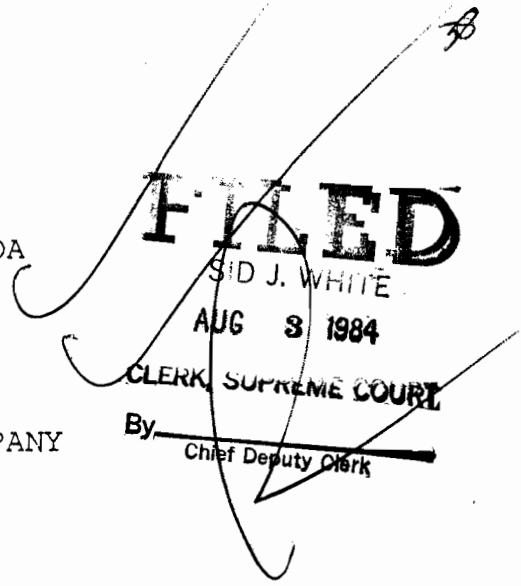


IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,904

THE MIAMI HERALD PUBLISHING COMPANY

Petitioner

vs.

ROBERT R. FRANK

Respondent

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

AMICUS CURIAE BRIEF OF PALM BEACH NEWSPAPERS, INC., POST-NEWSWEEK STATIONS, FLORIDA, INC., SCRIPPS-HOWARD BROADCASTING CO., AND DAYTONA TIMES, INC.,

---

Of Counsel

Talbot D'Alemberte
Tallahassee, Florida

Donald M. Middlebrooks
Thomas R. Julin

Steel Hector & Davis
Attorneys for Amici Curiae
1400 Southeast Bank Bldg.
Miami, Florida 33131
(305) 577-2810

STEEL HECTOR & DAVIS
SOUTHEAST BANK BUILDING
MIAMI, FLORIDA 33131

IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,904

THE MIAMI HERALD PUBLISHING COMPANY

Petitioner

vs.

ROBERT R. FRANK

Respondent

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

AMICUS CURIAE BRIEF OF PALM BEACH NEWSPAPERS, INC., POST-NEWSWEEK STATIONS, FLORIDA, INC., SCRIPPS-HOWARD BROADCASTING CO., AND DAYTONA TIMES, INC.,

---

Donald M. Middlebrooks
Thomas R. Julin

Steel Hector & Davis
Attorneys for Amici Curiae
1400 Southeast Bank Bldg.
Miami, Florida 33131
(305) 577-2810

Of Counsel

Talbot D'Alemberte
Tallahassee, Florida

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES

EXPLANATION OF REFERENCES

The petitioner, The Miami Herald Publishing Company, will be referred to in this brief as The Miami Herald or the defendant. The respondent, Robert Frank, will be referred to by name or as the plaintiff.

References to the record are made by the notation "(R.)." References to the trial transcript are made by the notation "(T.)."

THE AMICI CURIAE

The amici curiae are:

Palm Beach Newspapers, Inc., a Florida corporation which publishes The Post, The Evening Times, and the Palm Beach Daily News.

Post-Newsweek Stations, Florida, Inc., a Florida corporation which operates WPLG-TV, Channel 10 in Miami, Florida, an ABC affiliate.

Scripps-Howard Broadcasting Co., an Ohio corporation which operates WPTV, Channel 5 in West Palm Beach, Florida, an NBC affiliate.

Daytona Times, Inc., a Florida corporation which publishes the Daytona Times and the Deland Times.

IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,904

THE MIAMI HERALD PUBLISHING COMPANY

Petitioner

vs.

ROBERT R. FRANK

Respondent

INTEREST OF THE AMICI CURIAE

Defamation means damage to reputation. Yet, the plaintiff in this "defamation" action waived all claims for damage to his reputation. At trial, his damage claim rested solely upon his testimony, his wife's testimony, and his son's testimony that he was angered by a Miami Herald news article. On this testimony, the jury returned a verdict of $30,000 against the defendant. The Third District Court of Appeal affirmed the judgment, accepting the plaintiff's view that libel plaintiffs may recover for mental distress -- without claiming or proving damage to reputation -- under a simple negligence theory.

The amici are publishers and broadcasters in Florida. They are interested in this case because the opinion of the Third District Court of Appeal threatens publishers, broadcasters and the judicial system with an inundation of defamation actions which lack any evidence of damage other than self-serving, speculative, and subjective testimony regarding

mental anguish. This threat is real and no better illustrated by the fact that four appeals from defamation judgments which were unsupported by evidence of damage to reputation are pending before this Court.

Florida courts historically have rejected the notion that defamation actions may be maintained absent a claim for and evidence of damage to reputation. Florida courts also have rejected naked claims for mental anguish caused by simple negligence. This case presents the Court with the opportunity to reaffirm these basic rules of defamation and tort law.

STATEMENT OF THE CASE AND THE FACTS

The amici adopt the statement of the case and the facts found in the petitioner's brief. The single fact of significance to this brief is that the plaintiff, Robert Frank, waived all claims for damage to reputation shortly before the trial of this case.[1] (T. 768-71, 937). The $30,000 compensatory award returned by the jury was based solely upon the testimony of

---

1. The plaintiff's original complaint alleged that "As a direct and proximate result thereof the plaintiff has suffered and sustained great injury and damage to his good name, credit and reputation and his personal, social and business and professional life." The second amended complaint dropped all claims of damage to reputation alleging "Plaintiff on compensatory damages as a direct and proximate result of the libel of the plaintiff has suffered compensatory damages in the loss of business and income as an attorney at law and has been further subjected to embarrassment, humiliation and mental pain and suffering." Counsel for the plaintiff took the position that his waiver of all claims for damage to reputation was supported by precedent: "Read Firestone v. Time, the United States Supreme Court and the Florida Supreme Court said that it is a perfectly proper claim. We proved it." (T. 769). No reputational evidence was presented at trial.

Frank, his wife, and his son that Frank experienced mental anguish when he read the Tropic article about him.[2]

Robert Frank testified regarding his mental anguish as follows:

> Q. Did [the article] have any effect on your relationship with your family?
>
> A. It did, sir.
>
> Q. In what [w]ay, sir?
>
> A. Well, I would say that it had an effect upon every member of the family. It had effect upon me most of all and I was concerned. I've always had a good relationship with all of the children but especially with Mike. And, he was off at school and I was concerned about how it would affect him.
>
> Q. How did you feel about the publication, sir?
>
> A. It was an embarrassment to me, sir.
>
> Q. Something that you found you had to explain as you went around?
>
> A. Not just to my family but to other people as well.
>
> (T. 850-51).

This was the only evidence of mental anguish offered by the plaintiff during his direct examination.

---

2. The plaintiff's bookkeeper, Peggy Fabry, and Frank also testified that revenues from Frank's bankruptcy practice declined after the article's publication, although his legal practice generally flourished. (T. 729-58, 845). Apparently the trial court and Frank regarded this evidence as a species of "special damage," as opposed to general reputational damage. No evidence was offered that would tend to prove that publication of the article was the cause of the relative decline of these revenues. It is clear on this record the jury based its verdict solely on the testimony that Frank suffered mental distress.

Miriam Frank, the plaintiff's wife, testified:

Q. What was your husband's initial reaction to the article?

A. He was furious. He was upset. He was not able to understand how a reporter could write something that wasn't true or hadn't been checked.

Q. After the first day or two that the article came out, did you notice any effects on Bob's personality?

A. Yes, he was upset most of the time. He was very short with the children which he usually is not. Many times, when they would speak with him he didn't answer because he really wasn't hearing what they said.

He was just, in general, short tempered and upset. He was not his usual self.

Q. Did you notice any changes in his sleeping pattern?

A. He didn't sleep too well. He was up most of the night.

* * *

Q. What do you think bothered Bob most about this?

A. Probably that his son should hear about it or shouldn't read the article because he was, I suppose, the apple of his eye. He is very close to him and he is to the others but he is very special.

* * *

Q. Mrs. Frank, you have described for the jury various emotional reactions that Bob had to the publication of that article. Did those reactions, those emotional reactions, have any effect on Bob's social activities whether with or without you?

A. Yes, they did.

* * *

A. He didn't want to go out as often as we were accustomed to. He tended to stay home. He seemed to be embarrassed and he just didn't want to go anywhere.3

(T. 765-72).

Michael Frank, the plaintiff's son, testified:

Q. Has there been any changes in the way he has acted since the article?

* * *

A. When I would bring [the Tropic article] to my father, he would sometimes, in my opinion, he was embarrassed about it during this time, I mean during the summer time, sometimes he would get short every time I would bring it up to him.

Q. Have you noticed any changes in your dad's private life or the way he conducts his life since the article?

* * *

A. I haven't noticed that many. When I was home for summer vacation I wasn't -- I wouldn't say that I was there much that I could tell how much it affected his private life.

(T.761-62).

None of the witnesses testified that their opinions of Robert Frank had been diminished by his reading of the article.

---

3. It is difficult to guess why Frank was embarrassed. Counsel for Frank argued it was because of the article. However, The Herald attempted to introduce evidence showing that not long before the article appeared, a federal district court had adjusted an attorney fee award assessed against Frank, Wolf v. Frank, 555 F.2d 1213 (5th Cir. 1977), which had been granted in an earlier action in which Frank was found to have violated the federal securities laws. Wolf v. Frank, 477 F.2d 467 (5th Cir. 1973). The trial court erroneously ruled that The Herald could not cross-examine Frank regarding the securities fraud suit that bore of Frank's claims of embarrassment and humiliation. (T. 798-802, 853-61, 932-42, 948-57, 1094-1112). There may have been many reasons therefore that Frank "didn't want to go out as often," other than publication of the Tropic article.

ARGUMENT

The amici advance one argument: the plaintiff should not have been permitted to maintain an action for defamation without claiming or proving damage to his reputation.

I.

An Action for Defamation May Not be Maintained Absent Damage to Reputation

This Court should hold that an action for defamation may not be maintained absent damage to reputation for three reasons: (A) the gist of every defamation action is damage to reputation, (B) recognition of an action for defamation absent injury to reputation is inconsistent with Florida law regarding tortious infliction of emotional distress, and (C) recognition of such an action is tantamount to allowing an unconstitutional recovery of presumed damages. Each of these points is discussed separately below.

A. Evidence of Damage to Reputation is Essential in Every Action for Defamation

The plaintiff's decision to waive all claims for damage to reputation should have been fatal to his action. As will be shown below, the tort of defamation exists to provide a remedy to one whose reputation has been injured. When the plaintiff claims no damage to reputation, he simply fails to state a cause of action for defamation. This principle has been recognized by numerous decisions in Florida and other jurisdictions. It should now be reaffirmed by this Court.

1. Damage to Reputation is the Gist of Every Action for Defamation

Defamation is defined as a communication " . . . which tends to injure 'reputation' in the popular sense; to diminish esteem, respect, goodwill or confidence in which the plaintiff is held." W. Prosser, The Law of Torts 739 (4th ed. 1971). "A communication is defamatory if it tends to so harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." Black's Law Dictionary 375 (5th Ed. 1979). Even to those without legal training the term "defamation" is understood simply to mean "injuring another's reputation." Webster's New International Dictionary 686 (2d ed.1951).[4]

An action for defamation "is intended to protect the individual against unfair damage to his reputation." T. Emerson, The System of Freedom of Expression 518 (1970).[5]

---

4. The word "defame" is formed from the etymological element "de-," which generally has been used to mean to bring, push or put down, and the word "fame," which is defined as meaning "That which people say or tell; public report, common talk; a particular instance of this, a report, rumour." The Oxford English Dictionary (1981). See also Veeder, History and Theory of the Law of Defamation, 3 Col. L. Rev. 546 (1904); 50 Am.Jur. 2d Libel and Slander §§1, 357; Restatement (Second) of Torts §559.

5. Emerson comments at page 518 that "The precise interests jeopardized by . . . damage to reputation have never been fully agreed upon. But they may be said to include:

"(1) Injury in one's trade, profession or other economic pursuits.

"(2) Injury to prestige or standing in the community, which affects one's position as decision maker or participant in the community.

In discussing the nature of defamation, the United States Supreme Court has repeatedly recognized the inextricable link between damage to reputation and the tort. "[S]tate remedies [for defamation] have been designed," the Court commented, "to compensate the victim and enable him to vindicate his reputation." Linn v. United Plant Guard Workers, 383 U.S. 53, 63-64 (1966). "[D]amage to reputation is, of course, the essence of libel." Monitor Patriot Co. v. Roy, 401 U.S. 265, 275 (1971). Defamation laws may impose some restraints on free speech only because "[s]ociety has a pervasive and strong interest in preventing and redressing attacks upon reputation." Rosenblatt v. Baer, 383 U.S. 75, 86 (1966). In Time, Inc. v. Hill, 385 U.S. 374, 385 n.9 (1967), the Court found that in "all libel cases . . . the primary harm being compensated is damage to reputation." Most recently, in Gertz v. Robert Welch, Inc., 418 U.S. 323, 348 (1974), the Court evaluated constitutional limitations on defamation actions in light of the "legitimate

---

(Footnote 5 continued from previous page)

> "(3) Injury to feelings, arising out of an affront to one's dignity, distortion of one's identity, reflection on one's honor, or lessening of the approval of one's peers."

Thus, under Emerson's definition of the tort of defamation, it is possible to recover for "hurt feelings." But the predicate for such damage is "an affront on one's honor, distortion of one's identity, reflection on one's honor, or lessening of the approval of one's peers." A plaintiff may not merely claim that his feelings have been hurt and expect to recover damages. He must prove that his hurt feelings "arise out of" the damage to his reputation which was actually done by the allegedly defamatory communication.

state interest in compensating private individuals for wrongful injury to reputation."[6]

Interpreting Alabama law, the Fifth Circuit held in United States Steel Corp. v. Darby, 516 F.2d 961, 963 (5th Cir. 1975), that "The essence of the tort of defamation is injury to one's public reputation." The Tenth Circuit, reviewing New Mexico law, noted in Gruschus v. Curtis Publishing Co., 342 F.2d 775, 776 (10th Cir. 1965), that "The primary basis of an action for libel or defamation is contained in the damage that results from the destruction of or harm to that most personal and prized acquisition, one's reputation."

The state courts have been no less explicit than the federal courts in recognizing that damage to reputation is at the core of every action for defamation and recovery of any other damages is possible only if damage to reputation is proven. The Supreme Court of Kansas held "any claim for mental anguish is 'parasitic' and compensable only after damage to reputation has been established." Gobin v. Globe Publishing Co., 649 P.2d 1239, 1244 (Kan. 1982). Expressly examining whether an action for defamation absent damage to reputation exists, the court concluded there is no such action, stating, "[i]t is reputation which is defamed, reputation which is

---

6. If the states had not justified their libel laws as protecting their citizens' reputational interests, it is doubtful whether the tort of defamation would have been held constitutional by the United States Supreme Court in the first instance. The absolutist views of Justices Black and Douglas -- that all libel laws infringe the first amendment -- may well have carried the day.

injured, reputation which is protected by the laws of libel and slander." Id. at 1243.

New York courts also have directly addressed this issue and held that "[a]s to [a] claim for mental anguish, it has long been held the law of this state that such damage is compensable only when it is concomitant with loss of reputation." Salomone v. MacMillan Publishing Co., 429 N.Y.S.2d 441, 442 (N.Y. App. Div. 1980). See also France v. St.Clare's Hospital & Health Center, 441 N.Y.S.2d 79 (App. Div. 1981).

The most recent decision on this point is from the Arkansas Supreme Court which, in reversing a judgment which was not supported by evidence of damage to reputation, held that "It is settled law that damage to reputation is the essence of libel and protection of the reputation is the fundamental concept of the law of defamation." Little Rock Newspapers, Inc. v. Dodrill, 660 S.W.2d 933 (Ark. 1983).

Many decisions from other states provide additional authority that a plaintiff may not recover damages in a defamation action without establishing damage to reputation.[7]

---

7. See, e.g., Ripps v. Herington, 1 So.2d 899, 902 (Ala. 1941)("The policy of the law is to protect . . . the reputation, the good name of the citizen, against the defamer"); Spence v. Funk, 396 A.2d 967, 969 (Del. 1978)("'communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community'"); Saunders v. Board of Directors, WHYY-TV, 382 A.2d 257, 259 (Del. Super. Ct. 1978)("the gist of an action for defamation is the injury to reputation"); Newell v. Field Enterprises, Inc., 91 Ill. App.3d 375, 415 N.E.2d 434, 440 (Ill. App. 1980)("statement is defamatory if it impeaches a person's . . . reputation");

(Footnote 7 continued on next page)

Florida courts also have long recognized that injury to reputation is the damage which actions for defamation are intended to compensate. The earliest definitions of defamation in Florida decisions stated that actions would lie "when there has been a false and unprivileged publication . . . which exposes a person to distrust, hatred, contempt, ridicule, or obloquy, or which causes such person to be avoided, or which has a tendency to injure such person in his office, occupation, business, or employment." Briggs v. Brown, 46 So. 325, 330 (Fla. 1908). See also Layne v. Tribune Co., 108 Fla. 177, 146 So. 234 (1933); Jones v. Greely, 25 Fla. 629, 6 So. 448 (1889);

(Footnote 7 continued from previous page)

Cochran v. Indianapolis Newspapers, Inc., 175 Ind. App. 548, 372 N.E.2d 1211, 1216 (Ind. App. 1980)("communication is defamatory if it harms the reputation of another"); Joiner v. Downing, 383 So.2d 93, 96 (La. App. 1980)("'[d]efamation is 'an invasion of the interest in reputation and good name'"); Tropeano v. Atlantic Monthly, Co., 400 N.E.2d 847, 851 (Mass. 1980)(writing is defamatory if it "discredits the plaintiff 'in the minds of any considerable and respectable segment in the community'"); Wilkerson v. Carlo, 300 N.W.2d 658, 659 (Mich. App. 1980) ("[d]efamatory statements are those which tend to harm an individual's reputation in the community"); Church of Scientology of Minnesota v. Minnesota State Medical Ass'n Foundation, 264 N.W.2d 152, 155 (Minn. 1978)("[w]ords are defamatory when they tend to injure the plaintiff's reputation"); Wainman v. Bowler, 176 Mont. 91, 576 P.2d 268, 271 (Mont. 1978) ("it is not sufficient, standing alone, that the language is unpleasant and annoys or irks [the plaintiff]"); Newton v. Family Federal Savings & Loan Ass'n, 48 Or. App. 373, 616 P.2d 1213, 1215 (Or. App. 1980)("defamatory communication is one which would subject a person to hatred, contempt or ridicule"); Capps v. Watts, 271 S.C. 276, 246 S.E.2d 606, 609 (1978)("[t]o be libelous the words . . . must tend to impeach the reputation of the plaintiff"); Fin v. Middlebury College, 136 Vt. 543, 394 A.2d 1152, 1153 (Vt. 1978)("gist of an action for libel is injury to the plaintiff's reputation"); Converters Equipment Corp. v. Condes Corp., 80 Wis.2d 257, 258 N.W.2d 712, 714 (1977)("communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community").

Montgomery v. Knox, 23 Fla. 595, 3 So. 211 (1887); 19 Fla. Jur. 2d Defamation and Privacy §3 (noting in the general description of libel that "Every person who has been injured in his reputation is guaranteed recourse to the courts by the Constitution of Florida").

The Florida definition, like the definitions found in other jurisdictions, focuses on the impact the communication has on third parties rather than the reaction of the plaintiff himself. The tort of defamation is not defined simply as any communication doing injury, but rather it is defined as communication which causes injury by adversely altering the attitude or behavior of third parties toward the plaintiff. The tort thus hinges on the loss of reputation suffered by the plaintiff.

"The action of slander is to redress an injury to reputation of a person. In that sense the injury to the individual is indirect or remote. Redress in the court does not extend to spoken words constituting a personal insult only." Mann v. Roosevelt Shop, Inc., 41 So.2d 894, 895 (Fla. 1949). "The fact that plaintiffs may not like the way the article was written or what it says about them does not automatically provide the basis for a libel suit." Kurtell & Company, Inc. v. Miami Tribune, Inc., 193 So.2d 471 (Fla. 3rd DCA 1967). See also Sailboat Key, Inc. v. Gardner, 378 So.2d 47, 48 (Fla. 3d DCA 1979)("Libel and slander involve defamation of personal reputation"); Axelrod v. Califano, 357 So.2d 1048 (Fla. 3d DCA 1978)("Slander may be defined as the speaking of base and

defamatory words which tend to prejudice another in his reputation").

In Miami Herald Publishing Co. v. Brown, 66 So. 2d 679 (Fla. 1953), this Court held that a plaintiff who had failed to prove damage to reputation is entitled to recover only nominal compensatory damages.[8] The only proof of damage submitted by the plaintiff was that when he read the allegedly defamatory publication at issue he "didn't like it." But, the Court held such evidence could not justify the $1,500 jury verdict. The Court held that "an award of substantial compensatory damages must be based on proof." Id. at 681. Proof that a publication is capable of defamatory meaning is not proof that the publication actually caused injury. "If such were the law, juries would need to consider only the article before fixing the verdict in any amount that suited their fancy." Id. at 680.

Like the plaintiff in Brown, the plaintiff in the instant action brought his lawsuit against The Miami Herald merely because he found The Herald's description of his handling of a bankruptcy case insulting. In short, he didn't like it. His damage is no more real than that alleged by Brown.

It has been clear throughout the common law history of Florida defamation actions that damage to reputation is the gist of the tort. Without even a claim for such damage, the plaintiff should not have been permitted to recover.

---

8. Recovery of even nominal damages would not, of course, be possible today because of the express holding of Gertz v. Robert Welch, Inc. that "all awards must be supported by competent evidence concerning the injury." 418 U.S at 350.

2. The Firestone Decision Should Not be Read as Eliminating the Common Law Requirement of Damage to Reputation

The sole decision in Florida which appears to be inconsistent with the line of authority requiring damage to reputation as an element of a defamation action is Firestone v. Time, Inc., 305 So.2d 172 (Fla. 1974).

In that decision, this Court affirmed a $100,000 libel judgment notwithstanding that the plaintiff had waived all claims for damage to reputation. The sole remaining damage claim in her "defamation" action was for "shame, mortification, mental anguish, and hurt feelings" she experienced as a result of Time magazine's coverage of her divorce.[9] See Firestone v.Time, Inc., 305 So.2d 172, 176 (Fla. 1974). The Firestone opinion has been critized by commentators and other state courts.[10]

---

9. The strategy of waiving all claims of damage to reputation effectively prevented the defendant from introducing evidence that Mrs. Firestone's reputation was so sullied before Time had published its article the damage caused by Time, if any, would be minimal. In his dissenting opinion in Time, Inc. v. Firestone, 424 U.S. 448, 471 (1976), Justice Brennan pointed out that Time "was affirmatively precluded from offering any evidence to refute any possible jury assumption [regarding damage to reputation] by a pretrial order granting 'Plaintiff's Motion to Limit Testimony,' App. 77.) Id. at 475 n.3.

10. See, e.g., J. Eaton, The American Law of Defamation through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer, 61 Va. L. Rev. 1349, 1436-37 (1975); D. Anderson, Libel and Press Self-Censorship, 53 Tex. L. Rev. 422, 472-73 (1975); S. Stanley, Torts: A Change in the Nature of the Libel Action, 28 U.Fla.L.Rev. 1052 (1976). In Gobin v. Globe Publishing Co., 649 P.2d 1239 (Ka. 1982), the Kansas Supreme Court stated, "We are aware that the State of Florida has permitted the recovery of damages for mental anguish in a 'defamation' action, without

(Footnote 10 continued on next page)

The amici submit that a close reading of that decision and the decisions of the Fourth District Court of Appeal in Firestone suggests the Court never intended to recognize a cause of action for defamation absent injury to reputation. Whatever the case may be, the Firestone result has caused much confusion. The instant case presents an opportunity to clarify the law.

When the Fourth District was first presented with the Firestone case, the primary issue presented by counsel for Time was "Whether there is a cause of action for libel without damage to reputation." The court held no such cause of action exists in Florida, but chose to focus its opinion primarily on the applicability of the constitutional privilege protecting matters of great public interest. Time, Inc. v. Firestone, 254 So.2d 386 (4th DCA 1971).

This Court determined in Firestone v. Time, Inc., 271 So.2d 745 (Fla. 1972), that the Fourth District erred in concluding the Firestone divorce was a matter of real public or general concern and remanded the case to the Fourth District for resolution of the other points raised by Time on appeal.

On remand, the Fourth District insisted that it had disposed of all points on appeal in its initial opinion. Time,

---

(Footnote 10 continued from previous page)

a showing of damage to reputation. . . The case has been soundly criticized. . . New York has reached exactly the opposite conclusion: Absent harm to reputation, a plaintiff may not recover damages for mental anguish on a claim of defamation unless plaintiff proves malice. . . We agree with the New York rule that the plaintiff in an action for defamation must first offer proof of harm to reputation; any claim for mental anguish is 'parasitic.' and compensable only after damage to reputation has been established." Id. at 1243-44. See also Little Rock Newspapers, Inc. v. Dodrill, supra (agreeing with Gobin).

Inc. v. Firestone, 279 So.2d 379 (Fla. 4th DCA 1973). Reiterating its view that there were five points of error warranting a reversal of the trial court,[11] the Fourth District emphasized that the first point of error was that "There is no cause of action for libel without damage to reputation." Id. at 394. The court held it had no obligation to write an opinion regarding any of the points raised on appeal.[12]

When again faced with the Firestone case, this Court in a per curiam opinion[13] held "We cannot agree with the decision of the District Court which reverses the judgment of the trial court." Firestone v. Time, Inc., 305 So.2d 172, 175 (Fla.

---

11. The Fourth District had stated in its initial Firestone decision: "Time has presented six cogent points on appeal. We have examined all briefs, transcripts and exhibits, listened to oral argument, and researched each point on appeal with care. We conclude that there is merit, to various degrees, to each point on appeal with the exception of number 5, passion and prejudice." 254 So.2d at 387. The Fourth District quoted this passage in its second Firestone opinion, adding emphasis to the words, "We conclude that there is merit . . . to each point on appeal with the exception of number 5, passion and prejudice." 279 So.2d at 391.

12. The Fourth District first noted that "When we undertook the determination of this appeal initially we considered each and every appellate point in depth and decided them in accordance with our understanding of law and the appellate function." 279 So.2d at 391. The court then stated, "It is our respectful view, based on the foregoing, that there is a misunderstanding or lack of communication between our two courts . . . If it was the intendment of the Supreme Court to cause this court to reconsider its earlier decision and to write an opinion on each of the points supporting our decision, we must respectfully decline." Id. at 393.

13. Chief Justice Adkins and Justices Roberts, Boyd, and Dekle concurred. Justice Ervin dissented without opinion. Justice Overton dissented, writing that he found no basis for jurisdiction. 305 So.2d at 178. Justice McCain did not participate in the decision.

1974). This Court then went on to write extensively regarding whether the damage award was prohibited by the first and fourteenth amendments because unsupported by any injury to reputation. Relying on Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), this Court found the $100,000 award "is supported by competent evidence concerning the injury" as a matter of constitutional law.

This Court did not, however, directly address whether there is a cause of action for libel without injury to reputation as a matter of common law. Merely because it is constitutionally permissible for a state to recognize a particular cause of action which has particular elements, does not mean that the state does indeed recognize that cause of action.

In the United States Supreme Court, counsel for Time, Inc. argued that "the only compensable injury in a defamation action is that which may be done to one's reputation, and that claims not predicated upon such injury are by definition not actions for defamation." Time, Inc. v. Firestone, 424 U.S. 448, 460 (1976). The Court rejected this argument, first observing that in Gertz "we made it clear that States could base awards on elements other than injury to reputation, specifically listing 'personal humiliation, and mental anguish and suffering' as examples of injuries which might be compensated consistently with the Constitution upon a showing of fault." 424 U.S. at 460. The Court then noted that "Florida has obviously decided to permit recovery for other injuries without regard to

measuring the effect the falsehood may have had upon a plaintiff's reputation."[14] Id.

The Supreme Court's interpretation of Florida law based on the Firestone decision of this Court may well have been technically correct. It is possible to read this Court's 1974 Firestone decision as holding -- by necessary implication -- that such a cause of action exists. It is far from clear, however, that this Court intended such a holding[15] and as will be shown in Point B below such a holding is squarely inconsistent with all Florida law regarding tortious infliction of mental and emotional distress. It is now appropriate in the instant case, and with due regard for the other defamation actions pending before the Court, to clarify this fundamental point of Florida defamation law.

B. Recognition of Defamation Actions Absent Injury to Reputation is Inconsistent with All Florida Law Regarding Tortious Infliction of Mental and Emotional Distress

Recovery of damages for defamation without injury to reputation but instead based solely upon the plaintiff's mental

---

14. It appears that the Court based this conclusion solely on its reading of the Florida Supreme Court opinion in Firestone v. Time, Inc. 305 So.2d 172 (Fla. 1974), because the Court cited no other Florida decisions as providing authority for the conclusion.

15. One author, analyzing this Court's 1974 Firestone opinion concluded that the Court had "effectively transformed the action of libel into an action for negligent infliction of emotional distress," but had "omitted an analysis of the fundamental basis of the libel action and a weighing of the interests involved -- an analysis that would seem to be required before taking such a fundamental step." S. Stanley, supra at 1057.

anguish cannot be reconciled with the body of law governing tortious infliction of emotional distress. This Court has rejected recovery for negligent infliction of emotional distress. Moreover, such recovery renders meaningless the safeguards and procedural requirements which have been set forth even under the more liberal rules adopted by certain of the district courts of appeal in cases involving intentional infliction of mental distress. This Court is presently considering several cases which will clarify whether an independent tort for infliction of emotional distress exists at all, and if so, under what circumstances.

It is beyond the role of amici curiae in this defamation case to suggest an appropriate result in developing the law governing actions for emotional distress. However, the crucial point here is that if defamation plaintiffs are allowed, under a negligence standard, to recover for emotional distress without showing injury to reputation, the safeguards of "physical impact," "outrageousness," or "underlying tort" that are present even in those jurisdictions where an action for tortious infliction of emotional distress is recognized are nonexistent.

Such a result unacceptably offers less protection for speech and public debate than activity unrelated to First Amendment concerns. This Court should hold that there is no cause of action for defamation absent damage to reputation. Alternatively, the Court must hold that the rules that limit the circumstances under which a plaintiff can recover for mental

distress are fully applicable in defamation actions involving no damage to reputation.

1. The Plaintiff was Permitted to Recover Damages for Negligent Infliction of Mental Distress

The plaintiff in the instant case recovered damages for mental distress in an action for negligent publication of a defamatory falsehood. The plaintiff was not required to show that the defendant acted in a malicious or outrageous manner, he was not required to show that he suffered any physical impact, and he was not required to demonstrate any physical manifestation of the claimed emotional distress. The plaintiff was allowed to go to the jury with mere evidence of negligent conduct and mental distress. On these instructions, the jury returned a verdict of $30,000 for the plaintiff. This result simply cannot be affirmed in light of the common law rules this Court has developed regarding tortious infliction of emotional distress.[16]

---

16. The amici agree with The Miami Herald that the plaintiff properly should have been required to show actual malice because the news article in issue was about a matter of real public or general concern. The issue concerning the proper standard of fault also is before the Court in Miami Herald Publishing Co. v. Ane, 423 So.2d 376 (Fla. 3rd DCA 1982), pet. for rev. granted, Case No. 63,114, and Tribune Co. v. Levin, 426 So.2d 45 (Fla. 2d DCA 1982), pet. for rev. granted, Case No. 63,217. This point assumes arguendo that simple negligence was the correct standard of fault to apply. This point does not address whether the plaintiff should have been permitted to recover for mental distress upon proving actual malice. The amici submit, however, that unless this Court is prepared to recognize an independent tort for intentional infliction of emotional distress, a defamation plaintiff may never be permitted to recover without proving damage to reputation because a defamation action which involves no damage to reputation is nothing more than an action for infliction of emotional distress.

2. This Court Has Expressly Refused to Allow Recovery for Negligent Infliction of Mental Distress

In Kirksey v. Jernigan, 45 So.2d 188 (Fla. 1950), this Court expressly rejected the theory that a plaintiff may recover for negligent infliction of emotional distress, stating "This Court is committed to the rule, and we re-affirm it herein, that there can be no recovery for mental pain and anguish unconnected with physical injury in an action arising out of the negligent breach of a contract whereby simple negligence is involved."[17] Id. at 189. The Court has adhered to the Kirksey rule in a number of decisions.[17]

---

17. Butchikas v. Travelers Indemnity Company, 343 So.2d 816 (Fla. 1977), Gilliam v. Stewart, 291 So.2d 593 (Fla. 1974), Herlong Aviation, Inc. v. Johnson, 291 So.2d 603 (Fla. 1974), Clark v. Choctawatchee Electric Co-operative, Inc., 107 So.2d 609 (Fla. 1958), and Crane v. Loftin, 70 So.2d 574 (Fla. 1954). In Champion v. Gray, 420 So.2d 348 (Fla. 5th DCA 1982), the Fifth District suggested that Florida should under some circumstances allow recovery for the physical consequences resulting from mental or emotional stress caused by a defendant's negligence in the absence of physical impact. This Court has accepted that case for review in Case No. 62,830. Even if the Court were to adopt this very liberal rule, the plaintiff in the instant action should not have been permitted to recover because he showed no physical consequences of the emotional distress. The physical consequence of the mental distress in Champion was death. Numerous recent cases have certified to the Court the question of whether the a plaintiff may recover for mental anguish absent physical impact. American Federation of Government Employees v. DeGrio, ___ So.2d ___, 9 Fla.L.W. 1583 (3rd DCA 1984); Doyle v. The Pillsbury Co., ____ So.2d ____, 9 Fla.L.W. 763, pet. for rev. granted, Case No. 65,249; Cadillac Motor Car Division, General Motors Corp. v. Brown, 428 So.2d 301 (Fla. 3rd DCA 1983), pet. for rev. granted, Case No. 63,583; Campos v. Demetree, 438 So.2d 1033 (Fla. 5th DCA 1983), pet. for rev. granted, Case No. 64,529. In all of those cases which advocate recognition of negligent inflicition of mental distress, the distress has manifested itself in some

(Footnote 17 continued on next page)

3. Even Under the Standards Governing Intentional Infliction of Mental Distress the Recovery in this Case is Foreclosed

The plaintiff's theory which was accepted by the trial court and by the district court of appeal was that The Herald could be held liable for the mental distress inflicted by its negligent behavior. As shown by subpoint 2 above, this theory is directly contrary to this Court's prior holdings. Even, however, if the plaintiff had been able to show that The Herald had intentionally inflicted mental distress upon the plaintiff, the plaintiff should not have been permitted to recover damages. This point is made to demonstrate the truly radical nature of the Third District's holding.

Language in Kirksey and the Court's subsequent opinions in Slocum v. Food Fair Stores of Florida, 100 So.2d 396 (Fla. 1958); LaPorte v. Associated Independents, Inc., 163 So.2d 267 (Fla. 1964), and Gilliam v. Stewart, 291 So.2d 593 (Fla. 1973), has inspired debate among the district courts of appeal

---

(Footnote 17 continued from previous page)

egregious way or the plaintiff has been in a clear "zone of danger." None of the decisions has suggested that damage for mental distress should be recoverable under a simple negligence theory when the plaintiff has simply been angered as is the case in the instant action. Most jurisdictions have held that simple negligence never can provide a basis of liability where the resulting injury is solely mental or emotional distress. See generally 38 Am Jur 2d Fright, Shock, and Mental Disturbance §1 (1968). Absent outrageous conduct, physical impact or the existence of some concomitant tort, courts have denied damages for emotional distress alone because of evidentiary problems. Courts have reasoned that there is no duty to exercise care to avoid emotional distress. See Restatement (Second) Torts §436A (1965).

regarding whether an independent tort for intentional infliction of emotional distress is cognizable in Florida.[18]

---

18. The First District held in Ford Motor Credit Co. v. Sheehan, 373 So.2d 956 (Fla. 1st DCA 1979)(false representation that children had been injured), cert. dismissed, 379 So.2d 204 (Fla. 1979), that there is an independent cause of action in Florida for intentional infliction of severe mental distress when the conduct alleged is "so outrageous in character, and so extreme in degree, as to go beyond all bounds of decency." The Second District held in Gmuer v. Garner, 426 So.2d 972 (Fla. 2d DCA 1982)(allegation that defendant fired plaintiff when she refused sexual propositions), pet. for rev. granted, , that no such cause of action exists in Florida. The Third District originally held in Gellert v. Eastern Air Lines, Inc., 370 So.2d 802 (Fla. 3rd DCA 1979)(allegation that employee was paranoid), cert. denied, 381 So.2d 766 (Fla. 1980), that such an independent cause of action does not exist. That court then receded from that holding in Dominguez v. Equitable Life Assurance Society, 438 So.2d 58 (Fla. 3rd DCA 1983) (insurance company's misrepresentations to disabled policy owner), pet. for rev. granted, Case No. 64,533, recognizing an independent tort it denominated "outrageous conduct causing severe emotional distress." The elements of the tort, the Court held are:

> (1) The wrongdoer's conduct was intentional or reckless, that is, he intended his behavior when he knew or should have known that emotional distress would likely result;
>
> (2) The conduct was outrageous, that is, as to go beyond all bounds of decency, and to be regarded as odious and utterly intolerable in a civilized community;
>
> (3) The conduct caused the emotional distress; and
>
> (4) The emotional distress was severe.

The Fourth District recognized an independent tort for intentional infliction of severe mental distress in Metropolitan Life Insurance Co. v. McCarson, 429 So.2d 1287 (Fla. 4th DCA 1983)(insurance company's refusal to pay for medical care), pet. for rev. granted, Case No. 63,739. The Fifth District refused to recognize such an independent tort in Boyles v. Mid-Florida Television Corp., 431 So.2d 627 (Fla. 5th DCA 1983)(allegation that the plaintiff taunted clients at a state institution for retarded persons), pet. for rev. granted, Case No. 63,753 Habelow v. Travelers Insurance Co., 389 So.2d 218 (Fla. 5th DCA 1980), and Food Fair, Inc. v. Anderson, 382 So.2d 150 (Fla. 5th DCA 1980)(coercion of an employee to admit theft).

All of the decisions recognizing the independent tort, insist that the conduct which gives rise to the action must be intentional, rather than negligent, and of an extremely outrageous nature.[19] Two of the cases in which recovery of damages has been held permissible illustrate the extreme nature of the outrageousness requirement Ford Motor Co. v. Sheehan, supra, involved a debt collector who, in seeking to locate the plaintiff to repossess his car, called the plaintiff's mother and told her that he needed to get in touch with the plaintiff because his children, her grandchildren, had been seriously injured in an accident. In Korbin v. Berlin, 177 So.2d 551 (Fla. 3rd DCA 1965), the defendant falsely said to a six year old girl, "Do you know your mother took a man away from his wife?

---

19. Some of the cases which have found the conduct at issue to be nonactionable are particularly illustrative of the outrageousness requirement. In Dowling v. Blue Cross of Florida, Inc., 338 So.2d 88 (Fla. 1st DCA 1976), it was alleged that the defendant had dismissed the two female plaintiffs from employment on a false accusation that they had sexual relations with one another in the defendant's building, that the accusations were made without benefit of an investigation that would have revealed that no such act had taken place; that as a result the plaintiffs were caused severe emotional distress. The First District upheld dismissal of the suit finding the allegations lacked sufficient outrageousness. In Lay v. Roux Laboratories, Inc., 379 So.2d 451 (Fla. 1st DCA 1980), a plaintiff sought recovery alleging that the defendant, in an argument over a parking space, threatened her with the loss of her job, using humiliating language, vicious verbal attack, and racial epithets. Id. at 452. Dismissal again was upheld by the First District because this conduct was deemed not sufficiently outrageous. See also Food Fair v. Anderson, 382 So.2d 150 (Fla. 5th DCA 1980)(involving the discharge of an employee who was coerced into falsely admitting thefts and then was discharged for committing thefts).

Do you know God is going to punish them? Do you know a man is sleeping in your mother's room?" Id. at 552.

The conduct of The Miami Herald upon which the instant action is based does not even approach the level of outrageousness which has been required by those district courts recognizing the independent tort. The Miami Herald published a news article about a large corporation's efforts to take over a small business. In the course of the article, The Herald mentioned Robert Frank's handling of a bankruptcy matter. The article reported that Frank had missed a filing deadline, but that the court had then extended the deadline. The article reported that a malpractice action had been filed against Frank, but that the jury had returned a verdict in Frank's favor. Frank claims no damage to reputation, but insists that he was "embarrassed" by the article and suffered mental distress. The action is indistiguishable from the actions described above except that it involves no allegations of outrageous conduct on the part of The Miami Herald.[20]

Ironically, the same district courts of appeal which have developed numerous hurdles to insure that plaintiffs could not flood the courts with baseless claims for mental distress,

---

20. When Frank's action against The Miami Herald was first filed it could have been characterized as an action for defamation rather than an action for tortious infliction of emotional distress only because it is based upon the publication of information which is capable of defamatory meaning. When Frank waived all claims for damage to reputation, the action lost its character as a defamation action and became a mere claim for negligent infliction of emotional distress.

have had no difficulty imposing liability on media defendants for the emotional distress caused by their negligent speech which did not do damage to reputation. See Miami Herald Publishing Co. v. Ane, 423 So.2d 376 (Fla. 3rd DCA 1982), pet. for rev. granted, Case No. 63,114; Tribune Co. v. Levin, 426 So.2d 45 (Fla. 2d DCA 1982), pet. for rev. granted, Case No. 63,217; cf. Nodar v. Galbreath, 429 So.2d 715 (Fla. 4th DCA 1983)(permitting recovery for mental distress on strict liability theory), pet. for rev. granted, Case No. 63,724. None of the various district court of appeal decisions regarding defamation which are before the Court for review have even suggested that a plaintiff who bases his defamation claim merely on mental distress should face the same rigors as the plaintiff who styles his action one for intentional infliction of emotional distress. The comparison of infliction of emotional distress cases with this case reveals a gross inconsistency in Florida law which should be corrected by the Court.

Under the holdings of the district courts of appeal, defamation plaintiffs may recover for claimed emotional distress upon the naked showing that the defendant engaged in negligent speech. Under the holdings of those same district courts, if an action is characterized as an action for infliction of emotional distress, a plaintiff may not recover compensatory damages without proving either some physical impact or that the defendant engaged in conduct that was so outrageous as to be intolerable to civilized society. Remarkably, these holdings give far less protection to good faith efforts to report news --

conduct which has been recognized as of fundamental importance in a democracy -- than to bad faith, self-interested commercial activity. Thus, the newspaper which negligently publishes an article causing mental anguish is held liable for that damage, while a bill collector who intentionally conveys a shocking story to a debtor in an effort to collect on an overdue statement may escape liability for the mental anguish he causes because there is no physical impact and he has not engaged in conduct intolerable to civilized society.

This result simply makes no sense.

C. Recognition of Defamation Actions Absent Injury to Reputation Allows Juries to Presume Damages in Derogation of Controlling Constitutional Principles.

Allowing a libel plaintiff to prevail upon the mere showing of mental anguish is essentially a return to the theory of presumed damages for defamation which was rejected by the United States Supreme Court in Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974).[21] Justice White, dissenting in Gertz interpreted the majority's opinion as "requiring the plaintiff in each and every defamation action to prove not only the defendant's culpability beyond the act of publishing defamatory material but also actual damage to reputation resulting from the publication." 418 U.S. at 370.

---

21. The majority held actual injury can not be presumed from the fact of publication in a defamation suit. Actual injury must be proven "by competent evidence." 418 U.S. at 350.

With the elimination of a requirement for damage to reputation, the Court will return defamation actions to the "largely uncontrolled discretion of juries to award damages where there is no loss," 418 U.S. at 349, which Gertz had eliminated. Every libel plaintiff who finds a news article or television broadcast objectionable will be able to recruit friends and relatives to testify about the severe emotional distress he has suffered. Juries will have no information from which to determine the monetary value of the injury. The Supreme Court warned in Gertz that permitting juries such power "unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms. Additionally, the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact." 418 U.S. at 349.

Defamation plaintiffs in Florida today take the witness stand and claim that they were distressed when they read the defendant's publication. Their families appear in court and confirm that the daily news has caused great anguish to the plaintiff and disrupted their lives. This is not evidence of actual injury on which substantial jury verdicts should be allowed to stand. Limiting defamation recoveries to awards based on actual proof of damage to reputation is essential to the unwarranted "chill" on free speech caused by unsupported damage awards. See D. Anderson, supra at 472-73; J. Eaton, supra at 1436-37.

In this country, the daily news more likely than not will be greatly distressing to many individuals. Many will disagree with the way they are portrayed in the media. Legal actions, unsupported by any evidence of loss of reputation, are not the way that this Court should encourage the venting of that disagreement. There is a "profound national commitment" to "uninhibited, robust, and wide-open debate," New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964), not to unlimited and groundless litigation.

CONCLUSION

The opinion of the Third District Court of Appeal should be quashed and entry of judgment for The Miami Herald Publishing Company should be directed.

Respectfully submitted,

Of Counsel

Talbot D'Alemberte
Tallahassee, Florida

STEEL HECTOR & DAVIS
Attorneys for the Amici Curiae

By _____
Donald M. Middlebrooks
Thomas R. Julin
1400 Southeast Bank Bldg.
Miami, Florida 33131
(305) 577-2810

CERTIFICATE OF SERVICE

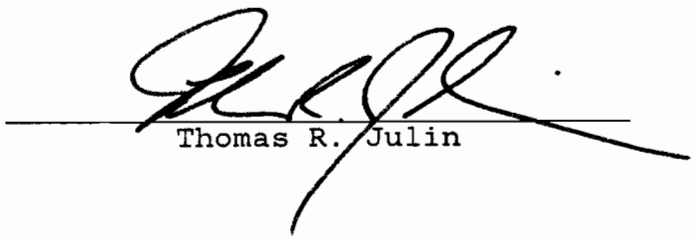
I hereby certify that a true and correct copy of this brief was mailed August 1, 1984, to:

Parker D. Thomson
Sanford Bohrer
1300 Southeast Bank Building
Miami, Florida 33131

Richard J. Ovelmen
General Counsel
The Miami Herald Publishing Company
One Herald Plaza
Miami, Florida 33101

Floyd, Pearson, Richman, Greer
and Weil, P.A.
25th Floor
One Biscayne Tower
Miami, Florida 33131

Lawrence B. Craig
116 West Flagler Street
Miami, Florida 33131



Thomas R. Julin

ACKNOWLEDGMENT

This brief was prepared with the assistance of Anne S. Mason, a summer associate at Steel Hector & Davis.