017
27

FILED
SID J. WHITE
AUG 15 1984
CLERK, SUPREME COURT
By
Chief Deputy Clerk

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

INITIAL BRIEF OF PETITIONER THE MIAMI HERALD PUBLISHING COMPANY

RICHARD J. OVELMEN
General Counsel
The Miami Herald
Publishing Company
One Herald Plaza
Miami, Florida 33101
(305) 350-2204

THOMSON ZEDER BOHRER
WERTH ADORNO & RAZOOK
PARKER D. THOMSON
SANFORD L. BOHRER
CHARLES V. SENATORE
LAURA BESVINICK
1000 Southeast
Bank Building
Miami, Florida 33131
(305) 350-1100

Attorneys for Petitioner
The Miami Herald Publishing Company

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

TABLE OF CONTENTS

TABLE OF CITATIONS iv

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 1

- The Tropic Article From Which This Suit Arises 1
- The Preparation Of The Article 4
- The *Herald's* Editorial And Legal Review Of The Article 5
- Frank's Claims 6
- What The Evidence Adduced At Trial Demonstrated Putney Could Have Known About The Events Of August 4, 5 and 6, 1969 9
- The Proceedings Below Relating To The Balter Verdict And Jurors 12
- The Negligence Instruction 13
- The Jury Verdict And Appeal To The Third District 14

ARGUMENT 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 14

- A. The *Herald* Reasonably And Carefully Gathered And Reported The Facts 17
- 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 19

1. The fact that Putney did not personally interview Frank was not evidence of a lack of reasonable care causing the alleged falsity in the statements 21

(a) There was no reason to interview Frank before publishing the statement that Frank failed to timely prepare the necessary loan document 22

(b) There was no reason to interview Frank before publishing the statement that Frank failed to get the necessary seal of court for the bank to fund the loan 24

2. None of the *Herald's* conduct was shown by Frank to indicate a lack of reasonable care causing the alleged falsity in the statements 25

II. HAD THE THIRD DISTRICT COURT OF APPEAL CONDUCTED THE REQUIRED INDEPENDENT APPELLATE REVIEW OF THE "CONSTITUTIONAL FACTS" OF FAULT AND FALSITY, IT WOULD HAVE REVERSED THE TRIAL COURT, EVEN ASSUMING A NEGLIGENCE STANDARD 28

A. Independent Appellate Review Is Required In Libel Cases To Insure That The Plaintiff Has Met His Constitutionally Imposed Burden Of Proving Fault And Falsity 29

1. Independent appellate review is required in all First Amendment cases

involving determinations of "constitutional fact" 30

2. The constitutional requirements of fault and falsity in libel cases are "constitutional facts" which merit independent appellate review 31

B. Had The Third District Conducted The Required Independent Appellate Review Of The Trial Court Record It Would Have Reversed The Jury Verdict For Frank 33

1. The required independent review of the record reveals that Frank failed to prove that the *Herald* was negligent 34

2. The required independent review of the record indicates that Frank failed to prove that the statements in the Article were not either true or substantially true 34

III. THE TRIAL COURT IMPROPERLY PERMITTED THE JURY TO INFER THAT THE STATEMENTS WERE FALSE FROM THE GENERAL MALPRACTICE VERDICT IN FRANK'S FAVOR 39

CONCLUSION 44

CERTIFICATE OF SERVICE 44

TABLE OF CITATIONS

Cases:

Allett v. Hill, 422 So.2d 1047 (Fla. 4th DCA 1982), *pet. denied*, 434 So.2d 887 (Fla. 1983) 43

Allstate Insurance Co. v. Vanater, 297 So.2d 293 (Fla. 1974) 43

Atlantic Coast Line R. Co. v. Campbell, 104 Fla. 274, 139 So. 886 (1932) 41

Baumgartner v. United States, 322 U.S. 665 (1944) 30

Beckley Newspapers Corp. v. Hanks, 389 U.S. 81 (1967) 31

Bishop v. Wometco Enterprises, 235 So.2d 759 (Fla. 3d DCA), *cert. denied*, 240 So.2d 813 (Fla. 1970) 35, 36, 39

Bose Corp. v. Consumers Union, Inc., 104 S.Ct. 1949 (1984) 28-29, 30, 31, 32

City of Anna Maria v. Miller, 91 So.2d 333 (Fla. 1956) 42

Delacruz v. Peninsula State Bank, 221 So.2d 772 (Fla. 2d DCA 1969) 34-35

Edwards v. South Carolina, 372 U.S. 229 (1963) 30

Firestone v. Time, Inc., 271 So.2d 745 (Fla. 1972) 15

Florida Power & Light Co. v. McCollum, 140 So.2d 569 (Fla. 1962) 43

Florida Publishing Co. v. Lee, 76 Fla. 405, 80 So. 245 (1918) 35

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) 19, 29, 32, 35

Gibson v. Maloney, 263 So.2d 632 (Fla. 1st DCA 1972), *cert. denied*, 268 So.2d 909 (Fla.), *cert. denied*, 410 U.S. 984 (1973) 31

Greenbelt Cooperative Publishing Association v. Bresler, 398 U.S. 6 (1970) 31

Hammond v. Times Publishing Co., 162 So.2d 681 (Fla. 2d DCA 1964) 36
Hawke v. Broward National Bank, 220 So.2d 678 (Fla. 4th DCA 1969) 35
Helman v. Seaboard Coast Line Ry., 349 So.2d 1187 (Fla. 1977) 33
Hill v. Lakeland Ledger Publishing Corp., 231 So.2d 254 (Fla. 2d DCA 1970) 35, 36, 39
Jacobellis v. Ohio, 378 U.S. 184 (1964) 30
Jamason v. Palm Beach Newspapers, Inc., 450 So.2d 1130 (Fla. 4th DCA 1984) 23
McArthur v. Cook, 99 So.2d 565 (Fla. 1957) 41-42
McCormick v. Miami Herald Publishing Co., 139 So.2d 197 (Fla. 2d DCA 1962) 35-36, 39
Medico v. Time, Inc., 643 F.2d 134 (2d Cir.), *cert. denied*, 454 U.S. 836 (1981) 35
Miami Herald Publishing Co. v. Ane, 423 So.2d 376 (Fla. 3d DCA 1983) 1
Miami Herald Publishing Co. v. Ane, Case No. 63,114 (Fla. *argued* January 10, 1984) 1, 15, 16, 28
Miami Herald Publishing Co. v. Frank, 442 So.2d 982 Fla. 3d DCA 1983) .....1, *passim*
Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971) 32
Neimotko v. Maryland, 340 U.S. 268 (1951) 30
New York Times v. Sullivan, 376 U.S. 254 (1964) 31
Pennekamp v. Florida, 328 U.S. 331 (1946) 30
Pennsylvania Insurance Co. v. Miami National Bank, 241 So.2d 861 (Fla. 3d DCA 1970) 42
Ross v. Gore, 48 So.2d 412 (Fla. 1950) 17
Roth v. United States, 354 U.S. 476 (1957) 30
St. Amant v. Thompson, 390 U.S. 727 (1968) 31
State v. Ramirez, 73 So.2d 218 (Fla. 1954) 41

Time, Inc. v. Hill, 385 U.S. 374 (Fla. 1967) 16
Time, Inc. v. Pape, 401 U.S. 279 (1971) 31
Tribune Co. v. Levin, Case No. 63,217 (Fla. *argued* January 10, 1984) 15, 16, 28
Trucking Employees of North Jersey Welfare Fund, Inc. v. Romano, 450 So.2d 843 (Fla. 1984) 42
Watts v. Indiana, 338 U.S. 49 (1949) 31
Wilson v. Scripps-Howard Broadcasting Co., 642 F.2d 371 (6th Cir.), *cert. granted*, 454 U.S. 962, *cert. dismissed*, 454 U.S. 1130 (1981) 35
Yacker v. Teitch, 330 So.2d 828 (Fla. 3d DCA 1970) 43

Other Authority:

6A Collier on Bankruptcy § 1120 (14th ed. 1977) 35
Fla. Bar Code Jud. Conduct, Canon 3A(6) 26
Florida Constitution: Article V, Section 3(b)(3) 1
Florida Statutes: Section 90.401 41
McCORMICK ON EVIDENCE, § 185 (2d ed. 1972) 41
Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure 1
Rule 9.120, Florida Rules of Appellate Procedure 1
U.S. Constitution, First Amendment .....14, *passim*

STATEMENT OF THE CASE

This is an action to review the affirmance by a divided panel of the Third District Court of Appeal of a judgment entered on a $30,000 jury verdict in a libel suit against Petitioner The Miami Herald Publishing Company (the "*Herald*") in favor of Respondent Robert R. Frank ("Frank"). *Miami Herald Publishing Co. v. Frank,* 442 So.2d 982 (Fla. 3d DCA 1983). After the Third District denied the *Herald's* Motion for Rehearing *En Banc,* Rehearing and Request for Certification of Questions of Great Public Importance, the *Herald* sought discretionary review in this Court. This Court accepted jurisdiction on July 12, 1984,[1] pursuant to Article V, Section 3(b)(3) of the Florida Constitution and Rules 9.030 (a)(2)(A)(iv) and 9.120 of the Florida Rules of Appellate Procedure.

This is the first libel suit involving a news report of "real public or general concern" tried to a jury under the simple negligence test adopted by the Third District in *Miami Herald Publishing Co. v. Ane,* 423 So.2d 376 (Fla. 3d DCA 1983), which is now pending in this Court. *Miami Herald Publishing Co. v. Ane,* Case No. 63,114 (Fla. *argued* January 10, 1984).

STATEMENT OF THE FACTS

The Tropic Article From Which This Suit Arises

On May 21, 1978, the *Herald* published an article entitled "The Saga of David and Ethyl" by Michael Putney

---

1. Citations to the Record on Appeal are designated "R"; citations to the transcript of the trial are designated "Tr."; and citations to the parties' trial exhibits are designated "Pltf. Ex." and "Def. Ex.". The *Tropic* article, Pltf. Ex. 1, is reproduced in the Appendix ("App.").

in *Tropic,* its Sunday magazine (the "Article") (App. 1) (Tr. 141-43; Pltf. Ex. 1). The Article concerns the 1969 bankruptcy of Pac Craft, a company owned by small-businessman David Balter, after an attempt to "reorganize" it under Chapter 11 of the bankruptcy laws; its subsequent takeover by Ethyl, a Fortunate 500 company, after the reorganization failed; and the resulting Dade County Circuit Court litigation. This lengthy story (about 4,000 words) related Balter's struggle to retain control of Pac Craft and reported the million dollar jury verdict Balter won in his circuit court action against Ethyl, John Scussel, and Paul Wolf (the "Balter trial"). The Article makes only brief references to Frank as the lawyer Balter hired to handle the reorganization of Pac Craft, including preparation of the documents necessary to obtain the funds for the plan of reorganization.

The Article reported that during the mid-1960's Pac Craft had been a very profitable "converter" of polyethylene film, which purchased almost all of its film from Ethyl. When, in 1967, Balter sought a $450,000 loan for his business and needed a guarantee, he approached Ethyl, which readily agreed. Shortly after Ethyl guaranteed the loan in exchange for the right to take over Balter's business in the event Balter defaulted, Ethyl began to ship defective film to Pac Craft. Pac Craft's business began to suffer, but Balter received no cooperation from Ethyl. Ethyl would not replace the defective film, give credits, or permit Balter to purchase film elsewhere. In addition, Ethyl threatened to decline to renew the loan guarantee.

Faced with the loss of the business he built, Balter took the only step remaining to him—he hired bankruptcy lawyer Robert Frank and filed for Chapter 11 in bankruptcy court. Out of the Chapter 11 proceedings arose a plan of arrangement, written by Frank, through which

Balter would retain control of his business, and his creditors, including Ethyl, would accept a payment plan.

As reported in the Article, under the plan of arrangement, Balter was permitted to retain control of Pac Craft if he could raise $213,000 to be deposited with the bankruptcy court's "monitor", David Hughes, by a certain date (originally, August 4, 1969, but later extended to August 6). Under the plan of arrangement, Wolf and Scussel were to contribute a total of $170,000—$100,000 of which was in the form of a check never deposited—and Balter was to raise the remaining $43,000. Balter arranged with a bank for a $43,000 loan, but Frank did not prepare a court order authorizing the loan (the "loan document") until shortly before the August 6 deadline for depositing the money. When Balter presented the proper loan document, it didn't have the clerk's seal (which the bank had advised Frank was required for the loan), the bank refused to fund the loan, and Balter missed the August 6 deadline. When Balter missed that deadline, the bankruptcy judge returned Wolf's check and, after missing two more deadlines, Balter eventually lost Pac Craft. Finally, the Article relates how Balter successfully sued Ethyl, Scussel and Wolf—receiving a million dollar jury verdict—for illegally interfering with Balter's plan of arrangement and unlawfully taking control of Pac Craft from him.

Although the Article mentions Frank only in passing, it reports he failed to prepare the loan documents in time for Balter to meet the August 6 deadline, failed to obtain the court seal required by the bank as a condition for funding the loan, and was later joined by Balter with the other Ethyl defendants and charged with malpractice. The Article also reports - *twice* - that the jury found Frank not guilty of malpractice and makes clear Frank was not involved with Ethyl, Scussel, and Wolf.

The Preparation Of The Article

The preparation of the Article involved the participation of an experienced journalist specializing in feature writing, several editors, as well as a lawyer specializing in conducting pre-publication libel review. The author of the Article, Michael Putney, had seven years of journalism experience prior to joining the *Herald* as a *Tropic* writer. He was a veteran of the national press, having been a writer for *Time,* and a reporter and bureau chief for the National Observer and National Weekly (Tr. 368-70).

Putney first became interested in writing the Balter story when he read a news report of the Balter trial verdict published by the *Herald* in April, 1978 (Tr. 386). The original story did not mention Frank, and Putney had not previously met or heard of Frank (Tr. 216, 245, 387). As the story went through various drafts, Putney added the reference to Frank in the context of reporting the mechanics of Ethyl's takeover attempt. The discussion of Frank related solely to his activities as Balter's lawyer in the public judicial proceedings in which Frank was to help Balter retain control of Pac Craft (Pltf. Ex. 1).

Putney spent four or five weeks researching and preparing the Article for publication (Tr. 245). He reviewed an enormous amount of material from the eight-year Balter proceedings, including the Amended Complaint, the opening statements of counsel for all parties (including Frank) in the 1978 Balter trial, copies of the "daily" trial transcripts, Balter's trial and deposition testimony, the depositions of Frank given in 1970 (only months after the events reported in the Article) and 1978, the depositions of Wolf and Scussel, the depositions of bankruptcy court monitor David Hughes in 1970 and 1972, bank officer William Boyd's 1970 deposition, some 190 trial exhibits, the jury

charges and various portions of the bankruptcy file (Tr. 392-97). In all, Putney reviewed hundreds of pages of "daily" trial testimony and thousands of pages of deposition testimony (Tr. 255-61).

Putney interviewed or tried to interview all the principals discussed in the Article. Thus, he interviewed Balter, Balter's attorney, Wolf's attorney, Scussel's attorney, Ethyl's attorney and Ethyl's general counsel (Tr. 271). He unsuccessfully attempted to reach Wolf and Scussel themselves (*See* Pltf. Ex. 1). As the basis for his few references to Frank, Putney relied on six instances of Frank's own testimony and statements as an officer of the court in judicial proceedings—including Frank's 1970 and 1978 deposition transcripts, his sworn statements filed in support of his application for attorneys' fees based upon work on the Pac Craft reorganization plan, his testimony at the hearing on his attorneys' fees application, and his other statements as an attorney in the bankruptcy court proceedings (Tr. 403-04). Putney also relied on testimony by others, such as bank officer Boyd and court monitor Hughes. Putney did not choose, in addition, to interview Frank, because it was clear from all the documents that Frank claimed full knowledge of the loan and its terms while he represented Balter and disclaimed knowledge or memory of the event after Balter sued him for malpractice (Def. Ex. X, Tr. 192-93).

The Herald's Editorial And Legal Review Of The Article

Under the editorial hierarchy of *Tropic*, Putney, a staff writer, was supervised by Steve Petranek and Lary Bloom, *Tropic's* editors, who in turn reported to *Herald* Assistant Managing Editor Janet Chusmir, who was ultimately responsible to John McMullan, Executive Editor of the *Herald* (Tr. 370-71).

After Putney completed a draft of the Article, it was reviewed in detail by his editors, Bloom and Petranek (Tr. 405). The role of each editor was to read the Article several times. The Article was read initially by each editor for general sense, completeness and accuracy. Each editor then read it again, line-by-line, word-by word for specific content, particularly to insure that the statements made in the Article were true and accurate (Tr. 375-76; 1276-78). In addition, the editors met with Putney periodically to monitor his progress and deal with any problems that might have arisen (Tr. 1276). Finally, the Article was reviewed by Janet Chusmir (Tr. 1300).

Because of the complexity of the factual situation described in the Article, the *Herald's* general counsel, James Spaniolo, reviewed a draft of the Article to determine whether it contained any defamatory material (Tr. 407-08). Spaniolo questioned Putney as to his sources of information regarding each of the defendants in the Balter trial, including Frank (Tr. 409). Spaniolo recalled asking particularly about Frank and remembered receiving a satisfactory explanation of the references to Frank (Tr. 556-58, 584-85). Because Putney had reviewed Frank's prior sworn testimony and statements as an officer of the court, which provided the factual support for the matters related in the Article, Spaniolo concluded it was not necessary for Putney to interview Frank before the Article could be published (Tr. 557-58). Spaniolo explained that he reviewed 200-300 articles for possible libel problems each year and that he treated each article as an individual case to be reviewed with great care (Tr. 577-80).

Frank's Claims

Frank sued the *Herald* on June 30, 1978, alleging that each of four statements appearing in the Article were

false and defamed him. Frank later announced that he "abandoned" his claims as to two of the statements (Third District Ans. Br. 4). The statements upon which Frank bases his claims briefly discuss his role as the lawyer hired by Balter to preserve Balter's interest in Pac Craft. They report (i) Frank's failure to prepare the loan document (an order authorizing the loan to Pac Craft for signature by the bankruptcy judge) in time for Balter to fund his reorganization plan by the close of business on August 6, 1969 and (ii) Frank's failure to obtain the clerk of the court's seal certifying the authenticity of the loan document as required by the bank:

> *Balter missed the* [*August 6*] *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 Manufacturers National Bank of Hialeah 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 bankruptcy referee extended the deadline for Balter to meet the terms of his plan of arrangement but monitor Hughes changed the locks at the Pac Craft plant and refused to let Balter and prospective investors in.
>
> * * *
>
> When Balter's final deadline passed, Wolf submitted his own plan of arrangement, and Wolf took over Pac Craft.

(Pltf. Ex. 1). Out of the entire sixty-paragraph Article, only two sentences in the fifty-first paragraph which

discuss Frank's role in Balter's loss of Pac Craft were alleged to be libelous. Both of the challenged statements relate to the events of August 4, 5 and 6, 1969, and Balter's failure to deposit with the bankruptcy court the $43,000 he needed to keep control of Pac Craft. Putney's Article reports those events, based on the court documents, including Frank's statements and testimony, from the Chapter 11 proceeding and the Balter trial.

Frank contends the underscored statements were false because they "clearly" blamed him for the failure of the plan of arrangement (Third District Ans. Br. 5). Specifically, Frank asserted the first of the statements was false because the loan document referred to in the Article was timely prepared because it was filed in the bankruptcy court before the close of business on August 6, although with insufficient time for Balter to meet the 5:00 p.m. deadline (Third District Ans. Br. 6). He also asserted, that, despite any failure of Frank to timely prepare the loan document, the bank would never have loaned Balter the money on August 6, because it only approved the loan on August 6 and had "placed impossible conditions on it" (Third District Ans. Br. 7). Regarding the second statement, Frank states it was false because of both the "impossible conditions" and the "fact" that the bankruptcy court (as opposed to the federal district court of which it is part) had no "seal" per se[2] (Third District Ans. Br. 7).

---

2. At trial, Jack Britton, a bankruptcy attorney called by Frank, explained that at the time of the Pac Craft reorganization, the bankruptcy court was a part of the federal district court in Miami. It accordingly would not have its own seal, but would use the federal district court's seal (Tr. 193). Also, while Frank has claimed that the court had no "seal" to be gotten, his bankruptcy expert at the Balter trial, Louis Phillips, testified in this case not only that a seal did exist, but that he had obtained it for documents "many, many times" (Tr. 366).

Frank also claimed below that the *Herald* was negligent in failing to interview him, despite Putney's review of Frank's then recent 1978 testimony as a malpractice defendant which fully discussed Frank's positions. Frank also contended that the *Herald* committed various "negligent" acts or omissions, which included failing to interview judges and failing to interview bankruptcy experts. *See* Section IB, *infra*.

What The Evidence Adduced At Trial Demonstrated Putney Could Have Known About The Events Of August 4, 5 And 6, 1969

In accordance with the reorganization plan, Balter had to deposit the money necessary to fund the plan, including his $43,000 portion, with the ccurt-appointed monitor, Hughes, by August 4, 1969 (Tr. 774-76). When money sufficient to fund the plan was not deposited by the deadline, the bankruptcy judge called an emergency hearing on August 5 to determine what should be done (Tr. 777-80; Pltf. Ex. 16; Def. Ex. HH).

At the August 5 emergency hearing, Frank acknowledged his client's failure to meet the August 4 deadline, but asked for an extension, representing that he and Balter had arranged a loan to cover Balter's portion of the funding of the plan (Tr. 778-90). The judge agreed to extend Balter's funding deadline the following day, August 6, and directed Frank to prepare the order authorizing the loan and the necessary loan documents by the close of business on August 5:

> THE COURT: I want this order signed today and I want the money in tomorrow.
>
> [MR. FRANK]: Okay, sir.

(Tr. 977).

Frank did not submit to the bankruptcy judge the order and loan documents by the end of August 5 as ordered (Tr. 983; Pltf. Ex. 4). With respect to the negotiations with the bank, Frank's sworn attorneys' fees application (filed in bankruptcy court) represents that he spent 2-1/2 hours on "8/5/69" providing services he described as "Conference-Bank-David Hughes-Dave Balter" (Def. Ex. CC). The transcript of Frank's 1969 testimony during his attorneys' fees hearing shows Frank testified that *he* had obtained the loan commitment and had spoken with Boyd (the bank officer in charge of the loan) and court monitor Hughes regarding the loan (Def. Ex. DD at 18-19). The brief filed by Frank in support of his appeal of the fee award stated the "negotiations with the bank that eventually provided the excess margin of capital to fund the final plan were carried on solely by your Petitioner, *and his efforts alone secured the loan*" (Def. Ex. X at 7) (emphasis added).[3]

The bankruptcy court was to have signed the order on August 5 authorizing the bank's loan to Balter and the money to be borrowed with the loan document was to be deposited in the bankruptcy court by the end of the day on August 6 (Tr. 977). As set forth in bank officer Boyd's uncontradicted deposition testimony (reviewed by Putney), to accomplish the funding, the bank required the judge's order authorizing the loan to have a court seal confirming its authenticity (Def. Ex. BB).

---

3. Frank's representation to the court in his brief was, of course, false, since the loan he purportedly "secured" never materialized. Frank changed his testimony entirely in a 1978 deposition, when he was a malpractice defendant and no longer seeking fees. Despite his sworn representations in open court in 1969, Frank testified that he did not know what documents the bank required and that he had no legal duty to find out (Def. Ex. LL at pp. 230-34). He also testified that he did not speak with bank officer Boyd until after the bank rejected the loan (*Id.* at 236).

The bank intended to make the loan as expected if it received this "sealed" loan document on August 6 (Def. Ex. BB).

Frank has always admitted the order/loan document was not submitted until August 6, although the record available to Putney shows he was directed by the judge to submit it on August 5 (Pltf. Ex. 4; Tr. 983). According to his testimony during the Balter trial, Frank's best recollection of when he gave copies of the documents to Balter was that it was some time prior to 5:00 p.m. on August 6, probably by 4:30 p.m. (Bal. Tr. 2898-99, 2919). Thus, even had the seal been on the documents, Balter would have had the impossible task of, beginning at 4:30 p.m., travelling from Miami Beach to the bank in Hialeah, processing the loan, obtaining the funds, and then travelling to wherever bankruptcy court monitor David Hughes was to deposit the funds with him by 5:00 p.m.

Frank's sworn fee application submitted to the bankruptcy court shows he spent five hours on "8/6/69" providing services he described as "Conference-Bank-David Hughes-Dave Balter" (Def. Ex. CC). Bank officer Boyd swore at his deposition that Frank knew of the bank's requirements to fund the loan (Tr. 1042-48; Def. Ex. BB). These terms were communicated to Frank as Frank himself confirmed at Boyd's deposition (Def. Ex. BB), and of course he claimed throughout that the loan was secured through "his efforts alone" (Def. Ex. X). Despite the bank's stated requirement for certified copies of the documents, the copies of the loan documents Frank gave Balter for submission to the bank had no court seal (Def. Ex. BB at 15). 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).

According to the 1970 and 1972 deposition testimony of court monitor Hughes, Frank called Hughes on August 6 and informed him that he could not get the money to Hughes that day because his photocopier had broken down (Def. Ex. F at 20). Frank, during his 1970 deposition, testified that he had called Hughes on August 6 and "told him that the money would not be out there by 5:00 p.m. on August 6" (Tr. 985-86). During the entire bankruptcy proceedings, and during the nine years the Balter suit was pending, Frank never contradicted Hughes' testimony.[4]

The Proceedings Below Relating To The Balter Verdict And Jurors

Balter eventually sued Frank for malpractice. This claim was tried together with Balter's claims against Ethyl, Scussel and Wolf. The jury returned a general verdict of "not guilty" in Frank's favor. The *Herald* reported the verdict twice along with the references to Frank in the Article (Pltf. Ex. 1).

During the trial proceedings below, the *Herald* acknowledged the fact of the jury's return of a general verdict in Frank's favor. However, during the pretrial stages of this case, counsel for Frank repeatedly asserted he could go *behind* the Balter malpractice jury verdict and contend that the verdict inherently meant the Balter jurors had concluded that Frank did not commit the acts attributed to him in the Article, and that the statements were accordingly false. Since Frank's counsel insisted he would

---

4. Frank had maintained in his 1970 deposition, his 1978 testimony at the Balter trial, and through discovery in this case that he could not recall having the conversation Hughes testified to twice about Frank's broken photocopier (Tr. 990-97). At trial, however, Frank vehemently denied that the conversation ever took place; in fact he characterized the allegation as ludicrous (Tr. 817).

thus go behind the jury verdict, the *Herald* contacted the Balter jurors for their views about Frank and of the truth of the statements. The foreperson of the jury, Shirley Smith, provided an affidavit which stated in relevant part about Frank:

> We decided the evidence showed he failed to prepare appropriate pleadings and papers in a proper and timely fashion . . .

(R. 24-25). She added, in her own handwriting, "I have read the article . . . and found the statements as to Mr. Frank completely accurate." *Id.* Frank's counsel took Smith's deposition—in which Smith repeated her assessment of the Article and Frank—and thereafter successfully sought (i) an order precluding Smith and the other jurors from testifying at the trial below and (ii) an instruction to the jury in this case stating the Balter jury verdict could mean the statements were false (R. 1071; Tr. 125). At trial, even though he knew the Balter jurors believed the Article to be accurate, Frank's counsel successfully excluded from evidence testimony from the Balter jurors regarding the truth of the statements, and actually argued to the jury below that the "not guilty" verdict meant Frank had not committed the acts attributed to him in the Article (Tr. 71-72, 80-83, 85). The trial court denied the *Herald's* motion for a mistrial (Tr. 93, 96).

The Negligence Instruction

Over objection, and despite lengthy argument and memoranda of law, the trial court instructed the jury that as a "private figure" libel plaintiff, Frank need prove only negligence to recover, even though the statements about Frank related solely to his involvement in a matter of real public or general concern (Tr. 1567; R. 1077-90).

The Jury Verdict And Appeal To The Third District

Frank demanded $70,000 in compensatory damages and $1 million in punitive damages (Tr. 1486, 1488). The jury returned a verdict in the amount of $30,000 in compensatory damages only (R. 1579). The *Herald* filed the appropriate post trial motions, which were denied.

The Third District affirmed the judgment on the jury verdict, expressly refusing to conduct an independent appellate review of the record to determine if Frank had proved at trial the "constitutional facts" of fault and falsity.

ARGUMENT

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

This is a case study of why the "actual malice" standard of knowing or reckless falsity is the only appropriate standard for evaluating alleged libels in reports of matters of real public or general concern. This case shows why the alternative offered—the negligence standard—utterly fails to rationally balance the First Amendment rights and duties of the press with the interests of a person involved in a matter of real public or general concern. Here, a jury awarded a plaintiff damages for the publication of a report of "real public or general concern" even though the Article was reported with more than "reasonable care" and its content is true. Worse, the Third District applied the differential standard of appellate review characteristically employed in simple negligence cases

to affirm the judgment. Thus, wholly nonactionable expression was rendered unprotected because the negligence standard simply does not sufficiently inform, guide or control juries. The *Herald* therefore urges this Court adopt the knowing or reckless falsity test argued to this Court by the Petitioners in *Tribune Co. v. Levin,* Case No. 63,217 (Fla. *argued* January 10, 1984), and in *Ane, supra.* Those cases set forth the legal and practical reasons why the knowing and reckless falsity test is necessary in evaluating reports on matters of real public or general concern. The *Herald* adopts those reasons. But here, the *Herald* shows, *by reference to the process by which the jury reached the result here,* how a negligence standard fails to provide adequate protection to the press' constitutional right of free expression, or to offer any meaningful pre-publication guidance to a publisher who neither knows a statement is false nor has been reckless in determining its truth or falsity.[5]

The proceedings in this case show that the negligence standard does not work for libel for at least two practical reasons: First, newsgathering is an open-ended process. It is always possible to interview more people, review more documents, allocate more time to research, contact additional sources, or await further developments before publishing. Professional judgments based on experience must always be made to determine when the process has proceeded far enough for an article to be published. Since errors of fact are inevitable, and since there is always

---

5. The Article in the case reported on a matter of real public or general concern since it highlighted the predatory practices of a large Fortune 500 corporation and its effects on a successful local businessman. It included an examination of the workings of the judicial and bankruptcy court systems, and involved issues of business morality. *Firestone v. Time, Inc.,* 271 So.2d 745 (Fla. 1972). The proper standard of "fault" to be provided by a libel plaintiff in such a story is knowing or reckless falsity. *See Levin, supra; Ane, supra.*

more newsgathering that could have been done, it is always possible to claim the error could have been avoided had there been further newsgathering. Thus, the negligence standard invites a jury trial in almost every case, and gives no guidance to the jury in making essentially journalistic judgments. Second, "facts" can vary enormously in complexity. For example, it is simple to determine the number of seats in the Orange Bowl: one has only to count them. But other "factual statements", such as those here, may involve reports of complex legal proceedings which involve events occurring years earlier. The simple negligence standard simply is inadequate, in light of the constitutional interests at stake, to protect the press from exposure to liability in such instances.

Permitting such a case to be decided by a lay jury applying various *ad hoc* standards of "reasonableness" provides insufficient protection for the publisher exercising his right of free expression while performing his duty to inform the public.[6] As shown in *Levin* and *Ane,* the negligence standard places the press in the constitutionally impermissible position of having to risk a libel action or hold back important information from the public.

Thus, it is no surprise that a clever plaintiff's lawyer, with months and years to scrutinize, depose, subpoena, and discover can, under guise of the negligence standard, isolate the two statements relating to Frank, and argue that

---

6. As the United States Supreme Court observed,

> "A negligence test would place on the press the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it to verify the accuracy of every reference to a name, picture or portrait.
>
> In this context, sanctions against either innocent or negligent misstatement would present a grave hazard of discouraging the press from exercising the constitutional guarantees."

Time, Inc. v. Hill, 385 U.S. 374, 389 (1967).

the care used by the *Herald* was not reasonable. But the *Herald,* in exercising its duty to report matters of real public or general concern, does not have years or months to report facts before they are no longer news. *See Ross v. Gore,* 48 So.2d 412 (Fla. 1950).

A. The Herald Reasonably And Carefully Gathered And Reported The Facts

All persons concerned at the *Herald,* including the reporter, believed that a thorough, professional job had been done. The only expert at trial who reviewed what the *Herald* did, Dr. David Gordon, Chairman of the Department of Communication at the University of Miami, agreed (Tr. 1324-27). Putney had spent five weeks researching the facts surrounding Balter's struggle to vindicate himself, reviewing hundreds of pages of daily trial testimony and thousands of pages of deposition testimony. More specifically, Putney

(i) reviewed the entire pleading file for the multi-week Balter trial (Tr. 391);

(ii) reviewed Balter's deposition testimony (Tr. 393);

(iii) reviewed the depositions given by Frank in 1970 and 1978 (Tr. 394);

(iv) reviewed the depositions of Paul Wolf and John Scussel (Tr. 393);

(v) reviewed the depositions given by bankruptcy court monitor David Hughes in 1970 and 1972 (Tr. 395);

(vi) reviewed the depositions given by bank officer William Boyd in 1970 (Tr. 396);

(vii) reviewed approximately 190 trial exhibits from the Balter trial (Tr. 397);

(viii) reviewed the Court's charges to the jury in the Balter trial (Tr. 397);

(ix) reviewed various portions of Pac Craft's file in bankruptcy court (Tr. 400);

(x) reviewed Frank's sworn attorneys' fee affidavit which represents to the bankruptcy court that he had conferences with the bank to arrange the conditions of the loan (Tr. 399);

(xi) reviewed Frank's courtroom testimony in support of his claim for attorneys' fees where he told the court he had arranged the loan (Tr. 399); and

(xii) reviewed the brief filed by Frank to appeal his fee award in which he represented he alone was responsible for the arrangements with the bank and satisfaction of their conditions (Tr. 399).

Putney also interviewed a number of the major figures in the Balter story. He interviewed Balter, Balter's attorney, Wolf's attorney, Scussel's attorney, Ethyl's attorney and Ethyl's general counsel (Tr. 271). Unsuccessful repeated attempts were made to reach Wolf and Scussel themselves (*See* Pltf. Ex. 1).

Besides Putney's efforts to determine the truth and accuracy of the facts, members of the *Herald's* editorial and legal staff each read and re-read the Article, line-by-line, word-by-word (Tr. 1276-78). Two editors each separately reviewed the Article twice - initially for general sense, completeness and accuracy, and subsequently word-by-word for specific content. After each of them reviewed

the Article, Janet Chusmir, Assistant Managing Editor, conducted her own review (Tr. 1300).

In addition, *Herald* general counsel James Spaniolo read the Article to determine whether it contained defamatory material (Tr. 407-08). Spaniolo confirmed with Putney his sources of information as to each defendant in the Balter trial, including Frank, and questioned Putney specifically about his sources of information regarding Frank (Tr. 409).

Neither Frank nor his attorney was interviewed during Putney's research in preparation for the May, 1978 Article. Putney, his editors, and the *Herald's* general counsel each considered that the brief references to Frank were sufficiently supported by the sworn public records available to Putney.

Dr. Gordon conducted a complete review of everything Putney, his editors, and the *Herald's* lawyer had done. He concluded, even assuming falsity, the preparation and publication of the article met all applicable journalistic standards (Tr. 1324-27).

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

The United States Supreme Court held in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), that regardless of the standard of liability a state establishes, there can be no liability "without fault". Assuming Florida's fault standard to be "negligence", a libel plaintiff still must show the publisher acted with a lack of reasonable care, and that such lack of reasonable care caused the publisher's publication of the false statement of fact at issue. Frank

never produced any evidence of such fault by the *Herald.* Frank's major claim with respect to the *Herald's* alleged "fault" at trial and on appeal has been the decision not to personally interview Frank. The Third District apparently agreed, citing this as its only example of a fact from which the jury "could have concluded" the *Herald* was at "fault". *Frank,* 442 So.2d at 984. But the *Herald's* decision to rely on the judicial records of Balter's trial and the Chapter 11 proceeding, including six statements (four of which were sworn) by Frank was not negligence; based on the facts available to the *Herald,* there was no reason to interview Frank. In any event, an unsworn interview of Frank in 1978 regarding the events of August, 1969 would not have revealed any facts that could have changed what was published about Frank.

The same is true for the other "acts or omissions" Frank attributed to the *Herald* and characterized as "overwhelming evidence" of the *Herald's* negligence. The record shows none to be evidence of a lack of reasonable care, and examination of each shows none to be "fault" causing the alleged falsity in the statements. Sadly, these "negligent" acts demonstrate that for the clever plaintiff's lawyer armed with a negligence standard, there are always more people a reporter should have consulted, more information sources which could have been tried and more documents or files which should have been reviewed. The decision to halt the newsgathering process involves a professional judgment which could always be "second-guessed" as to its reasonableness. Here, however, this second-guessing is particularly specious.

1. The fact that Putney did not personally interview Frank was not evidence of a lack of reasonable care causing the alleged falsity in the statements

The only fact the Third District identified in its decision as evidence on which the jury "could have" based its negligence verdict is Putney's decision not to interview Frank prior to publication. Because the Third District did not conduct an independent appellate review of the record relating to "fault", the court failed to note Putney (i) did review, and was entitled to rely upon, Frank's testimony and representations in court papers directly addressing the facts at issue here and (ii) any reasonable person who reviewed this material would conclude an interview with Frank would be unnecessary. The two statements alleged to be false were in fact based on Frank's own sworn statements, as well as the corroborating testimony of others.

Perhaps the best evidence that an interview with Frank was not necessary is the transcript of Frank's own testimony in his malpractice trial. Under oath at the 1978 trial, Frank repeatedly denied having any recollection of the events described in the statements and confirmed in record sources and court documents, including Frank's testimony eight years earlier. Presumably, Frank's responses in a 1978 interview a month or so after trial on precisely the same subject would have produced the same response. Frank testified at the malpractice trial that he had no independent recollection of the events of August 5 (Bal. Tr. 2900-02). He did not recall whether he spoke with court monitor Hughes on August 5 (Bal. Tr. 2897). He could not remember what day he prepared the order authorizing the loan document, or how long it took to prepare it (Bal. Tr. 2898-99). He further asserted on the

witness stand that he really just could not recall events of the day of August 6 (Bal. Tr. 2929). His best recollection as to when he could have given the order to Balter was that it was probably around 4:30 p.m. on August 6 (Bal. Tr. 2919).

(a) There was no reason to interview Frank before publishing the statement that Frank failed to timely prepare the necessary loan document

Frank claims that a personal interview would have shown how the statement that "Balter missed the [August 6, 1969] deadline because his attorney, Frank, failed to draw up the necessary loan document before the close of the business day" was false. However, the record before the *Herald* at the time of publication overwhelmingly indicated the statement was accurate:

(i) The transcript of the August 5 emergency hearing shows Frank was ordered to and agreed to prepare the necessary loan document and to present it to the court by the end of the business day on August 5, 1969, so Balter could get the loan and deposit the borrowed money with David Hughes, the bankruptcy court monitor, by 5:00 p.m. August 6 (Tr. 977);

(ii) Frank testified consistently that he did not prepare the order until the afternoon of August 6 (Tr. 813-14);

(iii) Frank's best recollection during the Balter trial in 1978 was that he gave the order to Balter at 4:30 p.m. on August 6, 1969, giving Balter 30

minutes to go to the bank in Hialeah, process his loan, obtain the funds, and deposit them with the monitor at 5:00 p.m. (Bal. Tr. 2919);

(iv) Frank testified during his 1970 deposition that he had called Hughes and told him that the money would not be deposited with him by 5:00 p.m. on August 6, 1969 (Tr. 985-86);

(v) Hughes testified in 1970 and again in 1972 that Frank had called him on August 6 and told him that the money would not be deposited on time, because Frank's photocopier had broken (*See* Def. Ex. F at 20; *See also* Frank's testimony in 1970, Def. Ex. Q. at 22); and

(vi) Frank had testified during the Balter trial in 1978 only two months before the Article was written, that he could not recall—one way or the other—whether he had told Hughes that he would be unable to meet the deadline for preparing the required loan document because his photocopier had broken (Tr. 986-98).

Thus, the uncontradicted record, including Frank's own statements, indicates Frank was to prepare the loan document on August 5 so the loan could be made in time for the money to be deposited by 5:00 p.m., August 6, and that Frank failed to do so. Putney and the *Herald* were entitled to rely upon those statements without a personal interview. *Cf. Jamason v. Palm Beach Newspapers, Inc.*, 450 So.2d 1130 (Fla. 4th DCA 1984) (fair and accurate reports of what transpired during judicial proceedings are privileged). There simply was no reason to believe an unsworn personal interview was needed or could add anything.

(b) There was no reason to interview Frank before publishing the statement that Frank failed to get the necessary seal of court for the bank to fund the loan

Frank further contends that the statement "Frank also failed to get the clerk of the court's seal on [the loan document] . . ." is false. Again, the record available when the Article was published, including Frank's own sworn statements in the Chapter 11 proceeding and Balter's lawsuit, unqualifiedly supports this statement and shows no reason for a personal interview. The record showed:

(i) the bank required the "seal" on the court documents authorizing the loan, and the seal was absent on the documents when the bank refused to make the loan on the evening of August 6, 1969 (Def. Ex. BB at 15; Tr. 104-05);

(ii) Frank testified at his 1978 deposition that bank officer Boyd told Frank the bank required the seal (Def. Ex. LL at 219, 234-35);

(iii) bank officer, Boyd, at his deposition, confirmed Frank's role in discussing the bank's requirements, for making the loan to Balter and confirmed Frank was told of all the bank's requirements, including the requirement of a court seal (Def. Ex. BB at 8); and

(iv) Boyd, responding to Frank's deposition questions, confirmed that the bank would have made the loan if it had received the required certified copies (Def. Ex. BB at 18-19), and Frank himself confirmed his conversations with Boyd took place prior to August 6 (Def. Ex. BB at 15-16).

Thus, as with the first statement, the record, including Frank's testimony from Balter's lawsuit, without qualification supported what was published. Thus, there was no need for a personal, unsworn interview of Frank.

2. None of the Herald's conduct was shown by Frank to indicate a lack of reasonable care causing the alleged falsity in the statements

In addition to Putney's "failure" to interview him, Frank has offered a number of other "acts or omissions" to support his claim that there is "overwhelming evidence" of the *Herald's* negligence. None was shown to reflect a lack of reasonable care by the *Herald,* and none was shown to have caused any alleged falsity in the statements.

In his Third District Answer Brief, Frank charged the *Herald* "negligently" interviewed only "biased" people. But Frank never showed how any alleged failure to interview anyone was either a lack of reasonable care or caused any "falsity" (Third District Ans. Br. 9). Frank complains that Putney never interviewed his attorney, yet concedes Putney read the opening statements of all parties' attorneys, including Frank's, who outlined Frank's whole position. He erroneously asserts Putney never interviewed the other Balter defense attorneys; the record clearly shows he did (Tr. 271). He contends Frank did not interview his experts at the Balter trial. No such "expert", however, could testify as to whether Frank did in fact fail to timely prepare documents or obtain a court seal, as none had any personal knowledge of the facts. (When one of Frank's experts *did* testify in this case, he opined that a lawyer who negotiates with banks—as Frank represented he did in his sworn fee application and his sworn deposition taken in 1978—has a duty to know a bank's require-

ments and help his client comply, and that a court seal can be obtained with no difficulty (Tr. 364).) Moreover, Frank claims Putney should have interviewed the Balter circuit judge and the Pac Craft bankruptcy judge, despite the canons of judicial ethics prohibiting the circuit judge from commenting while the case was pending on appeal, and despite the inappropriateness of the bankruptcy judge commenting on the behavior of lawyers who appear before him. *See* Fla. Bar Code Jud. Conduct, Canon 3A(6).

Frank's charge that Putney only interviewed "biased" people is spurious. He read the sworn deposition testimony of bank officer Boyd, court monitor Hughes, Frank himself, Scussel and Wolf. He also read the entire Balter pleadings file, which contained the legal papers served by all sides. Short of suggesting that Putney shoud be compelled to interview every witness, expert, attorney, party, judge and juror in trial coverage, Frank wholly fails to show how Putney did not act with reasonable care.

Frank also made the utterly specious charge that the *Herald* "ignored the import of the [not guilty] verdict." *Id.* Besides the Article reporting the not guilty verdict twice, what makes this contention outrageous is that the "import" of the jury verdict did not contradict the statements, but affirmed their truth. The Balter jurors, who rendered the verdict, believed the statements to be *true*.

Third, Frank's claim that Putney negligently used the "David and Goliath" "angle" to describe Balter's fight against Ethyl makes no sense. *Id.* The Article's "angle" is irrelevant to whether Putney investigated the facts with reasonable care. Moreover, to the extent Frank claims the "angle" slanted the presentation of the facts, such slant would not have been directed against Frank. To follow the analogy, Frank was "David's" lawyer in the struggle with Ethyl, Scussel and Wolf ("Goliath").

Frank speculates as to other sundry acts of "negligence", but fails to show Putney acted other than reasonably or that the acts caused any "falsity". For instance, he complains that Putney based the Article on testimony excluded in the *Balter* trial (Third District Ans. Br. 25). But the Boyd deposition (to which Frank is referring) was taken by Frank himself who elicited Boyd's statements about Frank (i) knowing the terms of the loan and (ii) being intimately involved in the negotiations (although the deposition was excluded as against Frank because he was not yet a defendant in the *Balter* case at the time of the deposition). Surely Frank cannot contend reporters should not use sworn testimony solely because it was not presented to a jury. Admissibility in evidence is not the test of a fact's reliability.

Frank also contends Putney "ignored" the fact that the bank "could not" have loaned the money on August 6, despite the lack of anything in the record substantiating such a contention (Third District Ans. Br. 12). Irrespective of any hypothetical reticence on the bank's part, the record shows without contradiction that the *reason* the bank rejected the loan was the absence of the court seal on the loan document. Similarly, Frank argues Putney negligently ignored the bank's desire to "get out" of the loan. *Id.* Of course, whether the bank was looking for a way out of the loan is irrelevant, since Frank failed to meet the bank's clear funding requirements.

Frank also claimed Putney was negligent in "ignoring" Balter's own apparent confusion over whether a court seal or a corporate seal was required on the loan document (Third District Ans. Br. 12). Despite Balter's confusion, however, there was never any question that the bank wanted a certified copy of the document. Another of Frank's charges is that Putney negligently failed to

report "both sides" of the story, thus ignoring the "principal element of journalistic fairness" (Third District Ans. Br. 10). Fairness, however, has nothing to do with a failure to take reasonable care in newsgathering. Besides, Putney "fairly" reported the only fact favorable to Frank that existed, the jury verdict in his favor, and he did so twice.

Certainly, this case aptly illustrates the inability of a negligence standard to adequately weigh reports of matters of real public or general concern against claims of "fault" and "falsity" when the press' First Amendment right of free expression and its duty to inform the public are in issue. This case shows how, although a reporter may do a thorough job of newsgathering and never suspect falsity, a creative lawyer can drag a newspaper through discovery and jury trial and secure a jury verdict based on a jury determination of "falsity" and lack of reasonable care, despite an utter lack of fault producing falsity. The verdict here indicates the "negligence" standard simply does not work. It affords inadequate protection to the vital constitutional interests at stake. *See Levin, supra*; *Ane, supra.*

II. HAD THE THIRD DISTRICT COURT OF APPEAL CONDUCTED THE REQUIRED INDEPENDENT APPELLATE REVIEW OF THE "CONSTITUTIONAL FACTS" OF FAULT AND FALSITY, IT WOULD HAVE REVERSED THE TRIAL COURT, EVEN ASSUMING A NEGLIGENCE STANDARD

Last Term, the United States Supreme Court reaffirmed that an independent appellate examination of the trial court record with respect to fault and falsity is required in libel cases. *Bose Corp. v. Consumers Union,*

Inc., 104 S.Ct. 1949 (1984). The Third District Court of Appeal explicitly declined to conduct this constitutionally-required review of the constitutional facts of fault and falsity. Such a review would have indicated Frank's complete failure at trial to prove either that the *Herald* was negligent or that the challenged statements in the Article were false. This Court should, therefore, like the *Bose* Court, conduct a properly searching review of the record *itself*, and reverse the decision of the Third District Court of Appeal.

A. Independent Appellate Review Is Required In Libel Cases To Insure That The Plaintiff Has Met His Constitutionally Imposed Burden Of Proving Fault And Falsity

The recent Supreme Court reaffirmation in *Bose, supra*, of the rule of independent appellate review in libel cases came in the context of suit in which the fault standard was "actual malice"—knowledge of falsity or reckless disregard as to truth or falsity. But the rule of independent appellate review applies with equal force in other libel cases in which the fault standard is not "actual malice."

Independent review is required whenever the decision to be reviewed is predicated on a determination of some "constitutional fact." Both fault and falsity are constitutionally-required elements of the libel tort. *Gertz, supra.* Thus, determinations of both fault and falsity are constitutional determinations subject to independent examination on appeal. The *degree* of fault a plaintiff must prove in a private figure libel suit does not alter the constitutional stature of the fault requirement nor does it change the fact that independent appellate review of the fault determination is appropriate.

1. Independent appellate review is required in all First Amendment cases involving determinations of "constitutional fact"

In *Bose, supra,* the Supreme Court noted with approval the essential role played by independent appellate review in the wide variety of cases that involve findings of "constitutional fact." *Bose, supra,* at 1962-65. In those cases—where "broadly social judgments" enter into findings of fact, *Baumgartner v. United States,* 322 U.S. 665, 670-71 (1944) (due process determination in citizenship proceedings)—the reviewing court is obliged to "independently decide whether the evidence in the record is sufficient to cross the constitutional threshold." *Id.* at 1965. Such review has been required with particular frequency in the First Amendment context, where "factual" findings often involve sensitive value judgments determinative of important constitutional rights. Thus, whether particular material is "obscene" and therefore not within the protection offered by the First Amendment is a question of constitutional fact requiring independent appellate review. *See Roth v. United States,* 354 U.S. 476 (1957); *Jacobellis v. Ohio,* 378 U.S. 184, 190 (1964). Likewise, whether a given set of circumstances constitutes a "clear and present danger" or particular conduct a "breach of the peace" are issues of constitutional fact, which require special appellate attention to ensure that "the constitutional limits of free expression" are protected. *Pennekamp v. Florida,* 328 U.S. 331, 335 (1946); *see Edwards v. South Carolina,* 372 U.S. 229, 235 (1963); *Neimotko v. Maryland,* 340 U.S. 268, 271 (1951). Courts have thus routinely engaged in independent appellate review of a wide variety of "constitutional facts". A court's determination of "constitutional facts" simply cannot be conclusive when each such fact is in reality a "conclusion [which] incorporates

standards of conduct or criteria of judgment which in themselves are decisive of constitutional rights." *Watts v. Indiana*, 338 U.S. 49, 51 (1949).

2. The constitutional requirements of fault and falsity in libel cases are "constitutional facts" which merit independent appellate review

Both Florida and federal courts uniformly hold that reviewing courts in libel cases are under a federal constitutional obligation to independently examine the trial court record with respect to the "constitutional facts" of fault and falsity. *See New York Times v. Sullivan*, 376 U.S. 254 (1964); *Gibson v. Maloney*, 263 So.2d 632 (Fla. 1st DCA 1972), *cert. denied*, 268 So.2d 909 (Fla.), *cert. denied*, 410 U.S. 984 (1973).[7] In *Bose, supra*, the Supreme Court again held it to be the "special responsibility" of appellate courts to undertake an "independent examination of the record" whenever it is claimed a particular communication constitutes unprotected expression. *Bose, supra*, at 1962. Only in this way can appellate courts safeguard important First Amendment rights and "ensure that protected expression . . . not be inhibited." *Id.*

---

7. Since the Court's ruling in *New York Times v. Sullivan, supra*, reviewing courts have consistently engaged in an independent review of the factfinder's finding of fault in libel cases. *See, e.g., Time, Inc. v. Pape*, 401 U.S. 279, 284 (1971) (holding magazine's conduct does not constitute reckless disregard of truth); *Greenbelt Cooperative Publishing Association v. Bresler*, 398 U.S. 6, 11 (1970) (holding jury instructions permitting jury to find liability merely on basis of falsehood and general hostility constitutes reversible error); *St. Amant v. Thompson*, 390 U.S. 727 (1968) (*per curiam*) (conducting independent review of facts and finding showing of reckless disregard inadequate); *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 82 (1967) (*per curiam*) (conducting independent review of facts despite defendant's failure to object to incorrect jury instruction concerning actual malice).

The duty of independent appellate review exists to insure the minimum standards set forth in *Gertz, supra,* are properly applied by trial courts. In *Gertz, supra,* the United States Supreme Court held that a private figure plaintiff is not constitutionally required to prove "actual malice" to recover compensatory damages, as is a "public figure", but that such a plaintiff *is* constitutionally required to prove both fault and falsity, with the precise *level* of fault left by the Court to the individual states to determine. The *Gertz* holding thus establishes that fault and falsity are constitutional elements of the libel tort—and hence "constitutional facts"—irrespective of the particular degree of fault which a state may choose to impose. A trial court finding of "negligent falsity" where negligence is the state's fault standard is no less subject to independent appellate examination than a finding of "actual malice" in a state where that happens to be the prescribed standard of fault. Indeed, if anything, independent appellate review is *more* needed when negligence is the standard and a jury is making the determination. As the *Bose* Court explained:

> the jury's application [of standards in such cases] 'is unlikely to be neutral with respect to the content of speech and holds a real danger of becoming an instrument for the suppression of those "vehement, caustic, and sometimes unpleasantly sharp attacks," which must be protected if the guarantees of the First and Fourteenth Amendments are to prevail.'

Bose, supra, quoting Monitor Patriot Co. v. Roy, 401 U.S. 265, 277 (1971) (libel case) (citations omitted).

B. Had The Third District Conducted The Required Independent Appellate Review Of The Trial Court Record It Would Have Reversed The Jury Verdict For Frank

The Third District explicitly declined to conduct the independent examination of the trial court record required by the First Amendment. As a result, it never considered the evidence before the trial court which revealed Frank's utter failure to prove either the *Herald's* negligence (assuming *arguendo*, this Court finds such is the standard) or the falsity of the challenged statements.

Despite the *Herald's* argument to the Third District that independent appellate review was necessary, that court refused to independently review the facts before the trial court in this case. Instead it deferred to the jury's findings, as if this were an ordinary tort case, and explicitly stated it was employing a deferential standard of review:

> Two well-settled principles of review govern our disposition of this cause:
>
> > First, it is not the function of an appellate court to reevaluate the evidence and substitute its judgment for that of the jury. . . . Second, if there is any competent evidence to support a verdict, that verdict must be sustained regardless of the District Court's opinion as to its appropriateness.
>
> *Helman v. Seaboard Coast Line Ry.*, 349 So.2d 1187, 1189 (Fla. 1977).

Frank, 442 So.2d at 983.

Erroneously applying this deferential standard of review, the Third District Court of Appeal relied exclusively upon two evidentiary considerations from which "*the jury*

could have concluded the statements pertaining to Frank were false" and negligently published: (i) "that the loan was denied for reasons unrelated to Frank's actions," and (ii) "that Frank was not contacted . . . prior to publication" 442 So.2d at 984 (emphasis added). The Third District conducted no independent examination to determine whether Frank proved the constitutionally required elements of "fault" and "falsity". Instead the Third District panel concluded that "controlling legal principles preclude us from disturbing the jury's determination." *Id.*

1. The required independent review of the record reveals that Frank failed to prove that the Herald was negligent

An independent appellate review of the record indicates that the *Herald* was not negligent in its publication of the Article and that Frank completely failed to carry his burden of proving fault. *See supra* at I.A.

2. The required independent review of the record indicates that Frank failed to prove that the statements in the Article were not either true or substantially true

An independent review of the record also shows Frank has failed to sustain his burden under Florida and federal law to prove "the essential and indispensable element of false words".[8] *Delacruz v. Peninsula State Bank*, 221 So.2d

8. Frank has not claimed he did *not* do as the Article reported. He contends instead that other causes were responsible for missing the deadline. Specifically, he argues (i) the bank's loan committee did not meet until the afternoon of August 6; (ii) the bank's requirements of monitor Hughes' signature and continued court jurisdiction were impossible; and (iii) Pac Craft's other lenders had not yet agreed to subordinate their priority

(Continued on following page)

772 (Fla. 2d DCA 1969); *Hawke v. Broward National Bank*, 220 So.2d 678 (Fla. 4th DCA 1969); *Gertz, supra; see also Wilson v. Scripps-Howard Broadcasting Co.*, 642 F.2d 371, 376 (6th Cir.), *cert. granted*, 454 U.S. 962, *cert. dismissed*, 454 U.S. 1130 (1981); *Medico v. Time, Inc.*, 643 F.2d 134, 146, n. 40 (2d Cir.), *cert. denied*, 454 U.S. 836 (1981). A properly searching examination of the record reveals that the statements were in fact true or substantially true, as required by Florida law. *See, e.g., Florida Publishing Co. v. Lee*, 76 Fla. 405, 80 So. 245 (1918); *Hill v. Lakeland Ledger Publishing Corp.*, 231 So.2d 254 (Fla. 2d DCA 1970); *Bishop v. Wometco Enterprises*, 235 So.2d 759 (Fla. 3d DCA), *cert. denied*, 240 So.2d 813 (Fla. 1970); *McCormick v. Miami Herald*

Footnote continued—

to the bank (Third District Ans. Br. 8, 20-23). These contentions are irrelevant to falsity.

First, Frank's reliance on the fact that the bank's loan committee did not meet on Balter's loan until August 6 is misplaced. If Frank had timely and properly tendered the required documents on August 6, as he was supposed to do the day before, the Bank could have funded. The Bank's loan committee *approved* the loan at its regular August 6 meeting (*see* Third District Ans. Br. App. 9), but Boyd would not give the money to Balter that day because the document did not have the clerk's seal (Tr. 1019). No other reason was given for refusing to make the loan. Because of Frank's delay, Balter arrived at the bank well after the close of the bank's business day and too late to return to the court for the seal. And obviously, that the loan was approved on the afternoon of August 6 does not foreclose the possibility that the loan could have been made on August 6 had the proper documentation been presented to the Bank.

Second, the bank's requirements relating to Hughes' signature and continued court jurisdiction were not "impossible conditions". Neither Frank nor his bankruptcy expert made this contention at the Balter trial, since black letter bankruptcy law neither precludes a bank from requiring the court monetor's signature nor the court from retaining jurisdiction. *See* 6A Collier on Bankruptcy, § 11.20, p. 316 (14th ed. 1977).

Third, whether other lenders agreed to subordinate to the bank's loan to Balter has nothing to do with whether Frank failed to obtain a seal. Moreover, Frank did not raise this point at his malpractice trial so it is unlikely he would have mentioned it to Putney in a contemporaneous interview.

Publishing Co., 139 So.2d 197, 200 (Fla. 2d DCA 1962) ("newspapers are not to be held to the exact facts or to the most minute details of the transaction they publish").

The requirement of "substantial truth" has been held satisfied when the truth as admitted by the plaintiff produces no "different effect" on the reader than the purported libelous statement. *McCormick, supra,* at 201 ("a workable test is whether the libel as published would have a different effect on the mind of the reader than that which the pleaded truth would have produced"); *accord Hammond v. Times Publishing Co.*, 162 So.2d 681 (Fla. 2d DCA 1964). As shown below, the challenged statements are not actionable because they are either literally true, or substantially true, and create no different impression on the reader than does the truth as admitted by Frank.

Frank's major argument in this case has been that the statements are false since other factors may have caused Balter to miss his funding deadline. He claims, despite his acts and omissions, he did not cause Balter's financial downfall. Frank's contention below is that the effect in the mind of the reader which flows from the challenged statements is that Frank is "blamed" for Balter's company's bankruptcy (Third District Ans. Br. 4-5).

Assuming *arguendo* the accuracy of Frank's contention, this Court must consider the effect publication of Frank's "side of the story" would have. *Bishop, supra; McCormick, supra; Hill, supra.* What Frank presents to this Court is a record in which his "side of the story" itself paints a picture of questionable practices and ethics which, if printed, would cause the reader to have no different (and certainly no better) impression of Frank as a lawyer. In fact, Frank's "side of the story", if printed,

may have caused the reader to think worse of him. As shown below, the publication of Frank's "side of the story" as integrated into the Balter "saga" would result in Frank being seen as an attorney who at best marginally attended to his professional duties and who was not above misrepresenting facts to the tribunals he was sworn to serve:

(i) Frank's "side of the story", as he swore at trial, is that he had no knowledge of the terms and conditions required by the bank in order for it to make the loan which would save his client's business. This is despite being expressly retained to protect Balter's interest in Pac Craft during bankruptcy proceedings and despite his undertaking to draft the papers required to save Balter's company (Tr. 812-13). Besides, Frank had described in open court in 1969 the details of the loan arrangement (Def. Ex. HH at 1101-03, 1105, 1108-09, 1112-13);

(ii) Frank also swore at trial below he had no role in arranging the loan with the bank (Tr. 814). He had, however, already sworn to the bankruptcy court in connection with his representation of Balter that he was entitled to be paid by the court for 10 hours of work, 7 1/2 hours of which were for conferences with the "Bank", "David Hughes" (the court monitor) and "Dave Balter" regarding the Pac Craft funding plan (Def. Ex. CC);

(iii) Frank swore in his 1970 deposition that he spoke with bank officer Boyd regarding the documents required by the bank to fund Balter's reorganization plan (Def. Ex. AA at 22-23). He also represented in his brief to the court while appealing his fee award that "the negotiations

with the bank . . . to fund the final plan were carried on solely by your Petitioner, and his efforts alone secured the loan" (Def. Ex. X at 7). In 1978, as a malpractice defendant, Frank reversed himself and swore that he did *not* know what documents the bank required and he had no legal duty to find out (Def. Ex. CC at 230-34);

(iv) Frank's bankruptcy expert at both the Balter trial and at the trial below (whom Frank claims Putney should have called) testified categorically that "there is no question" that bankruptcy lawyers who negotiate with banks regarding loans have a duty to know what the bank requires (Tr. 364);

(v) Frank admits failing to prepare an order authorizing the loan in time to satisfy the bankruptcy court's direct order to Frank that the loan document be submitted for signature by the court no later than August 5 (Tr. 977);

(vi) despite a funding deadline of 5:00 p.m. on August 6, 1969 which determined the fate of his client's company, Frank's best recollection of when he delivered the document to Balter in Miami Beach was 4:30 p.m. (Balter Tr. 2919), giving Balter one half hour to (a) drive from Miami Beach to Hialeah (where the bank was); (b) execute the necessary documents to process the loan; (c) obtain the funds; and (d) return to Miami to deposit the funds at the bankruptcy court by 5:00 p.m.;

(vii) Frank admits that *after* he was sued for malpractice, he shredded his files, which could

have answered so many questions and could have refreshed Frank's claimed lack of recollection (Tr. 1003-08); and

(viii) despite the jury verdict in Frank's favor in the Balter malpractice trial (upon which Frank relied so heavily at trial to show the statements were false), the Balter jurors had "decided that the evidence showed [Frank] failed to prepare appropriate pleadings and papers in a proper and timely fashion" and had acquitted Frank only because their consideration of the case against Frank "fell between the cracks" (R. 25). The Balter jury foreperson found the Article "completely accurate" as it related to Frank. *Id.*

It is clear that publication of Frank's "side of the story" would produce no better picture in the mind of the reader of Frank as a lawyer than did the Article actually published. Even if Frank's version would not lead the reader to "blame" Frank for Balter's financial downfall, it would at least lead him to perceive Frank as a scheming, manipulating, careless attorney. The challenged statements cannot, therefore, support a verdict for Frank as a matter of law. *Bishop, supra; Hill, supra; McCormick, supra.*

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 court's treatment of the general verdict in Frank's favor in the Balter malpractice trial was a major issue in the trial court. The simple *existence* of the "not guilty"

verdict was not in dispute; in fact, the *Herald twice* reported it in the Article. The *import* of the verdict, however, was very much in dispute. At trial, over the objection of the *Herald*, the court allowed Frank to argue to the jury that the general verdict meant that he had prepared the loan document and gotten the court seal. Not only did the trial court instruct the jury that it could consider the general verdict as proof of the falsity of the challenged statement, it refused to allow into evidence the only testimony which could explain the true meaning of the verdict —the Balter jurors' belief that the statements about Frank were true.

On appeal, the Third District affirmed the trial court's judgment, holding that the instruction "even if somewhat unclear, did not rise to the level of reversible error," 442 So.2d at 984, and that the trial court had properly disallowed the Balter jurors' testimony. In so holding, the Third District failed to recognize: (i) the *general* jury verdict in the Balter/Frank malpractice action did not bear on the truth of the *specific* statements concerning Frank in the Article, (ii) the Balter jurors' testimony was admissible to *explain* the general verdict's meaning once Frank made it an issue, and (iii) the trial court erroneously permitted Frank's counsel to bind the *Herald* to a verdict rendered in an action to which it was not a party. The trial court committed reversible error in thus misleading the jury.

First, the general jury verdict of "not guilty" rendered in the prior malpractice action between Balter and Frank was not relevant to or probative of the truth or falsity of the specific statements concerning Frank in the Article. As Judge Jorgensen properly noted, dissenting from the opinion of the Third District panel below:

> The general malpractice verdict was probative only of the issue of "whether Robert Frank was negligent in the performance of his contractual relationship with David Balter and [whether] such negligence was a legal cause of damage to David Balter", a fact that was reported in the *Herald* article and is not at issue here and, therefore, is not relevant.

442 So.2d at 984 (Jorgensen, J., dissenting). The verdict as a matter of law cannot mean the statements were false, since the only thing it can mean is that Balter had failed to produce sufficient evidence to prevail as to any one of several elements to recover for malpractice. *See* Section 90.401, Florida Statutes (1983); McCORMICK ON EVIDENCE, § 185 at 437 (2d ed. 1972); *see also Atlantic Coast Line R. Co. v. Campbell,* 104 Fla. 274, 139 So. 886, 890 (1932). Yet Frank's counsel was permitted to thoroughly confuse the jury as to the verdict's significance, and argue, *fifteen times,* that it *meant* the statements about Frank were false.[9]

Once it permitted the jury to consider the verdict as evidence, the second mistake of the trial court was in failing to allow the Balter jurors to explain that their verdict did not mean the statements were false, as Frank contended. *See State v. Ramirez,* 73 So.2d 213 (Fla. 1954). In truth, the general malpractice verdict did *not* mean that the statements were false, since the Balter jurors were all prepared to testify that they in fact believed the statements to be *true*--and both the trial court and counsel for Frank knew it. *See McArthur v. Cook,* 99

---

9. Counsel for Frank relied on the Balter verdict extensively, referring to it at least seven times during opening (Tr. 71, 72, 82, 85, 86, 90, 91), at least seven more times during the presentation of evidence (Tr. 218, 219, 227, 228, 232, 645, 646), and again during closing (Tr. 1453).

So.2d 565 (Fla. 1957) (reversible error to exclude the only competent evidence on fact in issue). Thus, the only opportunity to "cure" the trial court's first mistake was lost.

Finally, the trial court permitted Frank to assert that the Balter verdict was, in effect, binding on the *Herald*. The *Herald* was not a party to the Balter trial, however, and could not be bound by its verdict. Relying primarily on *Pennsylvania Insurance Co. v. Miami National Bank*, 241 So.2d 861, 864 (Fla. 3d DCA 1970), Judge Jorgensen correctly noted:

> The prior verdict between a third party and one of the parties to the present action should not in any way determine the rights of a party not affected by a judgment rendered on that verdict. The rights of the parties in the present action "are to be determined as though the [prior] judgment had never been rendered. This is true even though the two suits arose out of the same transaction and involve the same issues and evidence".

442 So.2d at 985 (Jorgensen, J., dissenting). *Trucking Employees of North Jersey Welfare Fund, Inc. v. Romano*, 450 So.2d 843, 846 (Fla. 1984); *see also City of Anna Maria v. Miller*, 91 So.2d 333, 334 (Fla. 1956) (collateral estoppel effect of verdict limited to findings actually rendered).

The Third District accordingly erred in holding that no reversal was warranted, despite the "somewhat unclear" jury instruction. 442 So.2d at 984. The trial court's decision to give the challenged instruction was reversible error because it tended "to confuse rather than enlighten" and may have "misled the jury and caused them to arrive

at a conclusion that otherwise they would not have reached." *Allstate Insurance Co. v. Vanater,* 297 So.2d 293 (Fla. 1974); *accord Florida Power & Light Co. v. McCollum,* 140 So.2d 569 (Fla. 1962). Moreover, the misleading instruction was particularly prejudicial because it was the only one given concerning the meaning of the jury verdict. *See Yacker v. Teitch,* 330 So.2d 828, 830 (Fla. 3d DCA 1970) (to warrant reversal, challenged jury instruction must be analyzed in light of all other instructions given on the same subject). In fact, the trial court singled out this particular instruction by charging the jury on it before the trial began (Tr. 125).

The trial court (i) erroneously instructed the jury that the general verdict could mean the statements were false; (ii) prevented the *Herald* from showing the Balter jurors who rendered the verdict believed the statements to be true; and (iii) permitted Frank's counsel to argue the Balter verdict meant the statements were false, despite the contrary being true—thereby committing a multitude of errors which together prejudiced the interests of the *Herald. See Allett v. Hill,* 422 So.2d 1047 (Fla. 4th DCA 1982), *pet. denied,* 434 So.2d 887 (Fla. 1983). The trial court's failure warrants reversal of the judgment below.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Third District Court of Appeal, with instructions to enter judgment for *The Miami Herald*.

RICHARD J. OVELMEN
General Counsel
The Miami Herald
Publishing Company
One Herald Plaza
Miami, Florida 33101
(305) 350-2204

THOMSON ZEDER BOHRER WERTH
ADORNO & RAZOOK
/s/ PARKER D. THOMSON
SANFORD L. BOHRER
CHARLES V. SENATORE
LAURA BESVINICK
1000 Southeast Bank Building
Miami, Florida 33131
(305) 350-1100
Attorneys for The Miami Herald Publishing Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Petitioner The Miami Herald Publishing Company was served by mail this 1st day of August, 1984 upon:

Bertha Claire Lee
Floyd Pearson Richman Greer
Weil Zack & Brumbaugh, P.A.
Attorneys for Respondent
One Biscayne Tower
Twenty-Fifth Floor
Miami, Florida 33131-1868

s/ PARKER D. THOMSON