IN THE SUPREME COURT OF FLORIDA

Case No. 64,904

THE MIAMI HERALD PUBLISHING COMPANY, a division of Knight-Ridder Newspapers, Inc.,
Petitioner,

vs.

ROBERT R. FRANK,
Respondent.

Discretionary Review of a Decision of the Third District Court of Appeal of Florida

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ANSWER BRIEF OF RESPONDENT ROBERT R. FRANK

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INTRODUCTION

Several cases involving the identical issue presented by The Miami Herald Publishing Company (Herald) sub judice are presently pending before this Court and were argued on January 10, 1984. Miami Herald Publishing Co. v. Ane, Case No. 63,114 and Tribune Co. v. Levin, Case No. 63,217. The major distinction is that this is the first case tried to a jury under the negligence test applicable to private persons as distinguished from "public" figures or officers on the basis of the Florida precedent in Ane formulated in reliance on Gertz v. Welch, 418 U.S. 323 at 338 41 L.Ed. 2d 789, 94 S. Ct. 2997, 3006 (1972) expressly receding from Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed. 2d 296 (1971) and Time, Inc. v. Firestone, 424 U.S. 448, 47 L.Ed. 2d 154 96 S.Ct. 958 (1976). In both Gertz and Firestone the United States Supreme Court specifically rejected the use of the subject matter classification of "public or general interest" to determine the extent of constitutional protection afforded defamatory falsehoods. 418 U.S. at 344-346, 94 S.Ct. at 3009-3010; 424 U.S. at 456-457, 96 S.Ct. at 966-967.

The Herald now asks this Court to return to the Rosenbloom standard and eschew Gertz and Firestone, and recede from the obvious holding by this Court in Firestone v. Time, Inc., 305 So. 2d 172 (Fla. 1974) that as far as private persons

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[1] Respondent employs the same symbols utilized by the Herald adding PB to designate the Herald's initial brief on the merits, RA for Respondent's Appendix, HIB for Herald's Initial Brief before the Third District Court of Appeal. **All emphasis is ours unless otherwise indicated.**

are concerned the test to be applied is "journalistic negligence."[2] To assay the propriety of the decisions below, we recognize the Court's need to reexamine the evidence to determine whether respondent Robert Frank (Frank), an attorney and a private person, met his burdens of proving falsity and fault (negligence) by sufficient competent evidence to pass constitutional muster. Unfortunately, the Herald's "Statement of the Facts" is so deceptively slanted and argumentative Frank finds it necessary to restate the facts.

STATEMENT OF THE FACTS IN EVIDENCE

In 1969 Frank began to represent Pac-Craft, a corporation owned by David Balter, in reorganization proceedings seeking to keep the financially imperiled company alive (T. 774). Initially Balter procured loans from banks which enabled him to continue operating Pac-Craft. These loans were repaid. However, by August, 1969, Pac-Craft again found itself in desperate need of cash to fund a final plan of reorganization in order to survive. Frank successfully obtained the approval of the Bankruptcy Court and various creditors to a "plan of arrangement" whereby Balter could "reorganize" the company by borrowing $213,000 with which to pay off the creditors, (of which the Ethyl Corporation was the largest) so that Balter could be discharged from the reorganization proceeding and continue

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[2] Judge Hubbard, in Ane, citing to the majority view adopted in twenty-five states strongly made the point:

> The prevailing First Amendment and Florida law, as discussed above, is supported by the overwhelming weight of authority in the country on this subject which has followed a Gertz-Firestone standard of negligence in defamation actions where the plaintiff is neither a public official nor a public figure.

[425 So.2d at 385 and f.n. 3 at 386]

operating Pac-Craft (T. 775). Finally Balter put together a financing proposal consisting of $170,000 from a private investor, Peter Wolf, and $43,000 from a Hialeah bank. (Def. Ex. HH).

Balter obtained the $170,000 and deposited it with the court-appointed monitor with the understanding that Wolf's check for $100,000 would not be deposited until the monitor received the balance necessary ($43,000) to fund the plan. (Def. Ex. HH). Balter did not receive the $43,000 loan from the Hialeah bank. As a result the plan of arrangement was never funded, the $100,000 check plus the $70,000 were returned to Wolf, and Pac-Craft was forced into bankruptcy (T. 179-180).

After Pac-Craft failed, Balter sued just about everybody who had been involved in keeping the company afloat. Balter sued the Bank for refusing to make the loan (Pl. Ex. 7). He sued the private lenders for interfering with the bank loan and for fraud, breach of contract, and other miscellaneous torts. (Id.) Claiming that the bank loan did not go through because of Frank's failure to timely or properly prepare the necessary documents, Balter also sued Frank for legal malpractice. (Id.)

The entire case was tried before a jury. The trial court directed a verdict in favor of the Bank because Balter presented no evidence that the Bank was committed to make the loan necessary to fund the plan. (T. 839). The claim against Frank was determined by jury verdict. The jury was instructed:

> If you find that Robert Frank was instructed or given the duty to prepare papers and legal forms sufficient to obtain the loan from the bank and that he failed to do so, and that his failure to do so was a legal cause of the failure to obtain the loan, then you must find for Mr. Balter and against Robert Frank.
>
> If, however, on the other side of the coin as to this claim, the greater weight of the evidence does

not support the claim of Mr. Balter, you must find for Robert Frank.

(Pl. Ex. 8).

Upon this instruction, the jury found Frank not guilty of malpractice and returned a verdict against the Ethyl Corporation, Peter Wolf and John Scussel for $1,000,000. (Pl. Ex. 9). The judgments in favor of Frank and the Bank were affirmed on appeal. Balter v. Pan American Bank, 383 So. 2d 256 (Fla. 3d DCA 1980); Balter v. Frank, 386 So. 2d 1227 (Fla. 3d DCA 1980). (T. 1175-6). The verdict against the Ethyl Corporation was reversed. Balter v. Ethyl Corp., 386 So. 2d 1226 (Fla. 3d DCA 1980) and the judgment against Scussel and Wolf was affirmed. Scussel v. Balter, 386 So. 2d 1227 (Fla. Oct. 1980).

At the time of the verdict, The Miami Herald published a small news article about the trial. In its original factual reporting of the trial, the Herald did not consider the Frank-malpractice part of the case significant enough to even mention it. (Pl. Ex. 14). Tropic Magazine writer Michael Putney read the article and he visualized a "David and Goliath" story. He set out to write a story about how little guy David Balter was victimized and had his company taken away from him by the big bad guys —who were all the Defendants in his lawsuit. (T. 387). This article carrying out Putney's "David and Goliath" theme was published in the Herald's May 21, 1978 issue of Tropic Magazine about 6 weeks after the trial. In the course of telling the story of how Balter lost his company, Putney significantly and pejoratively involved Bob Frank. Without contacting Frank[3] and acting on biased and admittedly one-sided information (T. 244, 389), Putney chose to blame Frank for the bankruptcy of Pac-Craft. On page 11 of the article Putney wrote:

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[3] Although Frank continuously lived and practiced law in Dade County during the time Putney was researching the article and thereafter, Putney never even met Frank until the start of this litigation. (T. 216).

> On the advice of his accountant, Balter hired Miami Beach lawyer Robert Frank to file for reorganization in Federal bankruptcy court. It was a decision Balter was to rue. "Nobody would have been in court if he had done his job," says Balter, who sued Frank for malpractice at the same time he sued [the other Defendants]. The jury, however found Frank not guilty.

(Pl. Ex. 1; A. 1.)

The libelous part of the article appeared on page 15 where the very acts which Frank had been found not guilty of were recited as absolute facts. That portion of the article said:[4]

> When the creditors' committee accepted Balter's plan, he was given until 5 p.m. on August 6, 1969 to submit the $43,000 which was his part of the plan. David Hughes, the court monitor, already held two of Wolf's checks for $170,000, including one for $100,000 that he had never deposited. When Balter failed to meet the deadline, Wolf asked for his check back and, the next day, the Court returned it to him.
>
> **Balter missed the deadline because his attorney, Frank, failed to draw up the necessary loan document before the close of the business day. Frank also failed to get the clerk of the court's seal on it so that when Balter finally arrived at the [Hialeah bank] on the evening of Aug. 6, a bank officer who had verbally agreed to loan Balter as much as $50,000 refused to go through with the deal.** By the time Balter had obtained the clerk's seal the next day, Wolf had retrieved his $100,000 check and the bank refused again to make the loan.

The article thus clearly blamed Frank for the failure of the plan of arrangement — something the jury had refused to do; and something the true facts did not support.

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[4](Pl. Ex. 1) A. p.8; (emphasis supplied). Although Frank's complaint alleged that the statements on page 11 were libelous as well, at trial Frank concentrated on those on page 15, abandoning those on page 11.

Frank requested the Herald to retract the statements about him. (Pl. Ex. 12.) Stating that the statements were based on "uncontradicted" trial testimony, the Herald refused. (Pl. Ex. 11.)

Frank then brought this action against the Herald for libel.

STATEMENT OF THE CASE

It is not disputed that Frank is a private figure for the purpose of determining the applicable standard of liability. On the authority of the Ane decision, the parties tried the case on the basis that Frank had to prove falsity and negligence to recover compensatory damages but that he could not recover punitive damages unless he proved actual malice. Because the Ane case was pending before this Court on certification, before the Third District Court of Appeal the Herald made clear that it was reserving its objections to the negligence standard for argument before this court[5]

The defamatory nature of the statement about Frank — that his client lost his company due to Frank's failure to adequately perform his professional duties — is self-evident. So at trial Frank concentrated on proving that the statements were not true (i.e., that Frank did all he was supposed to do and that Balter missed the deadline for other reasons) and that the Herald acted at least negligently in publishing the untrue statements. The evidence presented on each of these issues will be discussed below.

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[5]Below, the Herald merely asserted that it disagreed with Ane; that negligence should never be the test for liability in libel suits because it destroyed the First Amendment guaranties of "free speech" and that the only appropriate standard is actual malice, citing the pre-Gertz, pre-Firestone, pre-Bose case of Time, Inc. v. Hill, 385 U.S. 374, 389 (1967). (HIB 29-31) This is the Herald's paramount point on appeal and we shall respond thereto at the appropriate place. p.22, infra.

The Falsity of the Statements

The language on page 15 of the article falsely states that Balter missed the deadline and was unable to fund the plan of arrangement because:

> (1) Frank failed to draw up the necessary loan document before the close of the business day on August 6; and
>
> (2) The bank refused to make the loan because Frank had failed to get the clerk of the court's seal on the loan document before it was presented to the bank.

The "loan document" referred to in the article was a court order authorizing the issuance of a certificate of indebtedness and an attached certificate of indebtedness. (T. 157) The court actually signed the order with attached certificate on August 6 and it was stamped "filed" with the court on that date. (Pl. Ex. 4). There is no doubt that the "loan documents" — as Putney called them —were prepared by Frank and filed with the Court before 5 p.m. on August 6, the business day referred to in the article. (T. 812). And they were obviously in correct form since they were identical to those used for earlier loans. (T. 167-169; Pl. Ex. 2, 3, 4).

In the face of this hard evidence, at trial, the Herald seemed to switch positions and argue that the article meant to say that Balter missed the deadline because the documents were not prepared on August 5. That, of course, is not what the article said. The article clearly identifies August 6th as the deadline. The reason the Herald tried so desperately at trial to change the date is that the court had told Frank and other attorneys present to prepare the documents by the end of the day of August 5. Frank admits not preparing the document on August 5 but it was clear that the failure to complete the documents on August 5 had absolutely nothing to do with Balter missing the deadline. This is underscored by

the fact that the court accepted and signed the documents on August 6. (Pl. Ex. 4).

Moreover, the Bank's loan committee did not even meet to approve the Pac-Craft loan until the afternoon of August 6. (Pl. Ex. 6). When the Bank did approve the loan three impossible conditions were placed on it. (Pl. Ex. 6; A. 9; T. 176, 177, 182-183, 348, 349).[6] First, the Bank required the signature of the court monitor but this was not authorized by any rule or court order. T. 163, 176-177, 348, 819). The Bankruptcy Judge testified in the Balter case that he would not have allowed this. (T. 294). The next requirement was that the company's other loans be subordinated to the Bank's. This was not possible because the permission of the other lenders was never obtained. (T. 176-177, 820). Finally, the Bank conditioned its commitment upon the requirement that the company's operations remain under the jurisdiction of the court until the loan was fully repaid. The very

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[6]The August 19, 1969 letter from Manufacturers National Bank stated (Pl. Ex. 6):

> Dear Mr. Balter:
>
> At its regular meeting on the afternoon of August 6, 1969, our Loan Committee approved a sixty (60) day loan of forty thousand and 00/100 dollars ($40,000.00) to Pac-Craft Corporation, Debtor in Possession. Included in our requirements for this advance were:
>
> 1) The loan would be evidenced by a Certificate of Indetedness issued by Pac-Craft Corporation, Debtor in Possession, and signed by you, as President, and David Hughes in his capacity as designated by the Bankruptcy Court, which Certificate would be supported by a certified copy of the Court Order authorizing its issuance.
>
> 2) The stockholders/investors loans to the company, approximately $200,000.00, would be subordinated to our advance.

purpose of obtaining the loan was to fund the plan that would end the court's involvement. (T. 177, 820). This third condition was legally impossible.[7]

In short, there was more than substantial competent evidence in the record upon which reasonable men — be it a trial judge, jurors or appellate judges -- could find that the missing of the deadline had nothing at all to do with the preparation of the loan documents. Balter could not have met the Bank's requirements on August 6 —nor at any time. That is why he did not get the money on August 6; that is why he missed the deadline for funding the plan; and that is why he lost his company.

For the same reasons, the second statement of fact was shown to be false. The article says that the bank refused to go through with the loan on August 6 because Frank had failed to get the clerk of the court's seal on the "loan documents." Obviously, the reasons that the bank did not make the loan on August 6 were that:

Footnote 6 (continued)

> 3) The company's operations would remain under the jurisdiction of the Court through Mr. David Hughes, the Court's Representative, until our advance had been repaid in full.
>
> Subsequent to this approval, we have been notified of changes in the company's status which necessitates our withdrawal of this commitment and any new credit request will be conditioned upon the company's present status and a new application.
>
> Sincerely yours,

[7] Before the Third District Court, the Herald for the first time cited Collier on Bankruptcy for the proposition that continued jurisdiction was not impossible. (HIB 9-10). The Herald persists in this irrelevant argument before this Court. (PB. 35, fn. 8) Neither this authority nor any other to the same effect was presented at trial. But more important, the Bankruptcy Judge stated he would not allow the Court Monitor to sign the certificates. (T. 294).

- the loan committee did not even meet until that afternoon;
- the conditions of Hughes' signing and continued court jurisdiction were impossible;
- the other lenders had not agreed to the subordination requirements.

Furthermore, there was testimony that the clerk of the Bankruptcy Court had no seal. (T. 182, 349). So the "court seal" referred to by Putney was non-existent. Additionally, there was other evidence presented that threw the whole "court seal" issue into question. Balter had originally claimed that the bank wanted a "corporate" seal and that Frank had failed to supply that. (Pl. Ex. 7)

All of this evidence proves that Frank met his burden of proving that the statements on page 15 of the article were false.

The Negligence of the Herald

Likewise, there is substantial evidence in this record to establish that the Herald was, at the very least, negligent in publishing the statements about Frank.

Putney's procedure in writing this article was exactly what his editors testified was bad practice (T. 589, 596). Putney started his research on the article with an "angle." He saw Balter as "David," a little guy who's company was lost due to the acts of "Goliath" — the Defendants in the Balter lawsuit. (T. 387). Even though he knew that Balter was biased against Frank and "not through with Frank yet" (T. 244, 310, 315), Putney talked only to Balter and Balter's attorney, Guy Bailey, but never talked to Bob Frank to learn his side of the story. Nor did Putney ever contact Frank's attorney, or the experts who testified at the Balter trial that Frank had done nothing wrong, or the other attorneys involved in the Pac-Craft bankruptcy, or the presiding judge in the Balter case, or the bankruptcy judge. (T. 217, 245, 269, 270, 271, 272, 273, 313-314). In fact, Putney admitted that he

presented only Balter's side of the story in the article. (T. 389). This was to make it fit into the "David and Goliath" theme.

While acknowledging that Frank had been found not guilty by the jury, Putney nevertheless ignored the import of that verdict in writing his story. At trial, Putney admitted that he understood that the jury's finding meant that the jury found that the accusations in the lawsuit were without foundation. (T. 219). He reviewed the Balter jury instructions and was well aware that the accusations the jury rejected (i.e., Frank's failure to properly or timely prepare the documents or get the court seal were the "legal cause of the failure to obtain the loan") were the very accusations that he wrote up as established fact. (T. 214, 218-9, 228, 233, 242-3, 248, 268, 323). Yet Putney proceeded with his story.

Herald Managing Editor John McMullen testified that his paper's standards include accuracy, truthfulness, fairness and good faith. (T. 595). He said that it is against Herald policy to go after a story with a pre-determined angle. (T. 596, 605). Herald reporters are expected to use diligence and care in preparing articles and in getting all sides of their stories and their editors are supposed to check and recheck to see that the stories are substantially correct. (T. 596, 597, 606). McMullen further testified that if facts are contested, both sides should be presented. (T. 596). Dr. Arnold Ismach, a well qualified journalism expert, testified that when accusations are made in an article they should be presented as accusations and attributed to the person making them. (T. 661, 683, 684).

Putney admits that what he wrote about Frank was highly contested at the Balter trial. (T. 246-7, 249, 263, 266, 268, 464). But he certainly did not present both sides. He wrote his own opinion of what happened to Pac-Craft without letting the reader know it was his opinion or that there were conflicting

facts or that the acts described were merely Balter's allegations. (T. 465).

Putney's editors did nothing to "check and recheck" the article's accuracy as McMullen testified was essential. (T. 555-6, 1267, 1285, 1303). They simply relied on Putney's investigation and their judgment of his abilities. Id. They made no independent check of the facts. Id.

Most telling on the negligence issue is the undisputed evidence that Putney violated the Herald's own official publishing standards. Those standards are contained in the "Miami Herald Stylebook"[8] (Pl. Ex. 15) which requires writers to:

> — **Beware of testimony the judge rules out.**
>
> — **Watch out for out of court statements by attorneys involved in a case.**
>
> — **Never depart from the facts; do not draw conclusions.**
>
> — **Remember the newspaper is not acting as a judge. It merely prints the information of which it is positive.**
>
> — **Make no assertions against a person's character or conduct unless ready to supply complete legal evidence.**

(T. 507-510).

Putney and his editors admitted that they did not use the Herald's own written standards on how to avoid libel in preparing this article. (T. 515, 592, 1280, 1305). The article violated each of these standards. Putney admits relying on

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[8] On July 29, 1980, Frank, by interrogatory, asked the Herald if it had any written guidelines or standards for reporting. (T. 380, 494). The answer, signed under oath by Putney, said there were none. (T. 380, 494-5). At trial, as a surprise to Frank, Putney identified the Stylebook and admitted that it contained the Herald's policies on libel, fairness, and accuracy. (T. 379). Frank demanded that it be produced at trial. (T. 380). It was produced and admitted into evidence without objection. (Pl. Ex. 15).

depositions that the Balter judge ruled inadmissible. (T. 507). He talked to Balter's attorney, got his obviously biased side of the story, and did not talk to Frank's attorney about the case. (T. 507). He admittedly departed from the facts and drew his own conclusions. (T. 465, 509). He acted as a judge. (T. 510).[9] And he certainly could not supply **any** evidence — much less **complete** legal evidence, to support the accusations he made against Frank.

Putney did not ever see the trial transcript or the August 19 letter from the bank. (T. 277-278, 509-510). He read selectively from certain depositions and daily copy but did not read testimony of nor contact experts in bankruptcy who testified for Frank at the Balter trial. He was aware that no attorney testified that Frank did anything wrong. He did not read Bankruptcy Judge Houston's testimony. He untruthfully told his editors that the assertions in his article came from uncontradicted trial testimony. (T. 254, 260-3, 265, 272, 326, 305-6, 569, 588). He did not review the court file. (T. 270). He did not review earlier certificates of indebtedness which were identical in form to the one prepared in August. (T. 274,280).

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[9] Reading from the Herald "Stylebook," Putney testified. (T. 510):

> Q. Would you look at number ten, Mr. Putney. Read number ten out loud, would you please?
>
> * * * *
>
> 'Remember the newspaper is not acting in the capacity of judge. It merely carries to the public the information of which it is positive.'
>
> Q. Not acting in the capacity of judge.
> You judged the actions of Robert Frank when you wrote what was on page 15 of this newspaper, didn't you, sir?
>
> A. I did.

Instead of reading the complete file Putney relied only upon a biased version of the story which supported his "angle" and ignored all the rest. In the face of the following red flags or warning signals, Putney wrote that Balter lost his company due to Frank's failures to act:

Red Flag No. 1: Putney knew that the Bank would not make the loan without the signature of court monitor Hughes and that Hughes could not or would not sign. (T. 291-294). He admits that if he had focused on this it might have made a difference in how he wrote the story. (T. 295).

Red Flag No. 2: Putney knew that the Bank and Balter did not ever agree on the terms of the loan. (T. 316).

Red Flag No. 3: Putney knew that Balter changed allegations in mid-stream with regard to whether Frank failed to provide the corporate seal or court seal. (T. 307-310, 312).

Red Flag No. 4: He knew that the Bank was looking for a way to get out of making the loan. (T. 429).

Red Flag No. 5: Putney knew that Balter was "out to get Frank". (T. 244).

Red Flag No. 6: Most importantly, he knew that the Balter's jury conclusion differed from his own.

After reading the Tropic Article, Frank wrote to the Herald asking that the false statements about him be retracted. (Pl. Ex. 12). Herald attorney, Jim Spaniolo forwarded the request to Putney who, exhibiting his irrational and biased state of mind, wrote back to Spaniolo that "Frank is full of it." (Pl. Ex. 13; T. 321). On the basis of this response, Spaniolo refused to retract, saying that the article

was based on uncontradicted trial testimony. (Pl. Ex. 11). It was learned during discovery, and stipulated at trial, that the Balter trial testimony had not even been transcribed when the letter was written and Putney did not attend the trial. (T. 326, 588).

The Herald's standards of accuracy, truthfulness and fairness (T. 382, 595) were certainly not used. Contrary to Herald policy (T. 597), Putney's editors failed to check on his accuracy and truthfulness. (T. 555-7, 566). The principle element of journalistic fairness — the opportunity of the accused to reply — was not provided. (T. 635). Putney ignored the accepted journalistic practice of presenting both sides of a disputed issue. (T. 646-7, 673). He did not even review all the facts available to him but merely selected those that would fit into his pre-determined "David and Goliath" theme. The evidence of failure to use reasonable care and to comply with accepted standards of journalism is overwhelming. There can be no question that the record contains a plethora of evidence of the Herald's negligence.

Miscellaneous Issues

A. The Court's Jury Instruction Regarding the Effect of the Balter Verdict.

Prior to trial, the Herald requested the court to instruct the jury that the verdict in Balter's case against Frank is not evidence of the falsity of the statements which are the subject of this action.[10] (R. 782, 797; T. 19-26). After extensive argument and strenuous objections by Frank (T. 26-29, 54-57) at the start of the case, the court gave a modified version of the requested instruction:

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[10] At page 16 of the Herald's Initial Brief in the appeal (HIB 16), the Herald incorrectly stated that Frank requested the instruction. The record as cited above is clear that the Herald requested it and Frank objected.

> It is undisputed that in a former case a Mr. David Balter sued Robert R. Frank, the Plaintiff in this case, for legal malpractice.
>
> In that case the jury returned a verdict finding Mr. Frank not guilty of legal malpractice.
>
> You are advised that such a verdict in and of itself does not mean that the statements in the article on which the case is based are necessarily false. However, you may consider the verdict, in that case, along with the other evidence in this case in arriving at your verdict in this case.

(T. 125).

The instruction given was not in the form requested by the Herald, but **the Herald did not object to the giving of the instruction** in the form revised by the court. On the other hand, Frank objected to the form of and the giving of the instruction. (T. 27-29, 54, 57). Nowhere in the Herald's Brief before the Third District or before this Court are these facts as to the questioned instruction made clear. (PB 12-13, 39-43).

B. The Court's Ruling that the Balter Jurors Could Not Testify to Explain Their Verdict.

Early in the progress of this litigation the Herald moved for summary judgment on the basis of its truth defense.[11] (R. 302). In support of that defense the Herald filed the affidavit of Shirley H. Smith, the foreperson of the Balter v. Frank jury. (R. 24-25). Mrs. Smith's affidavit stated that the jury, in its deliberations, decided that Frank had failed to prepare appropriate papers and pleadings, that "the case against Frank 'fell through the cracks'," and that the Tropic article was "completely accurate" as to Frank. (R. 24-25). She confirmed this on a later deposition. (R. 315).

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[11] That motion was denied on May 10, 1979. R. 337.

When the Herald subpoenaed all the other jurors from the Balter trial for deposition, it became apparent that an attempt would be made to submit their testimony at trial in support of the truth defense. Frank moved for a protective order. On June 19, 1980 the motion for protective order as to the taking of the depositions was granted. (R. 506-508). At the hearing the court ruled:

> The court will not invade the sanctity of the jury deliberations by allowing depositions to be taken of individual jurors as to what they considered, what they didn't consider in arriving at a verdict in a collateral lawsuit.

(R. 482).

In the week before trial, apparently still intending to offer the jurors' testimony, the Herald learned that one of them, Gladys Todres, would not be in town for the trial. They noticed her deposition. Frank moved to quash the notice and for an order in limine to exclude the jurors' testimony. (R. 738, 1064). The motions were granted. (R. 1071). The Herald filed an emergency petition for certiorari review of the court's order regarding the jurors. The petition was denied. The Miami Herald Publishing Co. v. Frank, Case No. 82-661, (Fla. 3rd DCA), Order entered April 2, 1982.

Faced with an order directly excluding the jurors' testimony, at trial the Herald tried to get in the same evidence by the back door. Putney testified, for the first time, that when Frank requested a retraction, he consulted Henry Smith, juror Shirley Smith's husband.[12] (T. 319-20). Putney said Mr. Smith told him that Mrs. Smith had commented after reading the Tropic article that it

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[12] In earlier testimony, when twice asked what he did in response to the retraction request, Putney had never mentioned this conversation with Mr. Smith. (T. 324, 326).

seemed accurate to her and that Frank probably should have been found guilty but that the jury was tired. (T. 461).[13]

Henry Smith was subsequently called to impeach Putney and testified that he never told Putney anything his wife said about the jury deliberations or the article. (T. 532-535). Shirley Smith was called to confirm the impeachment and she testified that she did not recall her husband making any inquiries of her on Putney's behalf. (T. 1142-43).

On cross examination, however, Mrs. Smith was permitted to testify that she had told her husband that the article was very factual based on the evidence produced at trial. (T. 1143). So through an obviously trumped-up roundabout story, the Herald was successful in getting a Balter juror to "explain" the verdict.

C. The Testimony of Professor Arnold Ismach.

As evidence of accepted standards of practice in the journalism profession, Frank submitted the testimony of Dr. Arnold Ismach. He is Associate Professor at the School of Journalism at the University of Minnesota and has been practicing or teaching journalism since 1951. (T. 615). He belongs to Sigma Delta Chi (the nation's largest journalism organization), the Association for Education & Journalism, United Press Editors Association, Associated Press News Editors Association and other organizations. (T. 616). He has authored several books on journalistic practices (T. 617) and is aware of widely accepted craft practices and norms as well as codes of conduct, ethics codes and codes of responsibility that are

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[13]The court instructed the jury that it could consider this conversation only for the purpose of determining what Putney did after the retraction request and should not consider the substance of the conversation in determining whether the article was true or false. (T. 462).

generally followed. (T. 618). The trial court accepted Dr. Ismach as an obviously qualified expert in the field of journalism.

Dr. Ismach testified that basic principles which run through all the codes include

— devotion to accuracy (T. 619);

— responsibility for fairness or fair play. T. 620.

With regard to the requirement of accuracy, Dr. Ismach testified that reporters are expected to do whatever is necessary to verify the validity of the information they print. (T. 623-624). On the issue of fairness, Dr. Ismach testified that it is a fundamental rule that the subject of negative statements in an article should have an opportunity to respond to accusations made. (T. 635).

In forming his opinion of whether the Tropic article and its author had complied with accepted journalistic standards of practice, Dr. Ismach reviewed the article; the depositions of Putney, Petranek, Chusmire, Spaniolo; the Balter v. Frank jury instructions: and the Balter v. Frank jury verdict. (T. 636, 678, 680).

He was then asked to assume the following facts:

— That the facts stated on page 15 regarding why Balter missed the deadline were highly contested at the Balter v. Frank trial; (T. 636)

— That the Balter jury was instructed that if Frank failed to prepare papers in proper form they should find for Balter; (T. 637)

— That Putney was at all times aware of the not guilty finding; (T. 637)

— That Putney talked to Balter and his attorney - whom he knew were biased - but did not (1) review all of the court records or testimony or evidence; (2) did not check with the other attorneys involved or any bankruptcy expert; (3) did not try to talk to the Pac-Craft Bankruptcy Judge or the Balter v. Frank judge;

(4) did not inquire about expert testimony given on Frank's behalf. T. 637-8.

— That he thereafter wrote what appears on page 15. (T. 638.)

Dr. Ismach, on the basis of the facts assumed and the documents he had reviewed, testified that the article did not meet standards of proper journalistic practice. (T. 644). He stated that the reporter should have verified the truth of what he wrote through the record. (T. 644-5). In a case such as this, when there was a mass of material with conflicting statements and the jury, having received all the material, entered a not guilty verdict, the normal course would be for the reporter to seek out a response from the other side. (T. 646). Ismach said that without question the article should have contained both sides of the issue. (T. 646). That would have been standard procedure. (T. 653). He also stated that rather than making statements of fact about why Balter missed the deadline, Putney should have written that Balter alleged that Frank's acts were the cause of missing the deadline. (T. 661, 669).

Ismach did not purport to be qualified to testify on whether or not the article was true. T. 672. His testimony was limited to the issue of whether or not the article complied with journalistic standards. (T. 664).

At trial, the Herald took the position that it was excused from contacting Frank because Putney had reviewed his trial testimony.[14] Dr. Ismach testified that if the testimony covered an identical issue, it would suffice. (T. 668). But where - as here - Bob Frank denied that Balter missed the deadline because Frank failed to do certain things, Frank should have been given an

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[14] As a matter of fact, the Balter trial transcript had not been transcribed at the time Putney wrote the article. (T. 326, 588).

opportunity to reply, his side of the story should have been told, and the statements should have been attributed as accusations. (T. 673, 682, 684). If something is reported that can be disputed, a source should be presented for it. (T. 683-4). None of this was done.

Upon the foregoing, the jury found in favor of Bob Frank and entered a compensatory damage verdict of $30,000. Frank's claim for punitive damages was rejected. (R. 1075). The Herald appealed.

D. Opinion of the Third District Court of Appeal

The Third District affirmed the jury's award of $30,000 to Frank for compensatory damages. Miami Herald Pub. Co. v. Frank, 442 So. 2d 982 (Fla. 3d DCA 1983), (RA 1). In rejecting the Herald's contentions that there was insufficient evidence to support the jury's findings of falsity and fault, the appellate court inter alia stated:

> We find no merit in appellant's contention. **Our review of the record** reveals the presence of substantial competent evidence from which the jury could have concluded that the statements pertaining to Frank were false and that their publication established the requisite degree of negligence on the part of the Herald. Tribune Co. v. Levin, 426 So. 2d 45 (Fla. 2d DCA 1982); Miami Herald Publishing Co. v. Ane, 423 So. 2d 376 (Fla. 3d DCA 1982). **The record contains evidence** that the loan was denied for reasons unrelated to Frank's actions and that Frank was not contacted by Putney for confirmation prior to the appearance of the article.

Thus the appellate court **expressly** represented that it had indeed "reviewed the record." Yet at least four times the Herald incredibly represents that the Third District "expressly **refused**" or "explicitly **declined**" to conduct on independent appellate review (NB 14, 29, 33, 34) apparently because the Third District did pay some deference to the fact that the record evidence supported the jury verdict.

ARGUMENT

I. THIS CASE DEMONSTRATES THE REASON FOR APPLICATION OF THE NEGLIGENCE RULE FOR LIABILITY INVOLVING MAGAZINE ARTICLES CONCERNING PRIVATE PERSONS.

[Restated to respondent's premise to reflect the facts sub judice] [15]

A. Subject Matter Does Not Determine Liability Rule.

If ever a case proved the correctness of the United States Supreme Court's rejection and recession from the very proposition now again urged and resurrected by the Herald it is this case. The Herald asks this Court to return to the standard of liability established by Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971) which extended the New York Times standard of liability (actual malice) to "all discussion and communication involving matters of public or general concern." Three years later, in Gertz v. Welch, 418 U.S. 323 (1974) the United States Supreme Court, faced with facts clearly analagous to this case, found this extension of the New York Times rigorous standard to private persons regardless of the subject matter of the news article "**unacceptable**". In Miami Herald Publishing Co. v. Ane, supra the Third District Court of Appeal opined: (423 So.2d at 383-384)

> In any event, the United States Supreme Court reversed the Florida Supreme Court for failure to apply, at least, a Gertz standard of negligence liability to the case. Upon remand, the Florida Supreme Court entered an order on the mandate in

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[15] The Herald states its Point I: (PB 14)

> I. This Case Demonstrates The Unworkability Of "Simple Negligence" As The Liability Rule For Libel Suits Involving News Reports Of Real Public Or General Concern.

> which it noted that the United States Supreme Court had made no determination as to whether the defendant, [Time, Inc.] was at fault in publishing the subject defamation, vacated the prior Fourth District Court of Appeal decision in the cause, see 279 So.2d 389, and directed the Fourth District Court of Appeal to vacate the trial court judgment previously entered in the plaintiff's favor "for further proceedings in the trial court not inconsistent with the decision by the Supreme Court of the United States in this matter." Firestone v. Time, Inc., 332 So.2d 68 69 (Fla. 1976). It is, therefore, clear that the ultimate decision of the Florida Supreme Court in this litigation adopted, without discussion, the Gertz-Firestone standard of negligence, and no higher standard, as the controlling law in the case which the trial court was to apply upon remand. This result is in perfect accord with the post-Gertz decisions in Florida previously cited; when Rosenbloom died at the federal level, it died in the Florida courts as well.
>
> In this connection, we have not overlooked the defendant Miami Herald's analysis of Florida defamation cases in which it is urged that Florida has adopted, as a matter of state law, the Rosenbloom reformulation of the New York Times rule which, it concedes, has been repudiated at the federal level. We respectfully disagree with that analysis.

We respectfully urge that this Court place its imprimatur on the well-reasoned and well-written majority opinion of Judge Hubbard in Ane for the reasons set forth in Gertz and Firestone, infra.

In a lengthy opinion, in Gertz, the United States Supreme Court explained the reasons for rejecting Rosenbloom [418 U.S. at 340-343]:

> We begin with the common ground. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust, and wide-open"

debate on public issues. . . . They belong to that category of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." . . .

Although the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless inevitable in free debate. As James Madison pointed out in the Report on the Virginia Resolutions in 1798: "Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press." . . .

The need to avoid self-censorship by the news media is, however, not the only societal value at issue. If it were, this Court would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and indefeasible immunity from liability for defamation. . . . Such a rule would, indeed, obviate the fear that the prospect of civil liability for injurious falsehood might dissuade a timorous press from the effective exercise of First Amendment freedoms. Yet absolute protection for the communications media requires a total sacrifice of the competing value served by the law of defamation.

[3] **The legitmate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood. . . .**

* * * *

Some tension necessarily exists between the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury. . .

In our continuing effort to define the proper accommodation between these competing concerns, we have been especially anxious to assure to the freedoms of speech and press that "breathing space" essential to their fruitful exercise. . . . To that end this Court has extended a measure of strategic protection to defamatory falsehood.

* * * *

> Rather, we believe that the New York Times rule states an accommodation between this concern and the limited state interest present in the context of libel actions brought by public persons. For the reasons stated below, we conclude that the state interest in compensating injury to the reputation of private individuals requires that a different rule should obtain with respect to them.

After considerable further discussion as to why a "private person" should be treated differently than a "public person" regardless of the nature of the matter under discussion, the Court continued at 418 U.S. 345-350:

> For these reasons we conclude that the States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual. The extension of the New York Times test proposed by the Rosenbloom plurality would abridge this legitimate state interest to a degree that we find unacceptable. . . . We doubt the wisdom of committing this task to the conscience of judges. Nor does the Constitution require us to draw so thin a line between the drastic alternatives of the New York Times privilege and the common law of strict liability for defamatory error. The "public or general interest" test for determining the applicability of the New York Times standard to private defamation actions inadequately serves both of the competing values at stake. . . .
>
> 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. This approach provides a more equitable boundary between the competing concerns involved here. It recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, yet shields the press and broadcast media from the rigors of strict liability for defamation.
>
> * * * *
>
> . . . It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless

> disregard for the truth to compensation for actual injury. We need not define "actual injury," as trial courts have wide experience in framing appropriate jury instructions in tort actions. Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humilation, and mental anguish and suffering. Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury.

Several years after Gertz, the United States Supreme Court again visited the issue of what standard of liability is applicable to a private person who claims to have been libeled as a result of false statements in a news report of judicial proceedings. Time, Inc. v. Firestone. 424 U.S. 448 (1976). That highest Court reaffirmed the Gertz rationale at 455-456:

> For similar reasons we likewise reject petitioner's claim for automatic extension of the New York Times privilege to all reports of judicial proceedings. It is argued that information concerning proceedings in our Nation's courts may have such importance to all citizens as to justify extending special First Amendment protection to the press when reporting on such events. We have recently accepted a significantly more confined version of this argument by holding that the Constitution precludes States from imposing civil liability based upon the publication of truthful information contained in official court records open to public inspection. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975).
>
> [6,7] Petitioner would have us extend the reasoning of Cox Broadcasting to safeguard even inaccurate and false statements, at least where "actual malice" has not been established. But its argument proves too much. It may be that all reports of judicial proceedings contain some informational value implicating the First Amendment, but recognizing this is little different

> from labeling all judicial proceedings matters of "public or general interest," as that phrase was used by the plurality in Rosenbloom. Whatever their general validity, use of such subject-matter classifications to determine the extent of constitutional protection afforded defamatory falsehoods may too often result in an improper balance between the competing interests in this area. It was our recognition and rejection of this weakness in the Rosenbloom test which led us in Gertz to eschew a subject-matter test for one focusing upon the character of the defamation plaintiff. See 418 U.S., at 344-346, 94 S.Ct., at 3009-3010.

Contrary to the Herald's position, the proceedings in this case dramatically illustrate why the negligence standard best protects the competing interests to be served — society's interest in protecting private individuals vs. freedom of speech and press. **First,** the complained of magazine article was not "on the spot news" requiring speed and instant decisions — it was an article appearing in a weekly magazine that did **not** report current news like Time or Newsweek. The lengthy story was written over a five to six week period and began with a predetermined angle or bias — "David slays Goliath". The Tropic feature story was not in a true sense "newsgathering" that had to be rushed to press. Indeed, Frank was not even mentioned in the original "news" story about the trial. Since Frank was found "not guilty" of being the "legal cause of [Balter's] failure to obtain the loan" in the jury trial that was the subject of the story, the Herald's reporter was plainly on notice to carefully investigate Balter's vituperation against Frank by contacting at least one person connected with Frank's side of the case. Instead, Putney elected to "judge" Frank from bits and pieces of discovery material furnished to him by Balter's frankly biased attorney, some of which was not even admissible in evidence. (E.g., Def. Ex. BB).

Second, the Herald's contention that the stale story enjoyed the New York Times privilege because it was a matter of "real public or general concern" because it "highlighted the predatory practices of a large Fortune 500 corporation and its effects on a successful local business" (PB 15) is less than credible.[16] As Judge Hubbard pointed out in footnote 5 of Ane, 423 So.2d at 387:

> Counsel for the Miami Herald, with characteristic candor and accuracy, conceded at oral argument in this cause that precious little which appears in the daily newspaper is not a matter of public or general concern. As such, all agree that the Rosenbloom rule effectively precludes a non-public person from recovering in most cases for defamatory falsehoods appearing in the daily press when such falsehoods are negligently uttered without due care as to their truth or falsity.

B. The Herald Negligently Gathered And Reported The False "Facts" Concerning Frank.

Attempting to prove the truth of its accusation that Balter's loss of his company resulted from the fact that Balter missed the deadline because of Frank's failure to draw up the necessary loan documents and obtain the clerk's court seal, the Herald lists the 12 things Putney did in researching the article over a five week period not including his interviews with Balter, Balter's attorney and the attorneys for all other defendants. It is not only what Putney did but what he **failed to do** that made him and the Herald guilty of journalistic negligence. Putney failed to comply with the reasonable standards of care in publishing the article as those

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[16] Most ironically, the Herald's (Putney's) "judgment" that the "predatory practices" of the Ethyl Corporation caused Balter's troubles was also less than sound or reasonable. In Ethyl Corp. v. Frank, 386 So.2d 1220 (Fla. 3rd DCA 1980) the Third District Court of Appeal absolved Ethyl of any fault whatsoever, and inter alia stated that "Ethyl was, as a matter of law, privileged to act as it did throughout the entire course of events involved in this case "and furthermore, Ethyl did nothing improper or unlawful in its activities undertaken to safeguard its own financial interests. 386 So.2d at 1225.

standards were enunciated in the Herald's own "Stylebook (Pl. Ex. 15). Putney's conduct fell short of acceptable journalistic standards in the following regards:

- He started the story with a definite, preconceived "David and Goliath" portrayal.

- He based the article on testimony ruled out by the court in Balter v. Frank.

- He relied on conversations with attorneys and parties he knew to be biased and did not seek information from the other side.

- He examined 190 exhibits in the Balter trial but did not see the all important August 19th letter (T. 277,278, 510, Px. 6, p.8, supra.).

- He departed from pure fact and drew conclusions from the very complex evidence before him. (T. 465)

- He acted as a judge. (T. 501).

- He made assertions against Frank's practice of his profession but did not have evidence to back them up.

- He knew that attorneys had testified in the Balter trial that Frank had done nothing wrong but he did not contact Frank's attorney or any of his witnesses. (T. 262)

- He ignored the fact that the Bank could not - as a practical matter - have loaned the money on August 6.

- He ignored the fact that the bank and Balter had never really finalized their deal and that the bank was looking for a way to get out of making a loan.

- He ignored the inconsistencies in Balter's allegations with regard to which seal would have been necessary.

- He ignored the principal element of journalistic fairness and did not give Frank an opportunity to reply to the charges he made.

- He did not present both sides of the issue.

- He did not inform the reader that his conclusions about Frank were his conclusions or that they were allegations made by another.

- He admits he didn't have all the facts in the case because he didn't read Bankruptcy Judge Houston's testimony or contact Houston. (T. 306)

- He did not go to the Courthouse to review the court file in the Balter trial. (T. 270)

- He did not examine the Bankruptcy Court file. (T. 270)

C. Frank Has Demonstrated That The Herald's Conduct Showed Lack Of Reasonable Care Resulting In The Publication Of False Statements.

[In response the Herald's point 1.B (B. 19)] [17]

In its brief the Herald unsuccessfully "stands on its head" trying to prove the truth of the statements that Frank's failure to timely present the necessary loan documents and obtain the court's seal thereon were the reasons "Balter misssed the deadline" resulting in the Bank's refusal to go through with the loan thereby causing Balter to lose his company. Twice in its Brief the Herald falsely states as bald facts (PB 11, 24 (iv): "Had the required seal appeared on the documents, Boyd's uncontradicted testimony confirms that the bank would have loaned Balter the $43,000 he needed for the plan of arrangement on August 6. (Def. Ex. BB at 18-19)." Boyd stated no such thing.

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[17] The Herald frames Point I.B (PB. 19):

> B. Frank Has Never Shown How Any Of The Herald's conduct Showed a Lack of Reasonable Care Or Caused The Alleged Falsity In The Statements

At Def. Ex. BB at 18-19 allegedly relied on by Putney, Boyd said:

> Q. All right. If you have received a certified copy of the order authorizing the loan and the certificate signed by **both Mr. Balter and Mr. Hughes,** the bank would have made the loan?
>
> A. Yes, sir, it was approved. We would have funded the loan.

And at Def. Ex. BB 16, Boyd previously stated:

> Q. And I believe that on one conversation with you, you did mention to Mr. Frank that you insisted that **Mr. Hughes** sign the certificate as well as Mr. Balter?
>
> A. Yes, sir, I did.

And at Ibid, p. 7, Boyd said:

> Q. The certificate, as I understand it, had to be signed **by both the President of the corporation and Mr. Hughes** to be acceptable to you; is that correct?
>
> A. That's correct. That was the basis that we made the prior loan on and that was the basis that we approved the other one.

In the Balter trial, Bankruptcy Judge Houston flatly testified that he would not have authorized Hughes to sign the certificate of indebtedness (T. 294).

Had the Herald's writer, Putney, heeded the many "warning bells" that called out to him and contacted Frank, or Frank's attorney or any experienced bankruptcy attorney or judge familiar with bankruptcy procedure and plans of arrangement in reorganization proceedings, or had he examined the Courthouse files in the Balter trial or the Bankruptcy Court file in the Pac Craft Reorganization, Putney would have learned the real reasons why the Bank loan did

not go through with the loan. Balter's failure to meet his deadline and obtain the necessary funds had nothing to do with the manner in which Frank prepared the necessary documents or the presence vel non of any "seal" - be it "corporate" or "court." Had Putney written the story without attempting to make the "facts" fit his slanted "David and Goliath" theme, the Herald would not have published the false defamatory statements about Frank that really added nothing to the alleged expose of "predatory practices" of the large Fortune 500 companies.

The evidence is overwhelming that Frank did all he was charged with doing in connection with the bank loan and that none of Frank's acts had anything to do with the fact that the plan was not funded on August 6.

The Bank loan committee did not even meet until the **afternoon** of August 6. (Pl. Ex. 6) While agreeing to make a loan for $40,000 (less than Balter needed), the bank placed impossible conditions on it. (Id.) Frank was not involved in negotiations for the loan; they were conducted by Balter. (T. 779, 823-839) Balter had told Frank that the loan had been approved and that he could get the money on a phone call. (T. 972-4) Frank was not aware of any special conditions or requirements before he prepared the certificate of indebtedness (T. 819).

There was no bankruptcy court seal in existence at the time. (T. 349) So if that is what the bank wanted, it too would have been impossible. The order authorizing the certificate of indebtedness was prepared, signed and filed, stamped before the close of business on August 6. (T. 812) Getting the papers to the Bank earlier would have done no good since the loan committee had not even met yet. (Pl. Ex. 6) Frank prepared the documents in the same form as the ones he had prepared before. (T. 167-169; Pl. Ex. 2, 3, 4)

All of this is evidence that Balter did not miss the deadline because of anything Frank did or did not do and that the Bank's failure to make the loan related to things other than a missing court seal. But most important of all, if Putney had researched the Balter trial and bankruptcy materials from a neutral standpoint instead of from Balter's and his attorney's jaundiced point of view it would have become crystal clear that Balter missed the deadline because it was impossible to meet the conditions required by the Bank as set forth in its letter to Balter himself on August 19th, several weeks after the August 6th so-called "deadline." See fn. 6, p. 8, supra.

As to whether the article was substantially true, the issue is whether a different impression would have been left with the reader if the truth had been published. Obviously if Putney wrote that Balter missed the deadline for getting the money because the Bank's conditions were not met, the impact on Frank would have been nonexistent. If he wrote that Frank prepared the documents before the August 6th deadline and that no court seal existed, Frank would have not been injured. The truth would have left a substantially different impression with the reader. Similarly, if Putney had merely attributed the statements on page 15 of the Article as accusations made by Balter, it would have been clearer to the reader that the statements were coming from a person with an axe to grind rather than from a supposedly neutral reporter.

Indeed, the record abounds with clear and convincing evidence that Putney's failure to use reasonable care, his disregard of the "warning bells" he heard and his preconceived "David and Goliath" theme resulted in the Herald's publication of false and defamatory statements about Frank.

II. BEFORE AFFIRMING THE JURY AWARD, THE THIRD DISTRICT COURT OF APPEAL CONDUCTED THE REQUIRED INDEPENDENT APPELLATE REVIEW OF THE "CONSTITUTIONAL FACTS" OF FAULT AND FALSITY.

[Response the Herald's Point II.(B)28. Reframed to Respondent's Premise].[18]

As the Herald put it, in Bose Corp. v. Consumers Union, Inc., 104 S.Ct. 1949 (1984) the United States Supreme Court "reaffirmed" that in libel cases an independent examination of the record with respect to fault and falsity is required. The question then becomes what constitutes an "independent" review. The Third District Court of Appeal in its opinion below expressly stated that it **had reviewed the record**; that the record contained **substantial competent evidence** from which the jury could conclude that the complained of statements were false and that the **requisite degree of negligence** had been established. The Third District found, **independently,** that "[t]he record contains evidence that the loan was denied for reasons unrelated to Frank's actions and that Frank was not contacted by Putney prior to the appearance of the article." 442 So.2d.

Admittedly, the Third District did pay deference to the jury verdict but the court did not stop there. It is clear from the opinion that the appellate court thoroughly reviewed the record and was familiar with the evidence contained therein.

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[18]The Herald framed II (PB. 28):

> II. Had The Third District Court Of Appeal Conducted The Required Independent Appellate Reveiw Of The "Constitutional Facts" Of Fault And Falsity, It Would Have Reversed The Trial Court, Even Assuming A Negligence Standard.

For example, when the court explained in footnote 3 (at 442 So.2d 984, App. p.2) why it declined to follow the position espoused by the dissent, it became obvious how carefully the record had been "independently" reviewed. This will be more fully discussed in reply to the Herald's point III infra pp. 40-41.

The query then becomes how far does an appellate court have to go to prove that it has "independently" reviewed the record to satisfy itself and a higher court that the record contains sufficient evidence to establish the "constitutional facts" necessary to find liability with the requisite certainty. Is an appellate court's finding that the record contains "substantial" and "ample" evidence to support a jury's verdict of falsity and fault (negligence) inconsistent with an "independent" review? Are the two mutually exclusive?

There can be no doubt that in all cases of libel involving the necessity to prove "actual malice" before any recovery can be made, a plaintiff must prove falsity and "actual malice" by "clear and convincing" evidence.[19] New York Times v. Sullivan, 376 U.S. at 279-280. However, careful research reveals no rule setting forth the **degree of proof** necessary to establish "negligence" in a libel case.

It is also clear that in cases requiring proof of actual malice, the appellate court must make an independent review of the record to insure that it contains sufficient evidence to satisfy the drastic **degree of proof** of "convincing clarity" necessary to establish actual malice in order to ascertain that the "judgment does not constitute a forbidden intrusion on the field of free expression." Bose Corp. v. Consumers Union of U.S., Inc., 104 S.Ct. 1949 at 1958 (1984).

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[19] In Time, Inc. v. Pape, 401 U.S. 279 at 284 (1971), the United States Supreme Court labelled its "definition of 'actual malice' a 'constitutional rule'." Bose, supra at 1964.

Be that as it may, the Herald supplies no authority for its position that the same stringent requirements as to the **degree of review** ("de novo"?) necessary to satisfy the actual malice "constitutional rule" applies to cases where liability for the defamation is founded on simple negligence. (PB. 29-31). The Herald bottoms its argument that the instant case required the highest standard of appellate review because the **degree of fault** is immaterial (PB. 24) if "constitutional facts" are involved and in support thereof cites a melange of pre-Gertz and pre-Firestone First Amendment cases involving "obscenity", "clear and present danger" and "breach of the peace." (PB. 30). In the cited cases dealing with the quite different issue of defamation, "actual malice" was the crux of the decisions. E.g., Bose, New York Times, Pape, etc. (PB. 31, f.n. 7) Not a single case involves the **degree of proof** or of **appellate review** applicable to the negligence standard of "fault" in a libel case.

Indeed, the United States Supreme Court in Bose, supra, carefully footnoted at 104 S.Ct. 1967:

> Indeed, it is not actually necessary to review the "entire" record to fulfill the function of independent appellate review on the actual malice question; rather, only those portions of the record which relate to the actual malice question; rather, only those portions of the record which related to the actual malice determination must be independently assessed. The independent review function is not equivalent to a "de novo" review of the ultimate judgment itself, in which a reviewing court makes an original appraisal of all the evidence to decide whether or not it believes that judgment should be entered for plaintiff. If the reviewing Court determines that actual malice has been established with convincing clarity, the judgment of the trial court may only be reversed on the ground of some other error of law or clearly erroneous finding of fact. Although the Court of Appeals stated that it must perform a de novo review, it is plain that the Court of Appeals did not overturn any factual

> finding to which Rule 52(a) would be applicable, but instead engaged in an independent assessment only of the evidence germane to the actual malice determination.

However, in Time, Inc. v. Firestone, 424 U.S. 458 at 461 the United States Supreme Court, reviewing this Court's opinion Firestone v. Time, Inc., 305 So.2d 172 (1974), relied heavily on its then fairly recent Gertz opinion and stated:

> The failure to submit the question of fault to the jury does not of itself establish noncompliance with the constitutional requirements established in Gertz, however. Nothing in the Constitution requires that assessment of fault in a civil case tried in a state court be made by a jury, nor is there any prohibition against such a finding being made in the first instance by an appellate, rather than a trial, court. The First and Fourteenth Amendments do not impose upon the States any limitations as to how, within their own judicial systems, factfinding tasks shall be allocated. **If we were satisfied that one of the Florida courts which considered this case had supportably ascertained petitioner was at fault, we would be required to affirm the judgment below.**

After noting that there was nothing in the record that indicated that either the jury or the trial judge found evidence of "fault" (negligence), the Court continued:

> Nothing in that decision or in the First or Fourteenth Amendment requires that in a libel action an appellate court treat in detail by written opinion all contentions of the parties, and if the jury or trial judge had found fault in fact, we would be quite willing to read the quoted passage as affirming that conclusion. But without some finding of fault by the judge or jury in the Circuit Court, we would have to attribute to the Supreme Court of Florida from the quoted language not merely an intention to affirm the finding of the lower court, but an intention to find such a fact in the first instance.
>
> * * * *
>
> But in the absence of a finding in some element of the state court system that there was fault, we are not inclined to canvass the record to make such a determination in the first instance.

Thus, it appears that Firestone makes clear that the Third District adequately performed its appellate function when it expressly concluded: **"Our review of the record reveals the presence of substantial competent evidence from which the jury could have concluded that the statements pertaining to Frank were false and that their publication established the requisite degree of negligence on the part of the Herald".** 442 So.2d at 983, App.2. Admittedly the Third District paid deference to the jury verdict but it did not stop there. The Herald's statements, repeated numerous times, that the Third District "expressly refused", "explicitly declined" to independently review the record are patently false. The Third District Court expressly stated that it conducted a "review of the record" and it must be presumed that an appellate court means what it says. Moreover, on the basis of its review of the record, the Third District Court of Appeal specifically rejected the Herald's assertions that the complained of statements are "substantially true":

> The Herald also asserts that the statements are substantially true and are therefore not libelous

> even if partially inaccurate. It maintains that because it announced the verdict in Frank's favor, it was not subject to liability for the offending statements. We disagree. Ane.

(442 So.2d at 984, App. p.2)

This Court now has before it the entire record below. We submit that another "independent review" will clearly establish that the evidence in that record is "sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by" substantial competent evidence of fault. [Paraphrasing Bose at 104 S.Ct. at 1965]. The stale, slanted article based on a deliberately incomplete examination of court records received more than adequate constitutional protection by the courts below. It is that type of careless, angled, twisted reporting that should be stringently inhibited if private individuals are not to be subjected to unwarranted and needless injury to satisfy a newspaper's "right" to publish defamatory statements that "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." Gertz citing Chaplinsky v. New Hampshire, 315 U.S. 568, 572 at 418 U.S. 341.

III. THERE WAS NO REVERSIBLE ERROR IN THE JURY INSTRUCTIONS OR EVIDENTIARY RULINGS.[20]

A. The Balter Verdict

At the very outset of the trial the Herald requested that the following instruction be read to the jury (R. 782-797; T. 26):

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[20] The Herald frames its Point III (PB. 39):

> III. The Trial Court Improperly Permitted The Jury To Infer That The Statements Were False From The General Malpractice Verdict In Frank's Favor

> The parties agree that David Balter sued Plaintiff Robert R. Frank for legal malpractice. The parties also agree that the jury in Balter's suit returned a verdict finding Mr. Frank "not guilty" of legal malpractice. So that there will be no confusion, this is to advise you the jury verdict for Mr. Frank against Mr. Balter does not mean the statements in the article on which this suit is based are false. Moreover, the article reported both the malpractice charge and the verdict.

We vehemently objected on the basis that such an instruction was improper since it constituted a comment on the evidence and makes it appear that the parties agreed that the Balter verdict played no part in the case when, in fact, Putney referred to the "not guilty" Balter verdict several times in the article itself. (T. 26-29, 54-57). After lengthy argument and over our objection (T. 57), and after opening statements,[21] the Court gave this modified version of the Herald's requested jury instruction:

> It is undisputed that in a former case a Mr. David Balter sued Robert R. Frank, the Plaintiff in this case, for legal malpractice.
>
> In that case, the jury returned a verdict finding Mr. Frank not guilty of legal malpractice.
>
> You are advised that such a verdict in and of itself does not mean that the statements in the article on which this case is based are necessarily false. However, you may consider the verdict, in that case, along with the other evidence in this case in arriving at your verdict in this case.
>
> I will give you further jury instructions after all of the testimony is in by both parties.

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[21] The Herald notes that we referred to the Balter verdict seven times during opening but neglects to state that the Herald mentioned it nine times (T. 108, 112(2), 118, 119(2), 120, 123, 124). Cf. PB. 41, fn 9.

The Herald did not object to that charge.[22] (T. 1-125).

Frank maintained throughout the trial that the **import** of the Balter verdict was that its very existence was a "warning bell", a "red flag," that the statements Putney claimed were true, were in fact, highly contested matters but that Putney callously and deliberately ignored the caveat. (E.g., T. 82, 85, 90, 309) Frank urged that disregard of that clarion warning that Frank was actually not the cause of the Bank's failure to lend Balter the money was classic "journalistic negligence." Time, Inc. v. Firestone, supra. The principal relevancy of the verdict was as to the issue of fault — not to prove falsity. Frank does not now, and never did at the trial or the appellate level, contend that the Balter verdict should have been conclusive or binding on the issue of falsity in this case. The Herald's argument to the contrary is unfair. (PB. 41)

Taking refuge in Judge Jorgenson's dissent below, the Herald now appears to assert that the Balter verdict should not even have been before the jury for any purpose. Indeed, the Herald's argument as to the **import** of the Balter verdict is difficult to follow since (1) the Balter verdict was twice referred to in the article itself; (2) it was introduced into evidence without objection by either party; (3) the Herald made the unusual request that the jury be instructed about the verdict before the examination of any witness began and (4) the Herald did not object to the charge.

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[22] As a matter of fact, after the charge had been read to the jury, counsel for the Herald stated (T. 130):

> The difference there is the difference we have been arguing about since the beginning of the case. And that is what the not guilty verdict means. I believe the Court agrees with us and gave an instruction somewhat geared toward that position.

The best answer to the Herald's arguments addressed to the manner in which the Balter verdict became a part of this trial below is the Third District's answer to Judge Jorgenson's dissent:

> There is little support in the record for the position espoused by the dissent: (1) the prior malpractice verdict was admitted into evidence during the trial without objection by either of the parties; (2) the Miami Herald requested the court to instruct the jury that the prior verdict "does not mean that the statements in the article upon which this suit is based are false." The court refused to give this instruction and in its place charged the jury with the more neutral instruction that the Balter verdict did not necessarily mean that the statements were false and that they might consider the verdict along with all the other evidence in the case; (3) although the record reflects that the Miami Herald preserved its objection to the jury charge concerning the verdict in the malpractice case, that instruction, even if somewhat unclear, did not rise to the level of reversible error when considered in the context of "all the other instructions given, and the pleadings and evidence in the case." Yacker v. Teitch, 330 So.2d 828, 830 (Fla. 3d DCA 1976).

442 So.2d 984, fn. App.2

Significantly, this reply of the appellate court to Judge Jorgenson's dissent are proof positive of the "independent" review of the record made by the Third District. See Point II, p. 34, supra.

B. Testimony of the Balter Jurors.

The Herald sought to present testimony of the jurors from the Balter case to support its position that the statements in the article were true. Although no proper proffer of the testimony was ever made at trial, before the trial the Herald asserted that the jurors would testify that although they thought

Frank failed to do what was required of him, the case against him "fell through the cracks" and that is why he was found not guilty.

The Florida Evidence Code, Fla. Stat. § 90.607(2)(a) provides:

> Upon inquiry into the validity of a verdict or indictment, a juror is not competent to testify as to any matter which essentially inheres in the verdict or indictment.

The Herald's attempt to call the jurors is an obvious inquiry into the validity of the verdict. The Herald wanted to put the jurors on to testify that they found Frank not guilty even though they thought he had done the things of which he was accused. That is, the Herald wanted to impeach the verdict by inquiring into matters which inhere in the verdict.

The Herald argues that they were simply attempting to "explain" their verdict. But Florida cases have long held that jurors may explain their verdict to uphold it but not to impeach or avoid it. McAllister Hotel, Inc. v. Porte, 123 So.2d 339, 344 (Fla. 1960); State v. Ramirez, 73 So.2d 218, 220 (Fla. 1954); Linsley v. State, 101 So. 273, 275 (Fla. 1924). The only time juror testimony is admissible to avoid a verdict is when the testimony relates to overt acts which might have affected the deliberations. But inquiry as that sought here, into matters concerning thought processes, intentions or emotions of jurors is prohibited. McAllister Hotel, supra; Fla. Stat. § 90.607(2)(b).

Furthermore, jurors' testimony would not be probative of any issue in the case. They have no independent knowledge of Frank's acts or the effect of those acts on Balter's company so they are not competent to testify regarding the truth of the statements. Putney did not contact the jurors before writing the

article, so their testimony would not be probative of whether the article was negligently published.

Since under the Evidence Code and the case law the jurors' testimony would be inadmissible and since in any event it would not have been probative of any issue in the case, the trial court was correct in excluding it. Moreover, since no proffer of the testimony was made at trial, the Third District properly affirmed on this issue. Stager v. Florida East Coast Rwy. Co., 163 So.2d 16 (Fla. 3d DCA 1964).

Nevertheless, through the backdoor methods detailed supra at pages 16-18, the testimony of one juror was admitted. So if the courts did err on this point -- and Frank maintains steadfastly that it did not -- the error was harmless because the evidence got in anyway.

Even Judge Jorgenson in his lengthy dissent made clear that the testimony of the Balter jurors was inadmissible. 442 So.2d 982 at 984, fn. 1, App. p. 3. There was no reversible error in the jury instructions or the evidentiary rulings.

CONCLUSION

The Herald's statement — the sting of the libel — that Frank's conduct resulted in the Bank's failure to fund the loan thereby causing Balter to lose his company is a blatant falsehood. Whether the documents were properly filed and sealed were hotly contested issues and no one testified that these two items caused the Bank to withdraw its commitment. Indeed the only competent, substantial evidence contained in **any** court record is to the contrary.

Had Putney heeded the "warning bells" or followed the Herald's own Stylebook or observed the basic rules for good reporting he would have discovered

the real reason Balter lost his company. Balter failed because he could not satisfy the conditions (all unrelated to Frank) necessary to obtain the Bank loan (PX 6, p. 8, supra). Frank met his twin burdens of proving falsity and negligence with "convincing clarity".

For the reasons and upon the authorities cited herein, the judgments below should, in all respects, be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing were mailed this 10 day of September, 1984, to: Parker D. Thomson and Sanford L. Bohrer, Paul & Thomson, 1000 Southeast Bank Building, Miami, Florida 33131; Richard J. Ovelmen, The Miami Herald Publishing Company, One Herald Plaza, Miami, Florida 33101; and Steel Hector & Davis, 4000 Southeast Financial Center, Miami, Florida 33131-2398.

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