the publication inherently tended to subject the plaintiff to contempt, hatred, or ridicule, it was said to be defamatory "per se." This categorization relieved the plaintiff of proving the third, fourth, and fifth elements of the tort. The existence of those elements would be presumed as a matter of law.[14] If the publication would not obviously subject the plaintiff to contempt, hatred, or ridicule, it was said to be defamatory per quod. This categorization meant that the plaintiff could prevail only upon pleading and proving each of the common law elements of the tort and none of the five elements of the tort would be presumed.[15] The courts held that in cases for libel per quod, plaintiffs must plead with specificity and prove through the greater weight of the evidence (1) extrinsic facts showing why the statement would subject the plaintiff to contempt, hatred, and ridicule, (2) express malice, also known as malice in fact, and (3) special damages quantifiable in some real economic terms. See, e.g., Layne v. Tribune Co., supra.

If the plaintiff established his prima facie case utilizing the per se presumptions, the defendant could

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14. Campbell v. Jacksonville Kennel Club, 66 So.2d 495 (Fla. 1953); Miami Herald Publishing Company v. Brautigam, 127 So.2d 718 (Fla. 3d DCA 1961).

15. E.g., Barry College v. Hull, 353 So.2d 575 (Fla. 3d DCA 1975). In this extraordinary record, the trial judge repeatedly ruled that the alleged defamation was slander per quod but then gave the jury instructions which allowed it to presume elements of the action.

avoid liability by pleading and proving that the statement was privileged.[16] Privileges were established for speech which occurred under facts and circumstances where it would not make sense to presume the defendant had a bad motive. For example, where the statement was true[17] or where the speaker had a right, duty or interest in making the statement,[18] the speech could not be presumed to be for a bad purpose. The existence of a privilege would defeat the presumption of malice and give rise to a presumption of good faith. Of course, if the plaintiff could submit evidence of express malice, demonstrating by the greater weight of the evidence that the defendant in fact had a bad motive, the plaintiff could defeat the privilege.

If the plaintiff established a prima facie case without utilizing presumptions, but instead by offering substantial evidence of each of the common law elements of the tort, the defendant could not avoid liability merely by offering evidence of the existence of a privilege because the plaintiff already would have submitted evidence of express malice (bad motive) which could

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

17. Florida Publishing Co. v. Lee, 76 Fla. 405, 80 So. 245 (1918); Applestein v. Knight Newspapers, Inc., 337 So.2d 1005 (Fla. 3d DCA 1976).

18. Abraham v. Baldwin, 52 Fla. 151, 42 So. 591 (1906); Coogler v. Rhodes, 38 Fla. 240, 21 So. 109 (1897).

defeat the privilege. The issue in such cases would be for the jury to determine whether the plaintiff had established bad motive by the greater weight of the evidence.

In summary, under the common law of defamation, privileges offered some protection for speech, but that protection vanished whenever the greater weight of the evidence established the defendant acted with a bad motive, known as express malice.[19] Of course, in every case where the plaintiff could offer substantial competent evidence of express malice, the issue of whether the defendant in fact had a bad motive would be submitted to the jury. Under the early common law, the truth of a statement did not always guarantee the defendant would be free of liability[20] and the negligence or fault of the defendant in making a false statement was utterly irrelevant to liability.

When the United States Supreme Court decided New York Times Co. v. Sullivan, 376 U.S. 254 (1964), it

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19. Because this common law scheme did not require plaintiffs to prove that the defendants were at "fault" for publishing false statements of fact, courts have interpreted the common law rules as a system of strict liability. See W. Prosser, Law of Torts 772 (4th ed. 1971).

20. See Wilson v. Marks, 18 Fla. 322 (1881). Later, this Court mitigated the harsh rule at least as applied in cases where the publication was about a matter of real public or general concern. 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); Coogler v. Rhodes, 38 Fla. 240, 21 So. 109 (1897). These decisions placed the burden of proving falsity and malice on the plaintiff.

introduced a new doctrine to defamation law which allowed defendants to avoid liability even in cases where the plaintiff affirmatively established express malice. The decision held that if the plaintiff were a public official, he could not prevail without submitting clear and convincing evidence of actual malice, meaning not the old common law express malice relating to the defendant's attitude toward the plaintiff, but instead, knowledge of the falsity of the defamatory statement or reckless disregard of truth or falsity. Id. at 279-80. Under this standard, the defendant's motive in publishing a statement about the plaintiff would be irrelevant.[21] Thus, although the plaintiff might establish the defendant published a defamatory falsehood with ill will, spite, or hatred and an intention to defame and injure, the plaintiff could not prevail without also proving, through clear and convincing evidence, knowledge of falsity or reckless disregard of falsity.

Note that this requirement placed the burden on the public official plaintiff of first proving falsity and, second, proving that the defendant breached the

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21. See Times Publishing Co. v. Huffstetler, 409 So.2d 112, 113 (Fla 5th DCA 1982) ("proof of elements of common law malice, viz. spite, hostility, deliberate intention to harm, does not satisfy the constitutional requirement of 'actual malice'"). Palm Beach Newspapers, Inc. v. Early, 334 So.2d 50 (Fla. 4th DCA 1976), cert. denied, 354 So.2d 351 (Fla. 1977), cert. denied, 439 U.S. 910 (1978) (reversing a jury verdict notwithstanding the evidence of the defendant's bad motive). The United States Supreme Court expressly recognized this proposition in Beckley Newspapers Corp. v. Hanks, 389 U.S. 81 (1967).

applicable standard of care in failing to prevent the publication of the falsehood. The Supreme Court explained in Sullivan that this constitutional privilege was required because common law privileges, which afforded protection only to defendants who acted with good motives, had proven to be insufficient to protect free and robust debate.

The Supreme Court again altered the law of defamation in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), this time not by providing defendants with a new privilege, but by adding an additional element to the tort -- the requirement of fault.[22]

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22. Although the Gertz decision involved a media defendant, nonmedia defendants, such as Mr. Nodar, are entitled to no less first amendment protection than media defendants. This Court recognized in Gibson v. Maloney, 231 So.2d 823 (Fla. 1970), that a nonmedia defendant was entitled to the protection against libel suits that the Supreme Court had extended to the media in New York Times Co. v. Sullivan, supra. Justice Thornal dissented from this holding. He argued that the press is entitled to special privileges under the First Amendment, but his argument did not carry the day. Of those jurisdictions which expressly have considered whether the Gertz principles apply to nonmedia defendants, the majority have held that they do. For a summary of the state decisions, see Developments in the Law -- The Interpretation of State Constitutional Rights, 95 Harv. L. Rev. 1324, 1405 (1982). The commentators also generally have agreed that the reasons offered by some courts for giving the public less protection than the minimal libel protection afforded the press under the First Amendment are unpersuasive. See, e.g., Note, Mediaocracy and Mistrust: Extending New York Times Defamation Protection to Nonmedia Defendants, 95 Harv. L. Rev. 1876, 1884-86 (1982). The decision of the Fourth District Court of Appeal treats Mr. Nodar, however, as if he is entitled to none of the constitutional protections afforded the press. This is

(Footnote 22 continued on next page)

Under the holding of Gertz, the plaintiff cannot establish a prima facie case without proving the plaintiff failed to adhere to the applicable standard of care for preventing publication of false statements of fact.[23] This new element -- like the actual malice requirement -- has two components to it. First, the plaintiff must plead and prove that the statement published was false,[24] and

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not the first nonmedia defamation case in which the constitutional principles established by Gertz were wholly overlooked or ignored. The Second District committed this error in Lewis v. Evans, 406 So.2d 489 (Fla. 2d DCA 1981), and the Fourth District did the same in Lundquist v. Alewine, 397 So.2d 1148 (Fla. 5th DCA 1981). The proliferation of these decisions, ignoring constitutional principles, leads to confusion in both the trial and appellate courts. For the direction of the bench and bar, this Court should make it clear that the First Amendment protects the speech of all citizens -- not only the speech of the press.

23. At the heart of the Gertz decision is the fundamental assumption that although "there is no constitutional value in false statements of fact," 468 U.S. at 340, such statements are "nevertheless inevitable in free debate." Id. Gertz imposed a duty on all citizens to prevent the publication of falsehoods, but because of the inevitability of falsehood in "free debate," Gertz imposes liability on the publisher of a falsehood only if he has breached the applicable standard of care.

24. Numerous decisions have explicitly held that Gertz places the burden of proving falsity squarely on the plaintiff in every defamation case. See, e.g., Wilson v. Scripps-Howard Broadcasting Co., 642 F.2d 371, 376 (6th Cir. 1981), cert. dismissed, 454 U.S. 1130 (1981)("Falsity is an element of fault under the First Amendment that should be proved and not presumed"). Even before Gertz, some Florida courts had placed the burden on plaintiffs to plead and prove falsity in every case, e.g. Delacruz v. Pennisula State Bank, 221 So.2d 772 (Fla. 2d DCA 1969); Hawke v. Broward National Bank, 220 So.2d 678 (Fla. 4th DCA 1969), and as shown in footnote 20, supra, Florida courts have long held the burden of pleading and proving falsity is on plaintiffs who base their actions on statements which are of public or general concern.

second, the plaintiff must plead and prove that the defendant did something "wrong" in publishing the incorrect information. The Gertz decision did not, however, define the standard of care defendants must adhere to in all cases.[25] So, for example, in cases other than those involving a public official or a public figure plaintiff, a state might allow a plaintiff to establish fault by proving that the defendant simply failed to act reasonably under the circumstances in preventing publication of the false statement. This would be a simple negligence standard of care. A state also might require that a plaintiff could establish fault only by proving the defendant had actual knowledge of falsity or recklessly disregarded truth or falsity. This would be an actual malice standard of care.[26]

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25. The Court articulated its holding this way:

> We hold that, so long as they do not impose liability without fault, the states may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.
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> 418 U.S. at 347.

26. The concept of fault was first introduced by the Supreme Court in the Sullivan decision -- not, however, by making it an element of the tort of defamation. The Sullivan Court held that if a defendant could prove his statements were privileged because they were about a public official, then the plaintiff could not prevail without proving the defendant was at fault and the plaintiff could do that only by offering clear and convincing evidence that the defendant breached the

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Neither Sullivan nor Gertz supplanted the old common law privileges protecting speech made with good motives (without express malice). Rather, they added an additional privilege and an additional element to the cause of action.[27]

B. There was No Substantial Evidence or Finding of Fault as Required by the First Amendment.

The petitioner in the instant case urges the Court to quash the decision of the District Court of Appeal because it failed to distinguish between "express malice" and "actual malice." The petitioner asserts this failure is significant in this case because the plaintiff, as a public school teacher, is a public official. Under New York Times, she therefore cannot prevail absent clear and convincing evidence of "actual malice." The jury was not so instructed and, in any event, no such evidence was offered in this case.

(Footnote 26 continued from previous page)

applicable standard of care defined as the "actual malice" standard. Gertz is quite distinct from Sullivan in that it requires every plaintiff in every defamation case to prove that the defendant breached a standard of care but it does not define the standard.

27. The Gertz decision also substantially modified the damage rules applicable in defamation actions, but for purposes of Point I of this brief those rules need not be considered. Point III of this brief does discuss the limitations Gertz imposes regarding punitive damage awards.

The amici curiae fully agree with the petitioner on this point and offer their views on it in Point II of this brief, but reversal is required for an even more fundamental reason. Irrespective of whether the plaintiff is a public official, reversal is required because neither the trial court nor the Fourth District Court of Appeal made any finding of fault as required by Gertz.[28] While struggling over the distinctions between express malice and actual malice, both courts wholly overlooked the fundamental federal constitutional requirement that the plaintiff must plead and prove the defendant breached the applicable standard of care in failing to prevent the publication of a false statement of fact.[29] A verdict

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28. The amici also agree with the petitioner that the verdict is unsupported by any evidence or finding of falsity as regarded by the First Amendment.

29. The Court has before it the question of what standard is applicable in cases in involving issues of public or general concern in Miami Herald Publishing Company v. Ane, Case No. 63,114, which is set for argument January 10, 1984. Because the instant case involves a matter of real general or public concern -- public education -- the standard which ultimately is held applicable in Ane should also be applicable in this case. The Third District Court of Appeal held in Ane that fault may be established by proof that the defendant speaks "without reasonable care as to whether the alleged false and defamatory statements were actually true or false." 423 So.2d 376, 378. The Miami Herald has argued that "actual malice" standard should be applicable to protect such speech because the common law privileges evolved to require the plaintiff to plead and prove "the communication is published falsely, fraudulently and with express malice and intent to injure." Abram, supra at 336, a standard which essentially combines a knowing falsity (actual malice) standard with the old ill will and intent to injure (express malice) standard. Whichever standard ultimately is

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for a defamation plaintiff, regardless of the plaintiff's status, may not stand absent a finding of fault. Time, Inc. v. Firestone, 424 U.S. 448 (1976).

The Fourth District's decision in the instant case fails to recognize any fault requirement. The Fourth District stated:

> The main issues at trial were whether the statements were opinion or fact; whether the statements were defamatory; whether defendant had a qualified privilege; and if so, whether the defendant was guilty of malice. It was determined by the jury that the statements were matters of fact which were slanderous. The qualified privilege was found applicable but the jury concluded that defendant exceeded the privilege because he made the statements with malice.
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> 429 So.2d at 716.

This concise summary of the issues and findings of the trial court reveals the complete absence of the issue of fault or any finding of fault. Indeed, the complaint does not even allege that the defendant acted in a negligent manner. Neither the judge nor jury made a finding of fault. The Fourth District also made no finding of fault. Furthermore, the evidence in the record is

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held to apply in public concern cases, it is clear in this case that the plaintiff did not plead and did not offer evidence of a breach of any standard and the trial judge never instructed the jury that it must make a finding of fault in order to return a verdict to the plaintiff.

insufficient to support a finding of fault.[30] As shown in the statement of facts, the Nodars took heroic steps to investigate the assertions made by their son that he had been harrassed by Mrs. Galbreath before taking their complaints to the school board. The Nodars spoke with Mrs. Galbreath herself, with the principal, and with the superintendant in trying to determine the facts. Mr. Nodar did not fail to take any steps a reasonable parent might be expected to take before publishing his son's allegations to the school board.

Indeed, the amici submit that even had Mr. Nodar made no efforts to investigate his son's charges before publishing them to the school board he could not, as a matter of law, be found to be at fault. School boards exist as representatives of the public and of the parents whose children attend the public schools. Parents are expected to bring their concerns to these boards and should be encouraged to do so. Society should not impose on

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30. It is not clear that counsel for the petitioner clearly objected to the trial court's failure to instruct the jury properly regarding fault, although he did clearly ask for an actual malice instruction. Therefore there may be some question as to whether the fault question is properly before this Court. Fortunately, there is authority which holds that where the sufficiency of the evidence is challenged in a defamation case the appellate court must undertake an independent examination of the record as a whole to ensure that the judgment does not constitute a forbidden intrusion on the field of free expression. See Beckley Newspapers Corp. v. Hanks, 389 U.S. 81, 82 (1967); Curtis Publishing Co. v. Butts, 388 U.S. 130, 156-59 (1967) (Harlan, J.); New York Times Co. v. Sullivan, supra at 285.

parents any duty to investigate statements their children make about their problems at school before they can report those statements to school officials and request an investigation by the school officials themselves. Reversal because of this very basic error is required.

C. There was No Substantial Evidence of Express Malice as Required by the Common Law.

One principle of law announced by the Fourth District Court of Appeal to which the amici curiae do not take exception is that a statement made by a parent to a school board about his concern for his son's education and the education of other students is protected by Florida's common law privileges.[31] The amici curiae do not agree, however, that either the Fourth District Court of Appeal or the trial court provided the defendant in this case with the full protection which the common law privilege offers because there is no competent evidence in this record, let alone a preponderance of evidence, which negates the presumption that Mr. Nodar acted in good faith -- without express malice -- in making his presentation to the Broward County School Board.

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31. The Fourth District held that the statement is protected by an "interested parent" privilege. However, other privileges could have been held applicable. See, e.g., Fioro v. Rogers, 144 So.2d 99 (Fla. 2d DCA 1969) (establishing a privilege for voluntary testimony in public meetings).

When a statement is made under circumstances which give rise to a qualified privilege, the plaintiff may prevail only by submitting evidence which establishes that the defendant was in fact motivated by hatred, ill will, spite and an evil intention to defame and injure the plaintiff rather than by some legitimate motive to do something of general benefit to society.[32] Gibson v. Maloney, 231 So.2d 823 (Fla. 1970); Abram v. Odham, 89 So.2d 334 (1956); Myers v. Hodges, 53 Fla. 197, 44 So. 357 (1907); Abraham v. Baldwin, 52 Fla. 151, 42 So. 591 (1906); Coogler v. Rhodes, 38 Fla. 240, 21 So. 109 (1897).

The defendant in Gibson made statements indicating that the plaintiff drove business and people away from the Apalachicola area "which [the plaintiff] did know, or should have known, were false when he made them." 231 So.2d at 827 (Thornal, J., dissenting). Notwithstanding this apparent presence of constitutional "actual malice," the majority quashed the district court of appeal's decision affirming a jury verdict for the plaintiff because the plaintiff had failed to prove express malice.

The defendant in Myers accused the plaintiff of being a "tricky, dishonorable, unscrupulous, and conscienceless man" who "would do everything in his power

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32. The amici agree with the petitioner that the jury was not given an adequate instruction regarding express malice.

by tricky, dishonorable, unscrupulous, and conscienceless means, to defraud the defendant, or anyone else with whom he had business relations, out of his or their money." 44 So. at 358. This Court held that the statement was privileged because of the circumstances under which it was published and affirmed dismissal of the complaint because the plaintiff had failed to plead that the defendant made the statements "to gratify private malice," id. at 362, that the defendant had "a want of good faith or a bad intent," id. at 364, or that the defendant was "prompted by bad feeling or wrong motives," id. The Court refused to infer express malice from the language of the publication itself.

In Coogler, the defendant wrote to the governor accusing a candidate for the position of sheriff of Hernando County of running a house of prostitution. The case proceeded to trial and the jury returned a verdict for the plaintiff. In reversing the verdict, this Court held the publication was privileged as a communication "to the appointing power," 21 So. at 112, and the trial court erred in not requiring the plaintiff to prove the defendant made the statements because of "private personal malice toward the plaintiff" rather than "motives for the public good." 21 So. at 113. Again, the Court refused to rely upon the language of the publication itself as showing express malice.

In the instant case, the record is devoid of any evidence suggesting that Mr. Nodar's statements to the school board, which do not even mention Mrs. Galbreath by name, were motivated by any "private personal malice" toward Mrs. Galbreath. Although Mr. Nodar's statements were strong and direct, it is clear from the context of the statement as a whole and Mr. Nodar's testimony at trial, that Mr. Nodar was motivated by a desire to ensure that his son would receive a good education and that the curriculum at Nova High School would meet the needs of all of its students. Surely, if Mr. Nodar had been motivated by personal malice toward Mrs. Galbreath, he at least would have mentioned her by name in his statement to the school board. Significantly, he did not do that. He also did not institute a grievance against her. He did not try to interest the media in his case or do any of a number of other things all within his rights as a citizen. It is apparent in the record that Mr. Nodar did not launch a personal attack on Mrs. Galbreath and did not go beyond his privilege to act as an advocate for his son before a public body.

The common law privileges were devised by Florida courts to make certain that citizens who have legitimate concerns about problems in our society and who are motivated by those legitimate concerns to speak out, can do so freely without fear of subsequent attack for defamation. If the verdict rendered by the jury below is

affirmed, the message sent to all parents will be that they are no longer free to inquire of and comment to public school officials about the education of their children or the treatment their children receive from the school system's teachers. Such a result would be in derogation of the principles of the common law and in derogation of the American family. Parents are entitled to take their complaints and concerns about the public school system to any of the officials within the system and to demand that answers be given. No substantial evidence of express malice having been submitted, the trial court should have granted a directed verdict at the close of the plaintiff's case. Accordingly, this Court should direct entry of judgment for the defendant.

II.

The Plaintiff is a Public Official who Should Not Have Been Permitted to Prevail Absent Clear and Convincing Evidence of Actual Malice

This point demonstrates that public school teachers are public officials under the case law evolving from New York Times v. Sullivan, supra, because they possess extraordinary, unreviewable, governmental power over the public's children with whom they are entrusted. Because the plaintiff is a school teacher and there was no clear and convincing evidence of constitutional actual malice, the plaintiff cannot recover. The petitioner

supplies the Court with abundant authority on the classification of public officials and the specific authority on school teachers as public officials. This brief adds the policy analysis.

A. School Teachers are Public Officials.

It cannot be doubted that teachers possess extraordinary government power to influence the lives of their students. Perhaps more than any other individuals except parents, teachers influence the beliefs, abilities, and futures of our children. High school teachers, through their power to evaluate and grade, are in a position to determine which colleges a student will be able to enter. These teachers, through their daily contact with students at a period in their lives when they are becoming more independent of their families and anxious to explore new things, are able to shape and mold their students' ideals and moral values. In the classroom, teachers' decisions and influence over their students are virtually unreviewable by any higher authority. Teachers therefore are unique public servants not only in the extent of their government power, but in their ability to wield that power without scrutiny.

The state gives teachers the duty to "embrace every opportunity to inculcate" their students with moral values, §231.09(2), Fla. Stat., and the authority to maintain discipline and punish children under

§232.27, Fla. Stat. As it does with other public officials, the state accompanies this allocation of power with extraordinary insulation from public accountability through the tenure system. Teachers usually receive this protection after only three years of teaching.[33] It is therefore especially clear that parents and the public must be granted great freedom at least to voice their criticisms of teaching and teachers. This may be the only means of maintaining some degree of accountability. The purpose of the New York Times doctrine is to provide just such a "privilege for criticism of official conduct" for individuals such as Mr. Nodar.

If there were ever any question about whether providing public education is one of the most important functions of the state, that question was put to rest in the seminal case which signaled the end of school segregation, Brown v. Board of Education, 347 U.S. 483, 493 (1956), where the Court stated:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstate our recognition of the

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33. When considering the question of whether a tenured public school teacher is a public official, it is also useful to consider the privileges enjoyed by public teachers who are called on daily to evaluate (grade), to criticize and comment on the performance of others. Teachers grade students, correct them in perceived errors (Mrs. Galbreath graded her student Joseph Nodar (T. 169) and, at trial, she criticized him for being "non-verbal" (T. 93)).

> importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.

Individuals who choose public education as a profession, such as Mrs. Galbreath, should not be surprised when their performance becomes the subject of free and robust debate. Indeed, the Fourth District recognized in this very case that comment regarding teachers is protected by Florida's common law privileges. It also is useful to remember that the Nodar case is not the first modern case decided by the Fourth District Court of Appeal involving claims of defamation arising from criticism of school personnel. In Palm Beach Newspapers, Inc. v. Early, 334 So.2d 50 (Fla. 4th DCA 1976), cert. denied, 354 So.2d 351 (1977), cert. denied, 439 U.S. 910 (1978), the court reversed a substantial jury award made to the plaintiff, a school superintendent.

In reversing, the Fourth District noted that the very heavy criticism by the newspaper defendants sought the removal of Mr. Early and, to this end, "published over a period of approximately fourteen months several hundred news articles and editorials, all of which were generally hostile to or critical of Early and many of which were of a defamatory nature." 334 So.2d at 51.

The Fourth District in Early provided an analysis of the other statements which went beyond opinion[34] and, as to those (i.e., charges of nepotism), the Court could not affirm because:

> There was no evidence to show that the defendants had accused plaintiff of nepotism with knowledge of the falsity of the charge or with a high degree of awareness of its probable falsity. There was, at most, only proof of defendant's failure to investigate, which without more, cannot establish reckless disregard for the truth.
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> 334 So.2d at 53.

It also should be remembered that the "academic freedom" teachers themselves are afforded under the Constitution grants them virtual immunity from suit or prosecution for their in-class pronouncements. One significant strand of the public official analysis in the Sullivan case is the thesis that the official himself is given immunity or privilege for his speech, the public should be afforded a like privilege for its expression about his conduct. In Florida, teachers are given very wide privileges. In Chapman v. Furlough, 334 So.2d 293 (Fla. 1st DCA 1976), a tenured school teacher and an

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34. The court held that certain of these statements were opinion, not statements of fact. Those opinion statements closely parallel the characterization of the plaintiff by the defendant in this case. Early was referred to as "unsuccessful" and there were references to his "ineptness," his "incompetence" and his "indecisiveness." Mr. Nodar referred to Mrs. Galbreath, not by name, but by position as "unqualified."

assistant principal were sued for remarks they made about the plaintiff's place of business. In essence, these remarks identified the plaintiff's place of business as a place where school children hung out and where drugs were sold. The court applied a qualified privilege to those statements and upheld the summary judgment entered by the trial court.[35] In determining that a school teacher's privilege is broad enough to carry well beyond the school house and the school yard, the court cited the substantial statutory authority which is given to teachers.[36]

Finally, the United States Supreme Court in another way has recognized the significance of public school teachers to our society. Some specific civil

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35. Today a school teacher may well be wholly immune from defamation actions in light of this Court's decision in City of Miami v. Wardlow, 403 So.2d 414, 416 (Fla. 1981), holding a police officer, as a "public employee is absolutely immune from actions for defamation" if "the communication was within the scope of the officer's duties."

36. The court stated:

> Parents are responsible for their children's school attendance. Section 232.09, Florida Statutes. A principal is required to enforce attendance regulations. Section 232.19, Florida Statutes. A principal is authorized to delegate to any teacher such responsibility for the control and direction of students as he may consider desirable. Section 232.26(1), Florida Statutes. Section 231.09, Florida Statutes, defines the duties of the members of the instructional staff, which include the effects of alcohol and narcotics upon the human mind and body.
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> 334 So.2d at 295.

service jobs are deemed so important to the state's interests that those interests justify the exclusion of aliens from those positions of employment. One of the crucial jobs is the position of public school teacher. Ambach v. Norwich, 441 U.S. 68 (1979). The Court observed in Ambach:

> [S]ome state functions are so bound up with the operation of the state or a governmental entity as to permit the exclusion of all persons who have not become part of the process of self-government.
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> 441 U.S. at 73, 74.

In deciding that school teachers occupy positions so essential to a representative government that the exclusion of aliens lies within the power of government, the Ambach court analyzed the purposes and functions of the public school system in a lengthy but significant passage:

> In determining whether, for purposes of equal protection analysis, teaching in public schools constitutes a governmental function, we look to the role of public education and to the degree of responsibility and descretion teachers possess in fulfilling that role. . . . Each of these considerations supports the conclusion that public school teachers may be regarded as performing a task "that go[es] to the heart of representative government." . . .
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> * * *
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> Within the public school system, teachers play a critical part in developing students' attitudes toward governmental and understanding of the role of citizens in our society. Alone among employees of the

system, teachers are in direct, day-to-day contact with students both in the classrooms and in the other varied activities of a modern school. In shaping the students' experience to achieve educational goals, teachers by necessity have wide discretion over the way the course material is communicated to students. They are responsible for presenting and explaining the subject matter in a way that is both comprehensible and inspiring. No amount of standardization of teaching materials or lesson plans can eliminate the personal qualities a teacher brings to bear in achieving these goals. Further, a teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values. Thus, through both the presentation of course materials and the example he sets, a teacher has an opportunity to influence the attitudes of students toward government, the political process, and a citizen's social responsibilities. This influence is crucial to the continued good health of a democracy.

Furthermore, it is clear that all public school teachers, and not just those responsible for teaching the courses most directly related to government, history, and civic duties, should help fulfill the broader function of the public school system. Teachers, regardless of their specialty, may be called upon to teach other subjects, including those expressly dedicated to political and social subjects. More importantly, a State properly may regard all teachers as having an obligation to promote civic virtues and understanding in their classes, regardless of the subject taught. Certainly a State also may take account of a teacher's function as an example for students, which exists independently of particular classroom subjects. In light of the foregoing considerations, we think it clear that public school teachers come well within the "governmental function" principle recognized in Sugarman and Foley.

441 U.S. at 76-80.

These words are consistent with the public policy of Florida where the public school system is of constitutional significance (Article IX Section 1: "Adequate provision shall be made by law for a uniform system of free public schools . . ."") and where educational issues occupy a large and important place in public policy discussions.[37] This Court therefore must declare that teachers are public officials for purposes of free speech.

B. There Was No Clear and Convincing Evidence Of Actual Malice.

Once it is clear that the plaintiff public school teacher is a public official, the case becomes quite easy to resolve by applying the acknowledged constitutional privilege. There can be no recovery absent clear and convincing evidence that the defendant has spoken a falsehood with knowledge of the falsity or with reckless disregard of falsity.[38] New York Times Co. v. Sullivan, supra.

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37. One of the most interesting of the current debates on education policy relates to "merit pay" and this debate centers around the methods of evaluating teachers.

38. The jury never received such an instruction. The absence of such an instruction was not cured by the instruction given regarding punitive damages. Instructions regarding punitive damages cannot cure an erroneous instruction on liability. See Belo Corporation v. Razor, 644 S.W. 2d 71, 85. (Tex. App. 1982). And, as discussed in Point III, the "actual malice" instruction given on punitive damages was itself defective because it did not require the jury to make a finding that the plaintiff had submitted clear and convincing evidence of actual malice as a prerequisite to awarding punitive damages.

There is absolutely no evidence in this record that Mr. Nodar knew any of his statements concerning Mrs. Galbreath to be false or had "serious doubts" as to their truth. For this reason alone, judgment should have been entered for the defendant. St. Amant v. Thompson, 390 U.S. 727 (1968). The sole material in the record even remotely relating to any standard of care issue is the testimony relating to the scope and completeness of Nodar's investigation into Mrs. Galbreath's competence. But even the failure to investigate her competence at all would not support an actual malice finding. A father is under no duty to investigate behind his son's statements to him prior to appearing before an elected public body charged with the duty of supervising teacher competency. The settled law makes it clear that the constitutional actual malice requirement cannot be fulfilled by the proof of failure to investigate.

The leading case on that subject is St. Amant v. Thompson, supra, in which the Supreme Court considered whether a political candidate acted with actual malice by publishing statements about the plaintiff contained in the affidavit of a union member. The Court reversed the Louisiana Supreme Court's determination that the plaintiff had met his burden of proving actual malice. The Court agreed with the findings of the Louisiana court that the

defendant was without knowledge that the affidavit was false, but disagreed with the lower court's conclusion that the defendant had acted with "reckless disregard." The father was justified in doing this action.

The evidence in St. Amant showed the defendant had failed to investigate the reputation for veracity of the affiant although he had verified other aspects of the affiant's information. Id. at 730, 733. The Court held that reckless disregard is not measured by whether a reasonable man would have published without further investigation, stating that "failure to investigate does not in and of itself establish bad faith." Id. at 731, 733.

Instead, the plaintiff must show the defendant "entertained serious doubts as to the truth of his publication."[39] The Court suggested that this could be shown where a defendant "fabricates a story," where the story "is the product of his imagination, or is based on an unverified anonymous telephone call," where the allegations are "so inherently improbable that only a reckless man would have put them in circulation," or where there are "obvious reasons to doubt the veracity of the informant or the accuracy of his reports." Id. at 732.

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39. Later, in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), the Court characterized the St. Amant standard as requiring the plaintiff to prove the publication was made with a "subjective awareness of probable falsity."

The facts of the instant case demonstrate that the son conferred with his father and told the father of his complaints. The son had an imposing academic track record. Thereafter, the father acted on his son's behalf, investigating the matter through phone calls and letters to various public officials, including Mrs. Galbreath, and appearing as an advocate in a public forum. The father was justified in doing this and as argued in Point I, this reliance by a father on his son's statements may not even be characterized as negligence.

III.

The Punitive Damage Award Violates Both the First Amendment and the Common Law

The United States Supreme Court in Gertz v. Robert Welch, Inc., supra, explicitly held that plaintiffs in defamation cases "who do not prove knowledge of falsity or reckless disregard for the truth" through clear and convincing evidence may not recover punitive damages, explaining:

> We ... find no justification for allowing awards of punitive damages against publishers and broadcasters held liable under state-defined standards of liability for defamation. In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. And they remain free to

> use their discretion selectively to punish expressions of unpopular views. Like the doctrine of presumed damages, jury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship, but, unlike the former rule, punitive damages are wholly irrelevant to the state interest that justifies a negligence standard for private defamation action. They are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurence. In short, the private defamation plaintiff who establishes liability under a less demanding standard than that stated by New York Times may recover only such damages as are sufficient to compensate him for actual injury.
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> 418 U.S. at 350 (emphasis added).

In the instant case, the jury instructions were insufficient because they allowed the jury to award punitive damages upon finding either express malice (bad motive) or actual malice (knowledge of falsity or reckless disregard of falsity). The instructions also were deficient in that they failed to require the plaintiff to establish actual malice with "clear and convincing" evidence of actual malice. And, as shown in Point II. B. above, the record in this case contains no clear and convincing evidence that Mr. Nodar had a subjective knowledge of falsity of any of his statements regarding Mrs. Galbreath or subjective knowledge that would give him

serious doubts regarding the truth or falsity of his statements.[40]

Florida common law affords defamation defendants additonal protection against punitive damages by precluding their recovery absent express malice. Montgomery v. Knox, 23 Fla. 595, 3 So. 211 (1897). As demonstrated in Point I.C. above, there was no evidence of express malice.

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40. This Court's obligation, irrespective of the propriety or impropriety of the jury instruction, is to determine whether clear and convincing evidence of actual malice was submitted to the jury to make certain that the punitive damage award does not violate the First Amendment. In Beckley Newspapers Corp. v. Hanks, 389 U.S. 81, 82 (1967), the Supreme Court stated:

> Although this action was tried subsequent to the decisions of this Court in New York Times Co. v. Sullivan,... and despite the fact that it was recognized at trial that the principles of New York Times were applicable, the case went to the jury on instructions which were clearly impermissible. The jury was instructed in part that it could find for the respondent if it were shown that petitioner had published the editorials "with bad or corrupt motive," or "from personal spite, ill will or a desire to injure plaintiff." Because petitioner failed to object to this erroneous interpretation of New York Times at trial, and in fact offered instructions which were themselves inadequate, the issue of these instructions is not before us. However, since it is clear that the jury verdict was rendered upon instructions which misstated the law and since petitioner has properly challenged the sufficiency of the evidence, we have undertaken an independent examination of the record as a whole "so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression." New York Times Co. v. Sullivan, supra, at 285.

Reversal of the punitive damage award is required because it violates both the First Amendment and Florida common law.

CONCLUSION

The decision of the Fourth District Court of Appeal should be quashed and entry of judgment for the defendant should be directed.

Respectfully submitted,

STEEL HECTOR & DAVIS
Attorneys for The Miami Herald Publishing Co.

By _____
Talbot D'Alemberte
L. Martin Reeder, Jr.
Thomas R. Julin
1400 Southeast Bank Bldg.
Miami, Florida 33131
(305) 577-2816

George Rahdert
RAHDERT, ANDERSON & RICHARDSON
Attorney for Times Publishing Co.
Post Office Box 960
St. Petersburg, Florida 33731
(813) 823-4191

Richard J. Ovelmen
General Counsel
The Miami Herald Publishing Co.
One Herald Plaza
Miami, Florida 33101
(305) 350-2204

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this brief was hand-delivered December 1, 1983, to James Cary Jacobson, Esq., 3363 Sheridan Street, Suite 204, Hollywood, Florida 33021, and Ronald P. Gossett, Esq., 3595 Sheridan Street, Suite 204, Hollywood, Florida 33021.

Thomas R. Julin