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

RESPONDENT'S ANSWER TO BRIEF OF AMICI CURIAE

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RESPONDENT'S ANSWER TO BRIEF OF AMICI CURIAE

Respondent, ROBERT R. FRANK ("Frank" or Plaintiff), herewith replies to the brief filed by PALM BEACH NEWSPAPERS, INC., POST-NEWSWEEK STATIONS, FLORIDA, INC., SCRIPPS-HOWARD BROADCASTING CO., and DAYTONA TIMES, INC., as Amici Curiae ("Amici"). Petitioner, THE MIAMI HERALD PUBLISHING COMPANY, will be referred to as "The Herald" or Defendant.

The following symbols will be used:

R = Record

T = Trial Transcript

A = Appendix to this Brief

All emphasis ours unless otherwise indicated.

I. AMICI CANNOT INJECT NEW ISSUES INTO THE FRANK CASE.

The thrust of Amici's brief is that Frank had no cause of action against The Herald because he elected to forego any claim for damages to his reputation. Amici have no standing to raise that issue since The Herald itself is foreclosed from arguing that point because it was not raised below and it was not preserved for appellate review in any manner whatsoever. What The Herald cannot do directly, Amici cannot do indirectly.[1] In Acton v. Ft. Lauderdale Hosp., 418 So.2d

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[1] 4 Am.Jur.2d Supp., Amicus Curiae, § 3, p. 26. In State ex rel Baxley v. Johnson, 300 So. 2d 106, 110 (Ala. 1974), the Alabama Supreme Court stated:

> This court will not decide a question presented by amicus curiae which was not presented by the parties to the cause, and will leave the question for decision when properly raised and presented. Alabama-Tennessee Natural Gas Co. v. City of Huntsville, 275 Ala. 184, 53 So. 2d 619.

1099, 1101 (Fla. 1st DCA 1982) the Court succintly stated the law:

> Amici do not have standing to raise issues not available to the parties, nor may they inject issues not raised by the parties. Keating v. State, 157 So.2d 567 (Fla. 1st DCA 1963).

In Keating v. State, 157 So. 2d 567 (Fla. 1st DCA 1963), a liquor licensee sought a writ of mandamus contending that the Beverage Director acted unlawfully in reinstating the license of a competitor. The competitor, alleging an interest in the litigation, sought and received recognition as Amicus Curiae. Relator licensee filed a motion to strike the brief of amicus. The First District held that the record revealed that the issues briefed by amicus were raised below and that the issues were within the respondent's assignment of error. In denying the motion to strike the amicus brief, the Court stated:

> We agree with relator's position that amicus is not at liberty to inject new issues in a proceeding; however, amicus is not confined solely to arguing the parties' theories in support of a particular issue.

Consider the procedure below. Two years before the trial Frank amended his complaint, dropped any claim for injury to his reputation and sought compensatory damages for "loss of business and income" and for "embarrassment, humiliation, and mental pain and suffering." (R. 444, A. 1) The Herald filed no responsive pleading thereto. Just prior to trial, Frank moved for an order in limine prohibiting The Herald "from mentioning in front of the jury, directly or indirectly, alleged evidence of bad character of the plaintiff' on the basis that

> The plaintiff has elected in his pleadings to not claim damages for injury to reputation. Plaintiff is limiting his claim to loss of income, shame and humiliation, mental anguish and hurt feelings as authorized by the Florida Supreme Court decision in Firestone v. Time, 305 So 2d 172 (1974).

(R. 1093, A. 2). The Herald acknowledged that Frank's reputation was not an issue but argued that the evidence sought to be excluded was solely for the purpose of attacking Frank's credibility: (T. 6; A. 3)

> MR. BOHRER: . . .
>
> Mr. Stewart has agreed to what we have thought was damaging to reputation. That is the case as I understand him to say. I understand that we certainly wouldn't be offering evidence as to his reputation since it is no longer an issue in that respect.
>
> However, Your Honor, we're entitled, it seems to me, without trying to pick out specifics, to attack, for instance, his credibility.

In its motion for directed verdict at the end of Plaintiff's case, The Herald did not even remotely suggest that Frank's failure to prove injury to his reputation was fatal to this lawsuit. (R. 1188-1222). Significantly, The Herald's "Motion to Set Aside Jury Verdict and Final Judgment and for Judgment In Accordance With Motion for Directed Verdict" raised the insufficiency of the evidence to prove (1) falsity, (2) actual malice, (3) fault, or (4) "any compensable injury." (R. 1096, A. 4)

And, finally, the "reputation" issue was not raised on appeal nor in the petition nor briefs before this Court in this discretionary review. Thus, there can be no doubt that the issue of what damages were compensable to Frank in this defamation case were framed by the pleadings and shaped the trial strategy for both parties thereafter. No attempt was made by The Herald to raise any of the new issues now injected into this case by Amici.

Obviously, when the Herald tried the case, it believed that pleading and proof of injury to reputation was not essential to the maintenance of a defamation suit but was an item of compensable damage had been well settled by the Florida

and United States Supreme Courts in the Firestone cases,[2] Gertz v. Welch, 418 U.S. 323 (1974), Miami Herald Pub. Co. v. Ane, 423 So. 2d 376 at 390 (Fla. 3d DCA 1982), pet. for rev. granted, Case No. 63, 114 and decided by this Court on September 13, 1984.

Indeed, able counsel for Amici must have been of the same opinion at the time they represented The Herald in Ane, supra. Very careful scrutiny of the brief submitted to the Court by counsel for Amici when they represented The Herald in Ane contains the following admission (Brief of the Miami Herald at page 60 in Ane, Case No. 63,114 (A. 6):

> Moreover, the petitioner respectfully urges the Court to reconsider its holding in Firestone I,[3] this Court held that a libel case may be maintained although no damage to reputation is claimed. . . . **The instant case presents the opportunity for the Court to reconsider the rule.**

Apparently, in Ane, like Frank, the "damage to reputation" issue was not raised at trial, nor argued on appeal. Amici obviously seek to use this case as a conduit in a last ditch, eleventh hour attempt to ask this Court to recede from the Gertz-Firestone rules.

This case is before this Court solely on the record and facts and issues in Frank v. Miami Herald. The brief of Amici should be stricken — it is worthless since it is of no assistance to this Court in arriving at resolutions of any of the issues tried in Frank. In essence, it is merely a forensic discourse based on what

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[2] Time, Inc. v. Firestone, 254, So. 2d 386 (4th DCA 1971), rev'd, 271 So. 2d 745 (Fla. 1972), on remand, 279 So. 2d 389 (4th DCA 1973), rev'd, 305 So. 2d 172 (Fla. 1974), rev'd, 424 U.S. 448 (1976), on remand, 332 So. 2d 68 (Fla. 1976).

[3] 305 So. 2d 172 at 176 (Fla. 1974).

the media thinks the law ought to be — not on what it is. Amici's brief violates every basic rule of appellate review. It is not based on the issues tried below.

II. PROOF OF DAMAGES TO REPUTATION IS NOT ESSENTIAL IN A DEFAMATION ACTION.

A. Statement of the Facts.

In this case, Frank proved that The Herald had negligently published false statements about his competency as a bankruptcy lawyer. His bookkeeper of 27 years, corroborated by Frank, testified to the sudden drop in Frank's bankruptcy practice after the Tropic article appeared. (R. 734; A. 6). Amici conveniently failed to include that fact in its "Statement of the Case and the Facts" setting forth in haec verba selected excerpts of testimony as to the other elements of damage Frank claimed. (Amici Brief, pp. 2-5)

We will not again review the plethora of evidence by which Frank proved that The Herald had negligently published false statements that impugned his competency as a bankruptcy lawyer, but reaffirm our reliance on the facts set forth in Respondent's Brief on the Merits at pp. 2-22. However, it is necessary to correct the Amici's several brazen misstatements of fact; to wit: "The $30,000 compensatory award returned by the jury was based solely upon the testimony of Frank, his wife and his son that Frank experienced mental anguish when he read the Tropic article about him." (Amici Brief, p. 2) "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." (Ibid. at p. 1) Amici's cavalier reference to the testimony of Peggy Fabry, plaintiff's bookkeeper, in footnote 3, does not excuse these misstatements of very material facts nor justify their deliberate glossing over of the substance of Fabry's testimony where they quoted at

length from the record on the other elements of damage which the jury obviously ignored, infra. We proved that although Frank's practice was not confined to bankruptcy matters, there was a direct correlation between the pejorative comment in the Tropic article about his bankruptcy expertise and the sharp drop in that portion of his practice.

Peggy Fabry testified to the noticeable decline in Frank's bankruptcy practice after the Tropic article appeared in 1978 (R. 734, A. 6):

> The question was, how much was received from bankruptcy fees in 1976?
>
> A. The total was $8,782.50.
>
> Q. What about 1977?
>
> A. From that source, in '77, $10,467.64.
>
> Q. 1978 bankruptcy fees?
>
> A. The '78 bankruptcy fees total $20,007.59.
>
> Q. What about '79?
>
> A. '79 the bankruptcy fees totaled $6,132.50.
>
> Q. What about 1980?
>
> A. 1980 bankruptcy fees totaled $7,950.
>
> Q. 1981?
>
> A. In 1981 bankruptcy fees totaled $13,995.

Based on her testimony and Frank's corroboration thereof, counsel for Frank argued to the jury (R. 1483-1484):

> Now, if you assumed only that his earnings have stayed the same and they have now come up in 1982; they're up. We're not claiming anything past this point. If you assume that they had stayed the same and not increased any and that he had not been able to improve one iota in the year since this publication came out — this area right here

> represents a loss of approximately $33,000 right there.
>
> Now, that is gross receipts and, of course, the test, in this case, is what is net because that is all he is entitled to recover in this case is net.
>
> You heard the testimony from Mr. Frank. Again, there is no contrary testimony and no contrary evidence, whatsoever, that most of the expenses that would have been required to produce this money had already been spent.
>
> The office was there. The secretaries were there. Everything was there. There would be some additional paper required. There might be some little long-distance phone calls or a few other miscellaneous items like that, but all of the expenses had essentially been spent.
>
> Had he been able to recover this, this would have been mostly profit that he would have been entitled to.
>
> We say that a fair sum for what he lost by the files not coming in following this publication and for the money not coming in following this publication; that a fair sum would be the sum of $30,000. I say that based on a couple of assumptions.
>
> One, that he would not have improved at all and that he would have stayed the same and that essentially all of this would have been profit. That is for you folks to decide and make an evaluation of that and determine what is appropriate and fair.

Additionally, we suggested to the jury that Frank be awarded an additional $40,000 for shame, humiliation and mental anguish making a total of $70,000 as compensatory damages (R. 1485-1486) and $1,000,000 as punitive damages. While it may be coincidental that the jury awarded Frank only the $30,000 he alleged was his actual pecuniary loss, it is much more likely that they chose that number because they thought his financial loss was his only real injury. Thus Amici's bold misstatments that the testimony as to Frank's anger was the "sole basis" for the jury's award is illogical, unreasonable and unfair.

B. **Argument**

Amici acknowledge that they "advance one argument: the plaintiff should not have been permitted to maintain an action for defamation without claiming or proving damages to his reputation." (Amici Brief p. 6) and thereafter insist that this is in accord with well established Florida law without citing a single Florida case that stands for that proposition. (Id. 9-13).

Amici cite a myriad of federal cases, legal treatises, cases from sister states, Kansas, Alabama, Arkansas and New York and some from Florida that state that defamation involves injury to reputation. We do not quarrel with those authorities and recognize that they establish the apodictic rule that in order to state a cause of action for defamation, the alleged false statements must be capable of a defamatory meaning causing injury to reputation. That is a far cry from a rule that states that plaintiff must prove and plead injury to "reputation." "Reputation" is made up of many elements. Indeed, when Amici quote Emerson, The System of Freedom of Expression, 518 (Id. at f.n. 5, p. 7)[4] they bolster Frank's position and buttress the rationality of Florida's established law that injury to reputation is only one element of damages recoverable in a defamation suit. Time, Inc. v. Firestone, 424 U.S. 448 (1976); Time, Inc. v. Firestone, 305 So.2d

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[4]Emerson included:

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

172 (Fla. 1974); Gertz v. Welch, 91 S.Ct. 2997 (1974); Miami Herald Co. v. Ane, 423 So.2d 376 (Fla. 3d 1982); pet. for rev. granted, Case No. 63,114 and opinion approved on Sept. 13, 1984. It cannot be gainsaid that Frank proved that he was injured in his profession, that he suffered shame and humiliation and that his dignity was affronted. Amici obviously do not understand that the sine qua non of a defamation action is the negligent or deliberate dissemination of false statements of fact (as distinguished from opinion) that causes injury to the person about whom the lies were published of which injury to "reputation" is only one of many elements. Firestone, Gertz, Ane, supra.

The Florida cases Amici cite reveal a total absence of Florida authority for their position. But more shocking still is their lack of candor. For example, Amici completely misrepresent the rationale of Miami Herald v. Brown, 66 So.2d 679. The case came about as a result of the Herald's inadvertent labeling of two pictures — the picture of a state attorney was identified as a man who was known as "a lottery king", while the alleged "lottery king" was identified as the state attorney. The Herald published a retraction and an apology. Nevertheless, the attorney sued. Although he did not seek punitive damages or special damages the jury returned a verdict of $1,500. The Herald appealed on the basis that he did not prove damages to his reputation since his six witnesses testified that his reputation was good before the publication of the misidentified pictures and remained unimpaired. Upon reviewing the record this 1953 Court **reversed**, but noted:

> We have found nothing in this presentation to indicate that damages came to him from the mistake and no proof even that his **feelings were injured** except what could be drawn from the laconic remarks that he "didn't like" the article.

However, the Court discussed at length the elements of compensable damages (actual damages) in a defamation suit as follows:

> . . . actual are compensatory damages, and include (1) pecuniary loss, direct or indirect, or special damages; (2) damages for physical pain and inconvenience; (3) damages for mental suffering; and (4) damages for injury to reputation.

Most important of all, and about which Amici keep very quiet is the closing paragraph of the Brown opinion:

> We therefore reverse the judgment with directions to enter one for nominal damages **unless the appellee can convince the trial court that at another trial he will be able to produce other evidence justifying a resubmission of the case to a jury.**

Frank, unlike Brown, proved that he suffered compensable damages as a result of the Herald's "flagrant journalistic negligence". Firestone v. Time, 305 So.2d 178 (Fla. 1974). Practically every Florida case relied on by Amici is pre-Gertz and Firestone — and none of those remotely suggest that proof of damage to reputation is absolutely essential to the maintenance of a defamation suit. Quite to the contrary, — proof of damages was not the issue in any case but Miami Herald v. Brown, supra which supports Frank's position.[5] (Amici Brief pp. 15).

C. **The Firestone Cases** - The Applicable Florida Law

Little or no reply is necessary to Amici's discussion of why they believe this Court should recede from the Firestone cases both federal and state based on Gertz and Ane. Quite frankly, (no pun intended) Amici's analysis of this Court's

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[5]The two post Gertz and Firestone cases are singularly inapposite: Sailboat Key, Inc. v. Gardner, 378 So.2d 47 (Fla. 3d DCA 1984) [involving a slander of title suit] and Axelrod v. Califano, 357 So.2d 1048 (Fla. 3d DCA 1979) [summary judgment reversed because whether a qualified privilege had been destroyed was a jury question].

opinion in Firestone I[6] is insulting since they seem to imply that the Court did not know what it was doing in Firestone I. (Amici's Brief p. 17, ¶ 2).

Be that as it may, contrary to Amici's argument, Gertz and Firestone and now Ane set forth the applicable law. As the United States Supreme Court said in Time, Inc. v. Firestone, 424 U.S. at 460 (1976):

> Petitioner has argued that because respondent withdrew her claim for damages to reputation on the eve of trial, there could be no recovery consistent with Gertz. Petitioner's theory seems to be 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. But **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.** This does not transform the action into something other than an action for defamation as the term is meant in Gertz. **In that** opinion 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.** Because respondent has decided to forgo recovery for injury to her reputation, she is not prevented from obtaining compensation for such other damages that a defamatory falsehood may have caused her.[7]

D. For the reasons set forth above we decline any lengthy discussion as to Amici's spurious contentions that the non-existent tort of Negligent Infliction of Emotional Distress and the recognized tort of Intentional Infliction of Emotional Distress are relevant here. Frank sued for defamation and proved falsity and fault. That is all that is before this Court in this case.

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[6] 305 So.2d 172 (Fla. 1974)

[7] Cited by this Court in the very recent approval of the Third District opinion in Ane decided by this Court on September 13, 1984.

CONCLUSION

The well reasoned, carefully explained opinions in Gertz, Firestone and Ane, supra require no amplification or expansion from us. Damage to "reputation" has always been almost impossible for the private person to prove. His friends will think well of him after the false statements and the people who are unknown to him are unavailable as witnesses. That's why the old common law presumed damages merely from the written words if they were libelous per se without more. But the United States Supreme Court found that rule constitutionally impermissible and prohibited recovery unless there was fault and the degree of fault necessary depended on the status of the plaintiff. New York Times and its prolific progeny.

Amici demonstrate no reason to give the media the absolute power to publish false statements they have always sought. The media has been given ample protection by the Courts. It is an old shibboleth, but a true one — "if power corrupts, absolute power corrupts absolutely." Society demands a balancing of interests and so does our Florida Constitution. Ane, Case No. 63,114.

For the reasons and upon the authorities cited herein, the decision of the Courts below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 19 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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