IN THE
SUPREME COURT OF FLORIDA

CASE NO. 74,904

IN THE MATTER OF USE BY THE)
TRIAL COURTS OF THE STANDARD)
JURY INSTRUCTIONS (CIVIL CASES))
)

Response of The Miami Herald Publishing Company,
Palm Beach Newspapers, Inc.,
Review Publications, Inc.,
Times Publishing Company,
The News-Sun/Avon Park, The News-Leader (Fernandina Beach), The Gainesville Sun, The Lake City Reporter, The Ledger (Lakeland), The Daily Commercial (Leesburg), The Marco Island Eagle, The Ocala Star-Banner, The Palatka Daily News, Sarasota Herald-Tribune, and The News-Sun (Sebring) to Supplemental Report No. 89-1 of the Committee on Standard Jury Instructions (Civil)

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Respondents are members of the mass media. They represent a broad spectrum of journalists who gather and disseminate news to the public. Because their ability to report the news fully and accurately is profoundly impacted by libel and slander suits, respondents are directly interested in the formulation of standard jury instructions for use in defamation cases. More specifically, respondents seek to ensure that established constitutional and common law protections for free speech are included in the instructions.

The instructions submitted by the Committee provide an incomplete and erroneous statement of the Florida common law of defamation and of constitutional protections which limit defamation actions. Consequently, adoption of the proposed instructions -- which would be generally utilized and widely regarded as a correct statement of the law -- would substantially erode freedom of speech and of the press in Florida.[1]

Submitted together with this brief is an appendix containing jury instructions that are supported by the arguments set forth below. Respondents ask that the Court adopt this set of instructions should it agree with respondents' criticism of the Committee's proposed instructions. Alternatively, respondents request that the Committee's instructions be remanded to the Committee for reconsideration of the arguments contained herein.

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1. The Committee received comments on the proposed instructions from a variety of sources. Many of those comments are consistent with the arguments set forth in this brief.

Araument

I.

The Proposed Instructions Abridge Federal and Florida Constitutional Principles

The instructions submitted by the Committee depart from at least four fundamental principles established in the Florida and federal constitutions.

A. The Instructions Discriminate Against Nonmedia Defendants

The single most obvious and most pervasive problem found in the proposed instructions is that they erroneously assume that speech by nonmedia defendants which is not about a public official or public figure, is not entitled to any state or federal constitutional protection.

This assumption is reflected in the fact that the proposed instructions contain a constitutional "fault" requirement where the media is a defendant or where the plaintiff is a public official or figure (MI 4.1 & 4.2), but the proposed instruction applicable where the media is not a defendant and the plaintiff is a private figure does not (MI 4.3) contain any such fault requirement.

The United States Supreme Court first announced in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), that no liability for defamation could be imposed against any defendant if the plaintiff failed to prove fault by a preponderance of the

evidence.[2] Because the defendant in the Gertz case was the publisher of a magazine, there was some debate after the decision regarding whether the fault requirement extended to protect "nonmedia" defendants. In the first decade following the Gertz decision, a number of courts considered the issue and the overwhelming majority agreed that Gertz did not interpret the First Amendment as protecting solely members of the institutional media. See Developments in the Law -- The Interpretation of State Constitutional Rights, 95 Harv. L. Rev. 1324, 1405 (1982) (summarizing state court decisions). The commentators also agreed that there are no legitimate reasons for giving members of the public less than the minimal libel protection afforded the press under the First Amendment. See, e.g., Note, Mediaocracy and Mistrust: Extending New York Times Defamation Protection to Nonmedia Defendants, 95 Harv. L. Rev. 1876, 1884-86 (1982).

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2. The Supreme Court previously had held in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), that no liability could be imposed against any defendant in a defamation case where the plaintiff was a public official and the plaintiff failed to prove "actual malice" with convincing clarity. This rule was later extended to encompass libel suits brought by "public figures." See Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967). Gertz then established the level of constitutional protection available in cases brought by private figures. In addition to finding a fault requirement, Gertz held that plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth are limited to compensation for actual injury. Such plaintiffs may not recover presumed or punitive damages. As will be discussed in Part I.C. of this brief infra, the Committee's proposed instructions do not discriminate against nonmedia defendants in this regard: the proposed instructions erroneously allow plaintiffs to recover presumed injuries in all cases, irrespective of the status of the defendant.

When this Court addressed the issue of whether the protections of Gertz apply in nonmedia, non-public official or figure cases in Nodar v. Galbreath, 462 So.2d 803 (Fla. 1984), it expressly concluded that arbitrary discrimination against nonmedia speakers is not permitted and that the argument that "Gertz protect[s] only those defamation defendants who are associated with the organized communications media" must be rejected. Id. at 808. "We believe," this Court held, " . . . that the constitutionally protected right to discuss, comment upon, criticize, and debate, indeed, the freedom to speak on any and all matter is extended not only to the organized media but to all persons. If common-law remedies for defamation are to be constitutionally restricted in actions against media defendants, they should also be restricted in actions against private, non-media speakers and publishers."[3] Id. The Committee observes

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3. Prior to Nodar, this Court had held that the protection which the Supreme Court recognized for the media in New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (requiring public officials to prove actual malice), protected nonmedia speakers as well. See Smith v. Russell, 456 So.2d 462, 463-64 (Fla. 1984), cert. denied, 470 U.S. 1027 (1985) (requiring constitutional "actual malice" to be proven by police officer suing nonmedia defendant); Gibson v. Maloney, 231 So.2d 823 (Fla. 1970) (requiring actual malice to be proven by newspaper publisher suing telephone company officer). Of course, the United States Supreme Court itself had held in Sullivan that the nonmedia defendants in that case were entitled to the same protection as was the New York Times. The Committee implicitly concedes the point that no distinction can be drawn between media and nonmedia defendants when the plaintiff is a public official or public figure because it does not provide a dual set of instructions for such cases. The Committee offers no reason, however, why the media/nonmedia distinction which admittedly cannot be made in these cases should exist in private figure cases.

in Comment 4 o its propose instructions that this language is "dictum" because the case was decided on "'common-law principles of qualified privilege.'" Comment 4. That "dictum" cannot, however, be ignored because the United States Supreme Court reached this same conclusion one year after Nodar in Dun & Bradstreet. Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985).

The Committee does note in Comment 1 that there has been "criticism of the categorical distinction [between media and non-media defendants] on . . . First Amendment grounds," citing the dissenting opinion of Justice Brennan in Greenmoss, 472 U.S. at 783-84. The Committee errs, however, in citing only the Greenmoss dissent. Justice Powell, who announced the opinion of the Court in Greenmoss and who was the author of the majority opinion in Gertz, wrote that constitutional protections enunciated by the Supreme Court in Gertz extend to all speech about matters of public concern. That opinion, joined by Justices Rehnquist and O'Connor, makes no intimation that speech about matters of public concern would not be entitled to the same constitutional protections if it were uttered by a private, nonmedia defendant.[4] Chief Justice Burger, concurring, agreed

4. It also is possible that the Gertz fault rule would apply to speech by nonmedia defendants which is not a matter of public concern because the only Gertz protection at issue in Greenmoss was the rule with respect to presumed and punitive damages. The four dissenters in Greenmoss point this out and would require proof of fault in all defamation cases. 472 U.S. at 781 (Brennan, J., dissenting). The opinion of Justices Powell, O'Connor and Rehnquist suggests that statements which are not of public concern are "not totally unprotected by the First Amendment." 472 U.S. at 760.

with the proposition that the Gertz protections apply to speech about matters of public concern. 472 U.S. at 763-65. He also made no suggestion that nonmedia speakers should be treated differently than media speakers.

Justice White, concurring in the Powell opinion, wrote separately to state: "Wisely, in my view, Justice Powell does not rest his application of a different rule here on a distinction between media and nonmedia defendants. On that issue, I agree with Justice Brennan that the First Amendment gives no more protection to the press in defamation suits than it does to others exercising their freedom of speech. None of our cases affords such a distinction; to the contrary, the Court has rejected it at every turn." 472 U.S. at 773 (White, J., concurring) (footnotes omitted). 5

Even more strongly, Justice Brennan, dissenting from Justice Powell's view that the Gertz protections could be trimmed back to cover solely speech about matters of public concern, wrote the following analysis of the media/nonmedia distinction in which Justices Marshall, Blackmun and Stevens joined:

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5. The cases cited by Justice White, such as Pell v. Procunier, 417 U.S. 817 (1974), all reject the notion that the press is entitled to greater rights than the public. See also Minneapolis Star and Tribune Co. v. Minnesota Commissioner, 460 U.S. 575 (1983) (holding discriminatory treatment of different speakers directly abridges the First Amendment). This Court has long endorsed this view. More than a century ago this Court held that the "press does not possess any immunities or privileges as to publishing libels which are not shared by every individual." Jones, Varnum & Co. v. Townsend's Administratrix, 21 Fla. 433, 450-51 (1885).

> [R]espondent urged that this pruning can be accomplished by restricting the applicability of Gertz to cases in which the defendant is a "media" entity. Such a distinction is irreconcilable with the fundamental First Amendment principle that "[t]he inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." First National Bank of Boston v. Bellotti, 435 U.S. 765, 777 (1978). First Amendment difficulties lurk in the definitional questions such an approach would generate. And the distinction would likely be born an anachronism. Perhaps most importantly, the argument that Gertz should be limited misapprehends our cases. We protect the press to ensure the vitality of First Amendment guarantees. This solicitude implies no endorsement of the principle that speakers other than the press deserve lesser First Amendment protection.

472 U.S. at 782-83.

Thus, the Supreme Court was unanimous that the status of a defendant as a nonmedia speaker cannot be used as a basis for denying the application of the First Amendment protections for speech recognized in Gertz.

The media organizations who file this brief make this point not solely for the altruistic purpose of ensuring that all people share First Amendment rights equally, but also because the media/nonmedia distinction is one which threatens to undermine the effectiveness of constitutional protection of the press. The press after all relies for most of its information upon sources who are not members of the media. If a source cannot rely on constitutional protection for her speech about matters of public concern, she is far less likely to provide

information which a journalist needs. Thus, if a source cannot share the journalist's protection, the journalist is likely to find that his protection is of little utility.

Moreover, many libel and slander claims are brought against both media and nonmedia defendants. Could a reasonable jury be expected to understand and to follow an instruction that greater protection is afforded to a reporter who published a statement about the plaintiff than is afforded to the nonmedia source who originally published exactly the same statement? Confusion might be the best result for which one might hope. One more likely would expect juries to understand the distinction quite well and to defeat it by making findings of negligence or actual malice merely *so* that journalists would share in any liability found against the unprotected nonmedia defendant.

Finally, freedom of speech and of the press would almost certainly be diminished by the adoption of the distinction merely because it would encourage the filing of more libel and slander suits generally. In some of those suits there would be substantial issues regarding how the term media should be defined. Creative lawyers would find ways to argue that numerous publishers of information do not qualify as "media." Those publishers would suffer. In other "nonmedia" suits substantial common law principles would be established and could detrimentally impact the media. Still other nonmedia cases would serve to stimulate interest in filing media libel cases.

At bottom, however, respondents do not rest on the argument that they will be the ones who will be most severely

harmed by adoption of the distinction proposed by the Committee. Any rule which reduces the availability of First Amendment protection against the threat posed by libel actions based on speech about matters of public concern will seriously harm all members of society.

B. The Instructions Do Not Require an Adequate Finding of Falsity

The second serious flaw in the proposed instructions is that they do not require a jury to make an adequate finding of falsity. The United States Supreme Court held in Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 768-69 (1986), that the defamation plaintiff who seeks damages based on speech about matters of public concern bears the burden not only of proving fault, but also of proving that the defamatory speech is false. Florida and federal courts repeatedly have held that "falsity" means not merely that the statement contains some technical or incidental falsity, but that the falsity is *so* substantial that the entire defamatory gist or sting is created by the falsity and that the same meaning would not be conveyed by the admitted truth. The standard developed by Florida courts is "whether the libel as published would have a different effect on the mind of the reader from that which the pleaded truth would have produced." McCormick v. Miami Herald Publishing Co., 139 So.2d 197, 200 (Fla. 2d DCA 1962). "'[N]ewspapers are not to be held to the exact facts or to the most minute details of the transactions they publish, . . . what the law requires is that the publication shall be substantially true, and that mere

inaccuracies, not affecting the material import of the article are immaterial.'" Id. (citation omitted); accord Valentine v. CBS Inc., 698 F.2d 430, 432 (11th Cir. 1983) (applying Florida law) (no liability if publication is "substantially and materially true"); Nelson v. Associated Press, Inc., 667 F. Supp. 1468, 1477 (S.D. Fla. 1987) (applying Florida law) (same); Times Publishing Co. v. Huffstetler, 409 So.2d 112, 113 (Fla. 5th DCA 1982) (test is whether publication is substantially accurate); Hill v. Lakeland Ledger Publishing Corp., 231 So.2d 254, 255-56 (Fla. 2d DCA 1970) (same).

The Committee recognizes and accepts this line of authorities in Comment 3 which cites the Huffstetler case and notes that a finding of falsity should not turn on "insignificant detail." Yet, the proposed instruction fails to explain this concept to the jury. It states only that the jury is to determine whether the publication at issue is false "in some significant respect." MI 4.1(b), 4.2(b).

The error invited by the proposed instruction is easily demonstrated by application of it in the Hill case. There the defendant published an article stating that the plaintiff had violated a state statute and that the state attorney general had concluded that the plaintiff had broken the law. The headline of the article also reiterated the attorney general's conclusion. Although the article's statements about the attorney general were untrue, the Second District Court of Appeal, applying the McCormick test, concluded that the article was not substantially false. The plaintiff had acted contrary

to the statute's plain language, and even if the statements about the attorney general were deleted, the effect of the article would have been the same. 231 So.2d at 255-56.

If the "significant respect" test had been applied in Hill, the result would have been different because it was certainly significant that the state attorney general had not issued an opinion on the legality of the plaintiff's conduct. This example shows the defect of the "significant respect" test: it does not require the jury to analyze the effect of the publication absent the false statements, and allows the jury to instead focus on isolated parts of a publication.

If the Committee's instructions are approved, a statement that a person stole $10,000 from a bank will be sufficient to impose liability even though the person has actually stolen $1,000. Such a result was expressly disapproved of in McCormick. 139 So.2d at 200-01. See also Restatement (Second) of Torts § 581A, comment f ("a charge of theft may be reasonably interpreted as charging any form of criminally punishable misappropriation"). Unlike the Committee's proposed instructions, the instructions proposed by respondents explain the falsity test recognized by the Florida courts and required under the state and federal constitutions. See Appendix.

C. The Instructions Omit the Requirement that the Plaintiff Prove Actual Injury

None of the proposed instructions, MI 4.1 through 4.4, require the jury to find that the publication of a defamatory falsehood in fact was the proximate cause of an actual injury to

the plaintiff. In every case under the proposed instructions, injury is presumed as a matter of law. The jury is told: "A [statement] [publication] is a cause of [loss] [injury] [or] [damage] if it directly and in natural and continuous sequence produces or contributes substantially to producing such [loss] [injury] [or] [damage]." MI 4.4 introduction (from existing introduction to MI 4.5). But the actual impact of the defamatory statement on the plaintiff is irrelevant. Only the "natural" effect of the publication is to be considered under the proposed instructions.

At common law, a publication was classified as defamatory "per se" if its "natural" impact on the plaintiff was the infliction of harm. In "per se" cases, the plaintiff was alleviated of the obligation of offering evidence that he in fact suffered harm. See, e.g., Layne v. Tribune Co., 108 Fla. 177, 146 So. 234 (1933). The proposed instructions fully embrace this concept of "per se" defamation in that they never require a finding that the plaintiff in fact suffered injury. Notably, in this regard, even the media is afforded no constitutional protection by the Committee's instructions. Both media and nonmedia defendants are to suffer the fate of "presumed damages" in all cases.

This conclusion simply cannot be squared with this Court's decision in Mid-Florida Television Corp. v. Boyles, 467 So.2d 282 (Fla. 1985), that it is "no longer accurate" to say that "'[w]ords amounting to a libel per se necessarily import damage and malice in legal contemplation, so these elements need

not be pleaded or proved, as they are conclusively presumed as a matter of law.'" Id. at 283 (quoting Layne). The majority in Boyles concluded that in light of Gertz, damages can no longer be presumed and that the terms libel and slander "per se" could be used solely to advise the defendant that the plaintiff is relying upon the words sued upon as facially defamatory. Justice Ehrlich, concurring in Boyles, went so far as to say that "[l]ibel per se is dead, and let no one read from this decision that this ghost which we find still persists, lingers in any form other than as a shorthand term." Id. at 284.[6]

The proposed instructions treat Boyles as if it had never been decided and resuscitates the full force and effect of the libel per se doctrine. For this reason also the proposed instructions should not be adopted.

The Boyles decision is, as noted, grounded in the Supreme Court's holding in Gertz that in defamation cases involving matters of public concern, the First Amendment requires the plaintiff to prove actual injury at least where there is no clear and convincing evidence of actual malice. The

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6. Even prior to the unequivocal statement of the law in Boyles, this Court and lower Florida courts had rigorously enforced the Gertz actual injury requirement in all cases involving speech of public concern. See, e.g., Miami Herald Publishina Co. v. Ane, 458 So.2d 239, 242 (Fla. 1984) (there must be "evidence of some actual injury"); Hav v. Independent Newspapers. Inc., 450 So.2d 293, 294-95 (Fla. 2d DCA 1984) (to "state a cause of action for libel, a private person must allege publication (1) of false and defamatory statements of and concerning that private person, (2) without reasonable care as to the truth or falsity of those statements, (3) resulting in actual. damage to that private person"); Shiver v. Apalachee Publishina Co., 425 So.2d 1173, 1175 (Fla. 1st DCA 1983) (plaintiff cannot recover "without proof of actual damage").

Gertz opinion, like Boyles, noted that "The common law of defamation is an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss." 418 U.S. at 349. Also like Bovles, the Gertz majority held that this common law proposition could no longer be considered accurate given First Amendment considerations. "The largely uncontrolled discretion of juries to award damages where there is no loss necessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms. Additionally, the doctrine of presumed damages invites juries to publish unpopular opinion rather than to compensate individuals for injuries sustained by the publication of a false fact." Id. Accordingly, the Supreme Court held, "It is necessary to restrict defamation plaintiff who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury. . . . [A]ll awards must be supported by competent evidence concerning the injury." Id. at 349-50.

Because the jury instructions proposed by the Committee do not require juries to ground an award of money damages on competent evidence of actual injury in any case, the instructions should not be adopted.

D. The Instructions Fail to Set Forth Necessary Negligence Instructions

As indicated in section I.A., the proposed instructions improperly do not require the plaintiff to prove fault in every case involving speech about matters of public concern. The instructions do provide such a requirement in media defendant

cases, but even in this regard the instructions are constitutionally deficient for a number of reasons.

Proposed instruction MI 4.2(c), which delineates the standard of fault for cases involving private plaintiffs and media defendants, sets forth a standard of ordinary negligence, and defines negligence as follows: "Negligence is the failure to use reasonable care. Reasonable care is that degree of care which a reasonably careful person would use under like circumstances." The proposed instruction's ordinary negligence formulation is inconsistent with this Court's application of a "journalistic negligence" standard in a libel case involving a media defendant. See Firestone v. Time, Inc., 305 So.2d 172, 178 (Fla. 1974), vacated on other arounds, 424 U.S. 468 (1976). See also Miami Herald Publishing Co. v. Ane, 423 So.2d 376, 382, 390 (Fla. 3d DCA 1983), approved, 458 So.2d 239 (Fla. 1984) (finding that media defendant had committed "journalistic negligence").

Other state courts examining the Gertz fault standard applicable in private figure plaintiff cases expressly have held that the plaintiff must prove the standard of care of the ordinary journalist when the defendant is a member of the media and must further show that the defendant has breached that standard **See,** e.g., Triangle Publications v. Chumley, 317 S.E.2d 534, 537 (Ga. 1984); Kerwick v. Orange County Publications, 420 N.E.2d 970, 971 (N.Y. 1981); Seegmiller v. KSL, 626 P.2d 968, 976 (Utah 1981); Martin v. Griffin Television, Inc., 549 P.2d 85, 93 (Okla. 1976). Cf. Butts, 388 U.S. at 155 ("highly unreasonable conduct constituting a departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers").

The proper standard of fault in a case involving a media defendant is one of "journalistic negligence," i.e., the degree of care which a reasonably careful journalist or media entity would use under like circumstances. Cf. Horowitz v. Schwartz, 74 So.2d 801, 804 (Fla. 1954) (comparing actions of doctor charged with negligence with methods known and approved by the medical profession). Proposed instruction MI 4.2(c) should be modified to incorporate this standard of care.

The fault instruction found in MI 4.2 also is deficient in that it makes no provision for the giving of either a comparative negligence instruction or an assumption of the risk instruction. In many libel and slander cases, it can be shown that the defendant published a false and defamatory statement of fact only because he was prevented from obtaining accurate information from the plaintiff or because the plaintiff created circumstances which subjected him to an obvious risk that he would suffer injury through the publication of defamatory falsehood. In such circumstances, libel and slander defendants should have the benefit of all negligence instructions applicable in other types of negligence cases. At the very least, the comments should reflect that the miscellaneous instructions applicable in defamation cases do not apply to the exclusion of all other potentially applicable standard instructions.

II.

The Proposed Instructions Depart From the Common Law

The Committee's proposed instructions not only omit the constitutional requirements discussed above, they also depart

substantially from the well-established Florida common law of defamation. Standard jury instructions should "state as accurately as a group of experienced lawyers and judges could state the law of Florida in simple understandable language." In re Standard Jury Instructions, 198 So.2d 319, 319 (Fla. 1967). They should not introduce major changes in the law as do the instructions proposed by the Committee.

A. The Instructions Omit the Element of Malice

Perhaps the most striking aspect of the proposed instructions is that they remove common law malice as an element of the tort.

It has long been the rule in Florida that malice is an essential element of every libel or slander action. See Abraham v. Baldwin, 42 So. 591, 592 (Fla. 1906); Myers v. Hodges, 44 So. 357, 365 (Fla. 1907). This Court, in Layne v. Tribune Co., 146 So. 234 (Fla. 1933), explained the foundation of this requirement:

> Libels were actionable at common law, because the right of every individual to personal security was deemed to embrace the right to be free from malicious publications, designed to give publicity to an imputation injuring one's good reputation. This theory caused libel to be denominated a tort.... Malice, either actual or imputed, becomes therefore the gist of every actionable libel. Without malice, either express or implied by law, no tort could result from the publication of a defamatory statement concerning another, however untrue it might be.

Id. at 238. Florida courts have repeatedly affirmed the malice requirement. See, e.g., Metropolis Co. v. Croasdell, 199 So. 569, 570 (Fla. 1941) (plaintiff must present some evidence of malice); Wolfson v. Kirk, 273 So.2d 774, 776 (Fla. 3d DCA 1973) ("Malice is an essential element of the tort."); Emulovers Commercial Union Ins. Co. v. Kottmeier, 323 So.2d 605, 606 (Fla. 2d DCA 1975) (same); Axelrod v. Califano, 357 So.2d 1048, 1050 (Fla. 1st DCA 1978) (malice is an essential element of slander).

The "common law malice" referred to in these decisions is ill will, hatred and a desire to injure the plaintiff. See Loeb v. Geronemus, 66 So.2d 241 (Fla. 1953); Montgomery v. Knox, 23 Fla. 595, 3 So. 211 (1887). As such, it is a different element from the "actual malice" requirement imposed in public official and public figure cases by the rule of New York Times co. v. sullivan, 376 U.S. 254 (1964). See Nodar, 462 So.2d at 806.

At common law a presumption of malice arose in cases of libel or slander per se or where the language was defamatory on its face. Lavne, 146 So. at 236. See also Teare v. Local Union, 98 So.2d 79, 82 (Fla. 1957). No such presumption existed in cases of libel or slander per quod where the defamatory nature of the language had to be shown by resort to extrinsic evidence. Id. But plainly in all cases, malice, either implied or express, was an essential element of the tort.

This Court's conclusion in Bovles that "[l]ibel per se is dead," 467 So.2d at 284 (Ehrlich, J., concurring), altered the common law by eliminating the presumption of common law

malice which existed in per se cases and thereby required every plaintiff to plead and prove common law malice.[7]

Nevertheless, the Committee's proposed instructions place no burden on the plaintiff in any libel case to prove malice as a part of his prima facie case. Malice is wholly omitted as an element of the tort. The Committee does retain at least a part of the doctrine that evidence of common law malice will defeat a common law qualified privilege. But, no Florida case ever has held that a plaintiff is required to establish malice only in those cases where the defendant can show that he published the statement at issue under circumstances giving rise to a common law privilege.

To the contrary, malice to date has been an element of the plaintiff's prima facie case -- or as Layne states even more directly, "Malice . . . [is] the gist of every actionable libel." 146 So. at 238. The elimination of malice as an element of the tort would be a plain and dramatic departure from the common law.

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7. Prior to Bovles, the presumption of common law malice would be defeated if the speech at issue was published upon a privileged occasion. See Nodar, 462 So.2d at 810. "The privilege . . . raise[d] a presumption of good faith and place[d] upon the plaintiff the burden of proving express malice -- that is, malice in fact as defined by the common law doctrine of qualified privilege." Id. Because Bovles requires every defamation plaintiff to prove common law malice -- by eliminating the presumption of malice -- a common law qualified privilege need not exist to impose this burden on the plaintiff in any case. Accordingly, the revised instructions submitted by the respondents delete all references to qualified privileges and substitute a requirement that the jury find express malice.

B. All Common Law Qualified Privileges are Made Unavailable to Media Defendants

Under the proposed instructions, media defendants do not even reap the benefits of a malice requirement in those cases where a qualified privilege should be available because the Committee has concluded that none of the many common law qualified privileges, developed by this Court over centuries and regularly applied in media cases, see, e.g., Abram v. Odham, 89 So.2d 334 (Fla. 1956), and Layne, 146 So. 234, are available to the media.

The apparent but unarticulated rationale of the Committee's decision on this point is that because every plaintiff who brings an action against the media must prove fault -- in the sense of either constitutional actual malice or negligence -- there is no need under any circumstances for any further protection of the media. This view is unsupported by any decision of any court and the fallacy of its reasoning is easily demonstrated. Neither New York Times Co. v. Sullivan nor Gertz v. Robert Welch, Inc. displaced the Florida common law. Rather, both cases provided certain floor-level protections for speech beneath which common law doctrines are not permitted to go. In those instances where the common law provides greater or different protections for speech than the constitutionally-required minimum protections, the common law continues in full force and effect.

There is no doubt that the protection afforded by the common law qualified privileges is far different and in many instances far greater than the constitutionally required

minimums. Again, this Court's Nodar decision provides substantial guidance. In that case, the Court held: "Petitioner correctly points out that the district court failed to recognize that the 'actual malice' necessary to overcome the 'constitutional privilege' of New York Times Co. v. Sullivan is different from the express malice necessary to avoid the common-law qualified privilege. The elements of 'actual malice,' and the standard of proof, differ from those of express malice." 462 So.2d at 806. The opinion continued on to note that the former type of malice must be proven with clear and convincing evidence that the defendant knew of the falsity of the statement or recklessly disregarded its truth, while the latter type of malice could be proven with a preponderance of evidence showing "the primary motive for the statement . . . to have been an intention to injure the plaintiff.'' Id. There may be many cases where the plaintiff might well show that the defendant had knowledge that his statements were false, but he will have no evidence that the defendant published the statements for the purpose of inflicting an injury on the plaintiff.8

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8. A recent example of such a case is Harte-Hanks Communications, Inc. v. Connaughton, 109 S.Ct. 2677 (1989), in which the Supreme Court found that there was clear and convincing evidence of constitutional actual malice, but also noted that the defendant appeared only to have been accurately reporting newsworthy allegations that a political candidate had used dirty tricks in the campaign. Id. at 2699 (Blackmun, J., concurring). An absolute "neutral reportage" privilege has been recognized by lower Florida courts and some federal courts to protect the publication of such statements. See Edwards v. National Audobon Society, Inc., 556 F.2d 113, 120 (2d Cir.),

(Footnote continued on next page)

The distinction between a finding of mere negligence and a finding of express malice is even more significant. Obviously, even a reporter who is acting with the best of intentions can from time to time publish a false statement accidentally. In such cases, the reporter might be found negligent, but under the Florida common law his report could not provide a basis for liability if ill will were absent.9

C. The Instructions Allow Liability to be Imposed in the Absence of Publication to a Third Party

None of the proposed instructions require the jury to find that a defamatory falsehood was published, i.e., communicated to a third party or, if so, precisely what words constituted that defamatory falsehood. Although these issues

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(Footnote continued from previous page)

cert. denied, 434 U.S. 1002 (1977), Huzar v. Gross, 486 So.2d 512 (Fla. 1st DCA 1985); Smith v. Taylor County Publishing Co., 443 So.2d 1042, 1044 (Fla. 1st DCA 1983); Victor v. News & Sun Sentinel Co., 10 Media L. Rep. (BNA) 2073 (Fla. 17th Cir. 1984); Bair v. Palm Beach Newspapers, Inc., 8 Media L. Rep. (BNA) 2028 (15th Cir. 1982), aff'd, 444 So.2d 1131 (Fla. 4th DCA 1984); El Amin v. Miami Herald Publishing Co., 9 Media L. Rep. (BNA) 1079 (Fla. 11th Cir. 1983); Wade v. Stocks, 7 Media L. Rep. (BNA) 2200 (Fla. 2d Cir. 1981). This privilege, however, is disregarded by the Committee's proposed instructions.

9. This Court's decision in Ane offers support for this conclusion. In that case, The Herald argued that a common law privilege, defeasible only by common law malice, protected the newspaper article at issue. The Court rejected this argument, concluding that no common law privilege applied. 458 So.2d at 242. The Court also concluded that liability could be upheld on the jury finding of negligence. Id. at 242. If negligence were equated with common law malice, as the Committee's proposed instructions have done, there would have been no need for the Ane Court to have reached the privilege issue. The conclusion that the jury correctly found negligence would have defeated any common law privilege.

ordinarily are not in dispute, serious factual disputes over these points can and do arise in numerous cases. Of course, the plaintiff always bears the burden of proving that a specific defamatory statement was published to someone other than the person defamed. In the words of the Florida courts, publication of the a defamatory statement to a third party is a "necessary predicate to a finding of defamation." Owner's Adjustment Bureau, Inc. v. Ott, 431 So.2d 695, 696 (Fla. 3d DCA 1983); see also Campbell v. Jacksonville Kennel Club, 66 So.2d 495, 497 (Fla. 1953); Tyler v. Garris, 292 So.2d 427, 429 (Fla. 4th DCA 1974); Fiore v. Rouero, 144 So.2d 99, 101 (Fla. 2d DCA 1962).

Proposed instructions MI 4.1(a), 4.2(a), and 4.3(a), which purport to set out the standards for liability, speak only to the question of whether the statement at issue was of and concerning the plaintiff.[10] Because they do not require the jury to find that the plaintiff has proven publication of a

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10. An earlier draft of the Committee's proposed instructions also omitted the element of publication, but the initial comment accompanying that draft stated:

> 1. Identifying the statement; publication issue. The Committee recommends that the alleged defamatory statement be expressly identified in the jury instructions. An additional charge on the "publication" issue, not here included, will be necessary if there is an issue whether the statement was in fact heard or read by someone other than the claimant.

Inexplicably, that correct statement of the law, which would have done much to remedy the omission of any publication instruction, has been deleted from the current comments, *so* that publication is not mentioned anywhere.

specific defamatory statement to a third party when the facts regarding this point are in dispute, as mandated by Florida law, the instructions should be modified or rejected.

D. The Instructions Improperly Allow Liability to Be Based on Truth in Private Figure Cases Against Nonmedia Defendants Who Cannot Prove "Good Motives"

As previously indicated, the First Amendment requires that falsity be proven by the plaintiff in cases involving public figures or matters of public concern. Florida common law also imposes the requirement of falsity in every defamation case irrespective of the plaintiff's status or the type of issue being discussed. It is hornbook law in Florida that a "false statement of fact is the sine qua non for recovery in a defamation action." Byrd v. Hustler Magazine, 433 So.2d 593, 595 (4th DCA 1980), pet. for rev. denied, 443 So.2d 979 (Fla. 1984). As this Court stated in Briggs v. Brown, 46 So. 325, 330 (Fla. 1908), a "civil action for libel will lie when there has been a false and unprivileged publication [that is defamatory.]" Accord Hallmark Builders, Inc. v. Gaylord Broadcastina Co., 733 F.2d 1461, 1463 (11th Cir. 1984) (applying Florida law); Axelrod v. Califano, 357 So.2d 1048, 1050 (Fla. 1st DCA 1978). This common law requirement is not qualified or compromised by a requirement that a truthful statement be uttered with "good motives." Simply, if the speech is true, the plaintiff's case has reached its end. The standard instructions therefore should indicate that liability cannot be found in any case where the plaintiff fails to establish falsity.

Contrary to Florida law, proposed instruction MI 4.3(b), which is applicable in private figure cases against nonmedia defendants, states, in apparent reliance on Article I, section 4 of the Florida Constitution, that truth is not sufficient to defeat a plaintiff's claim unless it is published with "good motives." This is a misapplication of article I, section 4, which provides a state constitutional floor of protection for speech -- it does not and cannot override constitutional and common law protections of speech.

Article I, section 4 provides that in "all criminal prosecutions and civil actions for libel the truth may be given in evidence to the jury, and if it shall appear that the matter charged as libellous is true, but was published for good motives, the party shall be acquitted or exonerated."

An examination of the common law landscape at the time the "good motives" provision was inserted into the Florida Constitution demonstrates that the provision was never intended to lessen protections of speech and that it should not be interpreted as doing *so* now.

At common law, there were two sets of rules -- criminal and civil -- for libel and slander. One of the ways that the criminal and civil rules differed was in their treatment of truth. Truth was not a recognized defense in prosecutions for criminal libel or slander. R. Smolla, Law of Defamation § 5.01[1], at 5-2 to 5-3 (1986); W. Keeton, Keeton and Prosser on Torts § 116, at 840-41 & n.4 (5th ed. 1984) (citing cases). Indeed, because the criminal law purportedly sought to prevent

breaches of the peace, a truthful criminal libel or slander -- which defamed the government or its officials -- was seen as more of a threat to the government's ability to maintain order. Thus, Lord Mansfield was reported to have said that in criminal cases the "greater the truth, the greater the libel." Id. at 840 & n.6. It was not until 1843 that the criminal rule on truth was changed in England. Id. at 840.

In the United States, the change came sooner. At the famous criminal libel trial of Peter Zenger in New York in 1804, Alexander Hamilton unsuccessfully argued for a new trial on the ground that truth should be a defense if uttered with good motives. After that trial, the states began codifying the "good motives" defense for criminal libel and slander prosecutions in order to ameliorate the harsh effects of the common law rule. Ray, Truth: A Defense to Libel, 16 Minn. L. Rev. 43, 46-49 (1931). For example, Massachusetts adopted a statute providing that truth was a defense "in every prosecution for writing and publishing any libel" if it was "published with good motives and for justifiable ends." Franklin, 16 Stan. L. Rev. at 792.

The Zenger innovation first entered Florida in Article I, § 15 of the 1838 Florida Constitution. It provided that "in all prosecutions and indictments for libel, the truth may be given in evidence; and if it shall appear to the jury, that the libel is true, and published with good motives, and for justifiable ends, the truth shall be a justification[.]" See 25 Fla. Stat. Ann. 360.

No such constitutional protection against libel and slander actions was required in civil cases because the English civil rule made truth an absolute defense, regardless of the motives of the speaker. See id. at 840 ("The criminal rule seems to never to have been applied in civil actions. . . . [T]ruth was a defense to any civil action for either libel or slander."); R. Smolla § 5.01[1], at 5-2 ("for libels resulting in mere civil causes of action it was early on established that truth was an absolute defense"). The American states adopted the English rule with respect to civil libel and slander in the early 19th century. Franklin, The Origins and Constitutionality of Limitations on Truth as a Defense in Tort Law, 16 Stan. L. Rev. 789, 790-91 (1964). *See,* e.g., Jackson v. Stetson, 15 Mass. 48, 51, 57 (1818). Florida adopted the English rule by virtue of a statute enacted on November 6, 1829, by the Governor and the Legislative Council of the Territory of Florida. See section 2.01, Florida Statutes (1989).

At this point in history there was no question but that truth was an absolute defense as a matter of Florida common law in civil cases. Recent decisions show that this common law rule properly is interpreted as placing the burden of proving falsity on the plaintiff in the first instance. See, e.g., Byrd, 433 So.2d at 595

Florida adopted a new Constitution, however, on February 25, 1868. 25 Fla. Stat. Ann. 355-56. Article I, section 9 of the new Constitution substantially incorporated the protection against criminal libel suits found in article I,

section 15 of the 1838 Constitution, but it expanded it to apply "in civil actions" as well.[11] That change has been carried forward in subsequent revisions to the Constitution and today is found in article I, section 4 of the 1968 Constitution.

In effect, this amendment to the Florida Constitution did not alter the common law rule in place at the time. Rather, it extended the floor-level protection available to defendants in criminal cases to defendants in civil cases as well. See Meeks v. Johnston, 95 So. 670, 671 (Fla. 1923) (Constitution is to be interpreted in light of the common law). The nature of a constitution is to give government certain powers and to set outer limits on governmental authority. As this Court stated in Tibbetts v. Olson, 108 So. 679, 688 (Fla. 1926), the "Constitution is designed to prescribe and limit governmental powers and to secure individual rights against unlawful invasion by public officers or by private parties." Because the Constitution "is not a grant of power to the Legislature, but is a limitation only upon legislative power," Savaae v. Board of Public Instruction, 133 So. 341, 344 (Fla. 1931), any argument that the "good motives" provision obliterated the protections provided by the common law rules for civil defamation is without force.

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11. The full text of the article I, section 9, Fla. Const. (1868), provided: "In all criminal prosecutions and civil actions for libel the truth may be given in evidence to the jury, and if it shall appear that the matter charged as libellous is true, but was published for good motives, the party shall be acquitted or exonerated." There are no preserved debates or legislative history of the 1868 Florida Constitutional Convention. Franklin, 16 Stan. L. Rev. at 803 n.72.

The structure and location of Article I, section 4 also suggest that "good motives" should not be read as an outer limit on common law protections. Article I, section 4 is part of the Florida Constitution's Declaration of Rights. It would be unusual to interpret a part of the Declaration of Rights as curtailing rights available at common law. It is even more unusual to find a provision of a Constitution requiring that certain defenses be held insufficient. See Franklin, 16 Stan. L. Rev. at 798-99. Moreover, the language of Article I, section 4 counsels against a restrictive reading. The provision states only that if the matter charged as defamatory is true and was published with good motives, the defendant shall be acquitted or exonerated. It does not state that the defendant will be held liable if truth and good motives is not established. "The affirmative statement of the consequences for a defendant who proves the listed elements does not logically or grammatically compel the conclusion that if he shows fewer elements he must lose." Id. at 799.12

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12. Language in this Court's cases, e.g., Florida Publishing Co. v. Lee, 80 So. 245, 246 (Fla. 1918), indicate that "good motives" must be proven by a defendant. Cases like Lee, however, rely on Wilson v. Marks, 18 Fla. 322, 327 (1881), in which this Court, in dictum, uncritically reiterated the "good motives" provision of the Constitution. Moreover, the Lee decision itself points out that the common law rule applicable in Florida is that "the truth of an alleged libellous publication is a complete defense in a civil action for libel." 80 So. at 246. The case offers no reason, other than citation to the Wilson dictum, that the constitutional declaration of rights should be interpreted as diminishing the common law protections for truthful speech.

Conclusion

The Committee's proposed instructions should be modified as suggested in this brief. Alternatively, the Court should defer revision of the standard instructions applicable in defamation cases until the Committee has reconsidered the instructions in light of the arguments made in this brief.

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