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A New Standard of Fault for the Reportorial Privilege

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evidence[43] removes the jury's opportunity to judge the witnesses' credibility which might be the determining factor in the ultimate verdict.[44] Similarly, where the jury receives an improper instruction,[45] the right to have the jury apply the correct principles of law to the facts will be abridged if the error remains uncorrected during trial.

Concededly, some writ applications, filed on frivolous grounds, will to some extent disrupt trial proceedings. However, most attorneys will be aware of possible adverse reactions by the trial judge in such cases and will accordingly limit their writ applications to meritorious claims. Therefore, in those cases where an error has destroyed any possibility of a proper jury trial, the appellate courts, by being more lenient in granting supervisory writs, can protect the right to a jury trial without hampering judicial efficiency or invading the province of the jury until it is absolutely necessary.[46]

Edward R. Greenlee

A NEW STANDARD OF FAULT FOR THE REPORTORIAL PRIVILEGE

Following a highly publicized divorce proceeding, Mary Alice Firestone obtained a $100,000 libel award against *Time* magazine for publishing a misstatement[1] of the trial judge's remarks[2] concerning the grounds for the

43. *E.g.*, Herbert v. Travelers Indem. Co., 193 So. 2d 330 (La. App. 4th Cir. 1966).

44. Appellate courts recognize the trial court's unique ability to judge credibility of witnesses. *E.g.*, Andrews v. Williams, 281 So. 2d 120 (La. 1973). Even though proffered testimony may be included in the record, in such a situation there can be no determination of credibility based on demeanor.

45. *E.g.*, Gonzales v. Xerox Corp., 320 So. 2d 163 (La. 1975); Bienvenu v. Angelle, 254 La. 182, 223 So. 2d 140 (1969).

46. There was an unsuccessful attempt to eliminate appellate review of facts at the 1974 constitutional convention. Fear was expressed that removing appellate review of facts would increase jury trials. Constitutional convention Vol. IX, 30th day, pp. 50-93. Granting more supervisory writs will probably not result in more jury trials since the facts are still reviewable on appeal.

1. The *Time* article read: "DIVORCED. By Russell A. Firestone, Jr., 41, heir to the tire fortune: Mary Alice Sullivan Firestone, 32, his third wife, a onetime Palm Beach schoolteacher; on grounds of extreme cruelty and adultery; after six years of marriage, one son: in West Palm Beach, Fla. The 17-month intermittent trial produced enough testimony of extramarital adventures on both

divorce. *Time* appealed from the adverse judgment,[3] and contended that liability should not be imposed without proof of "actual malice,"[4] claiming that Mrs. Firestone was a public figure. *Time* further argued that the actual malice standard should be applied to the common law reportorial privilege.[5] Rejecting these arguments, the U.S. Supreme Court *held* that a person does not become a public figure simply by participating in a judicial proceeding, and that fault, not actual malice, is the standard to be applied in determining liability when the reportorial privilege has been raised as a defense to a defamation action brought by a plaintiff who is not a public figure.[6] *Time, Inc. v. Firestone*, 96 S. Ct. 958 (1976).

At common law, the tort of defamation generally involved strict liability.[7] However, the issue of fault did play a limited role in determining

sides, said the judge, 'to make Dr. Freud's hair curl.' " Time, Inc. v. Firestone, 96 S. Ct. 958, 964 (1976).

2. The trial judge had said: "According to certain testimony in behalf of the defendant [Mr. Firestone], extramarital escapades of the plaintiff [Mrs. Firestone] were bizarre and of an amatory nature which would have made Dr. Freud's hair curl. Other testimony, in plaintiff's behalf, would indicate that defendant was guilty of bounding from one bedpartner to another with the erotic zest of a satyr. The court is inclined to discount much of this testimony as unreliable. Nevertheless, it is the conclusion and finding of this court that neither party is domesticated, within the meaning of that term as used by the Supreme Court of Florida. . . ." *Id.* at 963. Apparently, the trial judge equated marital fidelity with domestication. However, on review of this finding, the Florida Supreme Court found that a lack of domestication was not a proper ground for divorce in that state. 263 So. 2d 223 (Fla. 1972).

3. Firestone v. Time, Inc., 305 So. 2d 172 (Fla. 1974).

4. If a statement is made with actual malice, it is made with knowledge that the statement is false, or in reckless disregard of its truth or falsity. New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964). This term is not to be confused with the common law notion of malice which meant "spite" or "ill will." W. PROSSER, LAW OF TORTS 771 (4th ed. 1971) [hereinafter cited as PROSSER].

5. The reportorial privilege historically afforded immunity in defamation actions to accurate and complete accounts of matters in the public concern. The privilege is based on the societal value of having public affairs made known to all. PROSSER at 830-32. *See* Aafco Heating & Air Conditioning Co. v. Northwest Publications, Inc., 321 N.E.2d 580 (Ind. App. 3d Dist. 1975); Michlin v. Roberts, 318 A.2d 163 (Vt. 1974). This privilege has recently been afforded constitutional protection. *See* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975). "[T]he States may not impose sanctions for the publication of truthful information contained in official court records open to public inspection." *Id.* at 495.

6. The Court remanded the case for a determination of whether *Time* was at fault in failing to use due care to insure that the published account actually conformed to the reported proceeding. 96 S. Ct. 958, 969.

7. Eaton, *The American Law of Defamation Through* Gertz v. Robert Welch, Inc. *and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1352 (1975). Plaintiff

whether the defendant had exceeded the scope of a qualified privilege[8] which had been raised as a defense. One of these defenses, the reportorial privilege, afforded immunity for accurate reports of public proceedings. The rationale underlying this privilege was that the reporter acts as a substitute for the public eye, only publishing that which the public could see or hear for itself if it were present.[9] Unlike other privileges, the truth or falsity of the reported statement was not at issue in determining whether the defendant was at fault. Rather the reportorial privilege was considered abused only if the report failed to conform with what actually transpired in the reported proceeding.[10]

Fault has recently assumed special prominence as the result of U.S. Supreme Court decisions which have applied the First Amendment guarantees of freedom of speech and press to the law of defamation. A constitutional requirement of fault was first announced in the 1964 landmark decision, *New York Times Company v. Sullivan*[11] where the Court found that the First Amendment prohibits the imposition of liability in defamation suits for statements concerning public officials unless it is shown that the defendant published with actual malice, that is, with knowledge that the statement was false, or in reckless disregard of its truth.[12]

The actual malice test was subsequently extended to suits brought by public figures,[13] and later, in *Rosenbloom v. Metromedia, Inc.*,[14] a plurality

merely had to prove that the defendant had published a defamatory statement to a third party to whom the communication was not privileged. The plaintiff was aided by a presumption of injury. "The conclusive presumption of injury . . . derives from the recognition that injury to reputation is extremely difficult to demonstrate, even when it is obvious that serious harm has resulted." *Id.* at 1357.

8. Qualified privileges include statements made in the legitimate interests of the defendant or another, such as an allegation made to a policeman that plaintiff had stolen defendant's property, communications made to one who may act in the public interest, and fair comment on matters of public concern. The concept of privilege was instituted to protect otherwise actionable statements where the publication of such utterances would promote a recognized social value. For a general discussion of qualified privileges, see PROSSER at 785-96.

9. *Id.* at 830.

10. *See* Gobin v. Globe Publishing Co., 531 P.2d 76 (Kan. 1975); Sherwood v. Evening News Ass'n, 239 N.W. 305 (Mich. 1931); Lehner v. Berlin Publishing Co., 245 N.W. 685 (Wis. 1932).

11. 376 U.S. 254 (1964) (newspaper-defendant held not liable for an advertisement which allegedly defamed an Alabama police commissioner).

12. *Id.* at 279-80.

13. Curtis Publishing Co. v. Butts, 988 U.S. 130 (1967). A public figure was defined as one who "commanded a substantial amount of independent public interest at the time of the publications . . . ." *Id.* at 154. In *Butts*, a college football coach

of the Court applied this strict fault standard to a private individual defamed in a report involving a matter of public interest.[15] In *Gertz v. Robert Welch, Inc.*,[16] the Court retreated from this latter extension, and redirected its attention to whether the plaintiff was a public figure or a public official as opposed to a private citizen, in order to determine if the actual malice standard was to be applied. *Gertz* recognized that private citizens deserve greater protection from defamation than do public individuals, since they have not voluntarily sought publicity,[17] and because they have little access to the media for rebuttal.[18] Consequently, the Court limited the application of the actual malice standard to only those plaintiffs who were public figures or public officials. To assist future courts in determining who is a public figure, the Court suggested two possible definitions, "one who achieves pervasive fame and notoriety,"[19] or one "who voluntarily injects himself or is drawn into a particular public controversy."[20]

The *Gertz* decision, however, was not confined to redefining public figures. Additionally, the Court, in an attempt to balance reputational interests with freedom of expression, announced a new constitutional fault standard for private plaintiffs, requiring that the defendant at least be shown negligent in failing to ascertain whether his statement was true or false before liability may be imposed.[21] The actual formulation of a fault standard was left to the states.[22]

In the instant case, the Court considered for the first time whether the

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was deemed a "public figure" for purposes of his suit against a national magazine for an article about the alleged "fixing" of a football game.

14. 403 U.S. 29 (1971) (issue was whether the actual malice standard would safeguard a radio station's broadcast that labeled a magazine distributor a "smut merchant").

15. Thus, in *Rosenbloom*, the Court applied the actual malice standard on the basis of the "public" nature of the subject matter reported rather than on the basis of the characterization of the plaintiff as a public figure or public official.

16. 418 U.S. 323 (1974) (Plaintiff, described as a "communist" by a magazine published by the John Birch Society, was determined *not* to be a public figure, notwithstanding his participation as counsel in a celebrated trial.)

17. *Id.* at 344.

18. *Id.*

19. *Id.* at 351.

20. *Id.*

21. Robertson, *Defamation and the First Amendment: In Praise of* Gertz v. Robert Welch, Inc., 54 TEXAS L. REV. 199, 242 (1976).

22. "We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehoods injurious to a private individual." 418 U.S. at 347.

constitutional fault standard applied in *Gertz* should be applied to the common law reportorial privilege. Before reaching that issue, however, the Court determined that Mrs. Firestone was not a public figure, and that the actual malice standard would not automatically attach on that basis. Writing for the majority, Justice Rehnquist applied the *Gertz* public figure test,[23] and found that Mrs. Firestone had not achieved the requisite amount of fame or notoriety because she had not assumed "any role of especial prominence in the affairs of society, other than Palm Beach society. . . ."[24] Emphasizing the fact that individuals must use the judicial process to have a marriage dissolved, the Court concluded that Mrs. Firestone had not voluntarily chosen to publicize her divorce. Justice Rehnquist further found that the dissolution of a marriage is not a public controversy as contemplated by *Gertz*, even though the proceeding attracts a high degree of publicity.[25]

The Court's analysis has provided additional factors which may be considered in determining if an individual is to be labeled a "public figure." Because Mrs. Firestone might have been considered a public figure if her defamation suit had been brought against a member of the Palm Beach press,[26] the Court's denial of national public figure status for her indicates that the scope of the plaintiff's notoriety and the extent of the defendant's circulation are factors to be considered before a particular individual is to be classified as a "public figure."[27]

In applying the "public controversy" element of the *Gertz* public figure definition to the facts of the instant case, the *Firestone* court refused to equate that element with all controversies of interest to the public,[28] and

23. 96 S. Ct. 958 (1976); see text at notes 19 & 20, *supra*.

24. *Id.* at 965.

25. *Id.*

26. As a member of the "400" of Palm Beach society, Mrs. Firestone attracted a great amount of public attention. 271 So. 2d 745, 751 (Fla. 1972). She appeared in the press so often that she subscribed to a press clipping service to keep posted on the stories written about her. 96 S. Ct. at 980. Even the Court noted that Mrs. Firestone had achieved "especial prominence" in the Palm Beach area. *Id.* at 965.

27. A more extreme view would hold that the Court's denial of public figure status to Mrs. Firestone has laid the groundwork for requiring national media defendants to show not only that the plaintiff is a public figure but also that the plaintiff's notoriety is national in scope before the protection of the actual malice standard can be exercised. If this requirement is to be imposed on future national media defendants, it may unfortunately result in a "chilling" effect on the press, since a workable definition of a "national" public figure may prove difficult to establish.

28. Mrs. Firestone's divorce proceeding generated a tremendous amount of public interest; so much, in fact, that she held press conferences during the proceedings to satisfy inquiries made by the press on behalf of their readers. 96 S. Ct. at 980 (Marshall, J., dissenting).

was unwilling to recognize that a highly publicized divorce proceeding is a public controversy. The Court's retention of the term "public controversy" in determining the applicability of the actual malice standard was criticized in Justice Marshall's dissenting opinion[29] as a return to the rejected subject matter test of *Rosenbloom*.[30] However, the Court's emphasis on the involuntary nature of Mrs. Firestone's lawsuit would seem to indicate its unwillingness to revert to the unworkable subject matter test, which did not inquire into the voluntary character of the plaintiff's participation in the public controversy.[31]

After concluding that Mrs. Firestone was not a public figure, and that the actual malice standard would not attach on that basis, the Court then faced the more difficult issue of determining whether the malice requirement should be applicable in defamation actions involving the reportorial privilege. Although *Time* contended that the public interest in reports of judicial proceedings warranted an application of the actual malice standard, the Court refused to extend the standard solely on the basis of the subject matter reported.[32] Such a broad extension would have effected "substantial depreciation of the individual's interest in protection from . . . [defamatory] harm[s], without any convincing assurance that such a sacrifice is required under the First Amendment."[33] Despite its refusal to apply the actual malice standard to the reportorial privilege, the Court found that the constitution did require proof of some form of fault on the defendant's part in order to protect freedom of expression.[34] Noting that the constitutional requirement of fault could be assessed at any stage of the proceedings, including the appellate level, the Court remanded the case to the state court to determine whether *Time* was at fault.[35]

29. *Id.* at 981 (Marshall, J., dissenting). Justice Marshall reasoned that the majority had found a divorce proceeding to be a controversy "not of the sort deemed relevant to the 'affairs of society' . . . and the public's interest not of the sort deemed 'legitimate' or worthy of judicial recognition." *Id.*

30. 403 U.S. 29 (1971). *Rosenbloom* extended the *New York Times* privilege "to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous." *Id.* at 43-44. This has been termed the "subject matter test" since it focuses on the activity reported rather than on the character of the person allegedly defamed. See text & material cited at note 14, *supra*.

31. 96 S. Ct. at 965.

32. *Id.*

33. *Id.* at 966.

34. The application of a fault standard provides an "adequate safeguard for the constitutionally protected interests of the press and affords it a tolerable margin of error . . . ." *Id.* at 967.

35. *Id.* at 969-70. The Court was disinclined to canvass the record in order to

Although the case could have been easily disposed of within the common law framework[36] on the basis that the report failed to conform to the proceeding, the *Firestone* court went further. By applying a constitutional standard of fault, the Court implicitly held that the reportorial privilege is no longer abused solely by a failure to make an accurate report. Consequently, before liability may be imposed, a court must find not only that the report did not conform to the proceedings but further that the non-conformity was due to the fault of the defendant.

Because *Gertz* allowed each state to decide for itself the standard of fault to be imposed,[37] the *Firestone* majority did not formulate a standard of negligence to be used in determining whether the reportorial privilege has been abused. However, in a concurring opinion, Justice Powell pointed out some factors that courts could consider in determining whether a defendant is at fault. These would include the degree to which the report failed to conform to the proceeding, the number of sources checked before publication, the amount of time available for investigation before deadline, and the technical nature of the subject reported.[38] These factors will have to be

determine *Time*'s fault. Justice White, dissenting, argued that the Florida Supreme Court had already inquired into the issue of fault when it "noted the 'convincing evidence of . . . negligence' in the case; [and] pointed out that a careful examination of the divorce decree would have 'clearly demonstrated' that the divorce was not grounded on adultery, as reported by *Time*, Inc.; and stated flatly 'this is a flagrant example of 'journalistic negligence.' ' " *Id.* at 979 (White, J., dissenting).

36. See note 5 and text at note 10, *supra.*

37. See note 22, *supra.* Louisiana courts have followed LA. CIV. CODE art. 2315 when applying the *Gertz* fault standard. This has been interpreted to mean that in order to be liable in a suit brought by a private individual, the "publisher must have some knowledge which would place him on his guard, making him aware that further research was necessary to insure the veracity of his report. . . ." LaBoeuf v. Times-Picayune Publishing Corp., 327 So. 2d 430, 431 (La. App. 4th Cir. 1976). *See also* Wilson v. Capital City Press, 315 So. 2d 393 (La. App. 3d Cir. 1975). Recently the Louisiana legislature passed an act which will allow punitive damages for both private and public plaintiffs on a showing of "actual malice." La. Acts 1976, No. 217 § 1, *adding* LA. CIV. CODE art. 2315.1 to the Civil Code. For a more complete discussion of the most recent legislation, see *The Work of the Louisiana Legislature for the 1976 Regular Session*, 37 LA. L. REV. __ (1976).

38. 96 S. Ct. at 970 (Powell, J., concurring). Although *Time* only received notice of the divorce decree in question the evening before the magazine went to press, Powell noted that there was "substantial evidence" that *Time* exercised considerable care in checking the accuracy of the story prior to its publication. *Time* checked the story from its Palm Beach reporter against an Associated Press dispatch and an article on the divorce from the New York Daily News. The reporter, before filing his story, had spoken with Mrs. Firestone's attorney and the trial judge who read him portions of the divorce decree. Powell also observed that on the face of the divorce decree, the decision of the Florida Circuit Court "was sufficiently ambiguous to have

assessed in light of the standard of care to be imposed upon the media. This standard may be measured by the skill and experience normally possessed by national professional journalists,[39] or it might be a community standard.[40]

Although a negligence standard will eventually be established in each jurisdiction on a case by case basis, the Court's failure to provide guidelines as to what will be considered "negligent reporting" may result in undesirable self-censorship, as members of the press attempt to anticipate the standard of "reasonable" journalistic conduct to be imposed after the fact by the courts.[41] If this problem does result, the Court will have defeated the delicate balance between reputational interests and freedom of expression which it sought to maintain.

Time, Inc. v. Firestone represents a departure from the *Gertz* concept of fault, which related solely to negligence in determining the truth or falsity of the reported matter. As a result of *Firestone*, fault may now include a negligent failure to insure conformity when the reportorial privilege has been raised as a defense to a defamation suit brought by a non-public plaintiff. However, the standard of fault to be applied to *public* plaintiffs in cases involving the reportorial privilege is unclear.[42] Because the actual

caused reasonably prudent newsmen to read it as granting divorce on the ground of adultery."

39. *Cf.* RESTATEMENT (SECOND) OF TORTS § 580 B, comment f, (Tent. Draft No. 21, 1975).

40. A "community standard" would be the experience of newsmen normally found within the locality in which the defendant is employed. This standard was applied in a case foreshadowing the result in *Firestone*, *Gobin v. Globe Publishing Co.*, 531 P.2d 76 (Kan. 1975). However, both of these alternatives would seemingly require that the plaintiff establish the defendant's fault through the use of expert testimony. Robertson, *supra* note 21, at 255. This could lead to difficulty if a "conspiracy of silence" develops among members of the press. Should such a conspiracy develop, it could be counteracted by the use of the *res ipsa loquitur* doctrine to infer the negligence of the defendant without resorting to expert testimony. Care should be used in applying this doctrine to defamation actions, since the inference of negligence made by a lay jury could force an undesirably harsh self-censorship of the press. RESTATEMENT (SECOND) OF TORTS § 580 B, comment f (Tent. Draft No. 21, 1975). The "conspiracy" might also be defeated by requiring the *defendant* to show that he has met the standard of care expected of members of his profession, thus relieving the plaintiff of the burden of proof in that regard. *Cf.* Shapo, *Media Injuries to Personality: An Essay on Legal Regulation of Public Communication*, 46 TEXAS L. REV. 650, 663-64 (1968).

41. For a discussion of the problems associated with the *Gertz* requirement of negligence, see Robertson, *supra* note 21, at 199, 235, 250.

42. The Court failed to comment on the application of the reportorial privilege when the plaintiff is a public figure or public official.

malice test focuses on the defendant's knowledge of the truth or falsity of his statement, its use appears awkward in the context of the reportorial privilege where the reporter's knowledge of the statement's veracity is wholly immaterial.[43] Nevertheless, the Court might analogize this situation to *Firestone*'s treatment of the *Gertz* negligence standard and the reportorial privilege by imposing liability on the basis of the reporter's knowledge that his report failed to conform, or his reckless disregard of the issue of conformity. However, such applications ignore the artificiality of the fault standards when applied to defamation actions which do not involve the issue of truth or falsity of the matter reported, and the Court should instead attempt to articulate a more realistic framework which would be compatible with all of the peculiarities of defamation law.

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SCIENTER REQUIREMENTS UNDER SECTION 10(b) and RULE 10b-5

Respondents, defrauded when the president of a small brokerage firm induced them to invest in nonexistent escrow accounts,[1] brought an action against petitioner accounting firm for damages pursuant to Section 10(b) of the Securities Exchange Act of 1934[2] and rule 10b-5 of the Securities and Exchange Commission.[3] Basing the cause of action on an allegation of

43. See text at note 10, *supra*.

1. The president of First Securities Co. of Chicago perpetrated the fraud from 1942 until 1966 by enforcing a "mail rule" in his office. All mail addressed to him could be opened only by him, thereby preventing discovery of the fraud by others in the company. Suit was filed against First Securities' accountants, Ernst & Ernst, because in their review of internal audit controls of the company they failed to discover the mail rule. For a more complete discussion of the financial misdealings, see Hochfelder v. Ernst & Ernst, 503 F.2d 1100, 1103-04, 1109 (7th Cir. 1974), *cert. granted*, 421 U.S. 909 (1975), and opinions cited therein.

2. Securities Exchange Act of 1934, § 10(b), 15 U.S.C. § 78j(b) (1970) [hereinafter cited as Section 10(b)]: "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . . (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any *manipulative or deceptive device or contrivance* in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." (Emphasis added).

3. 17 C.F.R. § 240.10b-5 (1976) [hereinafter cited as rule 10b-5]: "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumen-