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Time, Inc. v. Firestone: The Supreme Court's Restrictive New Libel Ruling

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TIME, INC. v. FIRESTONE: THE SUPREME COURT'S
RESTRICTIVE NEW LIBEL RULING

In 1967, Russell Firestone was granted a divorce from his wife, Mary Alice. This action marked the end of a seventeen-month trial which had become a cause celebre in social circles across the country. Mary Alice originally sought separate maintenance, and Russell counterclaimed for divorce on grounds of extreme cruelty and adultery. In granting the divorce, the trial judge stated that “neither party is domesticated” and found the equities of the case to favor Russell Firestone.¹

Shortly thereafter, Time reported the divorce in the “Milestones” section of the magazine, listing the grounds as extreme cruelty and adultery.² Mary Alice Firestone brought a successful libel suit against Time, claiming that the divorce had not been granted on the ground of adultery. Five years after publication of the “Mile-

1. The relevant portions of the court's final judgment read:
According to certain testimony in behalf of the defendant, extramarital escapades of the plaintiff 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 the court that neither party is domesticated....

In the present case, it is abundantly clear from the evidence of marital discord that neither of the parties has shown the least susceptibility to domestication, and that the marriage should be dissolved.

ORDERED AND ADJUDGED as follows:

1. That the equities in this cause are with defendant, that defendant's counterclaim for divorce be and is hereby granted, and the bonds of matrimony which have heretofore existed between the parties are hereby forever dissolved.


2. The full text of the “Milestones” report is as follows:
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 sides, said the judge, “to make Dr. Freud's hair curl.”

stones" item, the Florida Supreme Court reviewed the divorce decree and upheld it on the ground of extreme cruelty only.³ Two years later, the Florida Supreme Court affirmed Mrs. Firestone's $100,000 libel judgment against Time.⁴

_Time_ appealed to the United States Supreme Court, claiming that the judgment violated its first amendment rights. _Time_ asserted that because Mrs. Firestone was a public figure and the report concerned a judicial proceeding, actual malice must be shown. Additionally, _Time_ maintained that because Mrs. Firestone claimed no harm to her reputation, she could neither base her suit on defamation nor recover damages for mental suffering alone.

The Supreme Court disagreed. The Court stated that _Time's_ report "may well be . . . the product of some fault" by _Time's_ staff.⁵ In addition, it held that no constitutional privilege was available to _Time_ because Mrs. Firestone was not a public figure⁶ and because reports of judicial proceedings were not entitled to a constitutional privilege.⁷ Finally, although Mrs. Firestone withdrew her claim for damage to her reputation, the Court found she could recover solely for her mental anguish.⁸

The news media view the Court's decision in _Time, Inc. v. Firestone⁹_ as a further erosion of press protections.¹⁰ The decision makes it dangerous for the media to report judicial proceedings in any meaningful manner and limits the press' investigative efforts. More basically, the case represents a fundamental shift in the balance the Court had meticulously constructed in _Gertz v. Robert Welch, Inc._¹¹ In that case, the Court attempted to accommodate

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³. Firestone v. Firestone, 263 So. 2d 223 (Fla. 1972).
⁶. Id. at 455.
⁷. Id. at 456.
⁸. Id. at 460.
¹⁰. Waters & Comper, _Private Lives_, NEWSWEEK, MAR. 15, 1976, at 66; _Who Is A Public Figure?, TIME_, Mar. 15, 1976, at 66; _Libel Case Goes Against 'Time,' Makes Life Tougher for Journalists_, BROADCASTING, Mar. 8, 1976, at 36. One periodical stated that the _Firestone_ decision "plunges the field of libel from the chilling level of uncertainty created by _Gertz_ into the cold certainty of self-imposed censorship." Pilpel & Rochett, _Supreme Court Ruling in Firestone Case is a New Danger to Press Freedom_, PUBLISHER'S WEEKLY, Mar. 29, 1976, at 39.
both the public interest in a free press and the injured plaintiff’s need for compensation. The Firestone decision undermines the Gertz balance, creating serious practical consequences for the news media. This Comment will examine the doctrinal significance of Firestone and its probable effect on news media practices. The analysis is prefaced by a brief review of libel law: the theory of liability, the defenses, and the damages rules.

THE DEVELOPMENT OF LIBEL LAW

The Common Law of Libel

Courts have historically protected a person’s interest in a good reputation. At common law, a libel plaintiff recovered on a theory of strict liability. The plaintiff had to prove only the defamatory statement and show that the defendant was responsible for its publication. The plaintiff did not have to prove the statement false. The interest protected was the plaintiff’s reputation. Consequently, courts focused on the effect of the statement on third

12. The Papyrus of Hunefer lists slander as one of the 42 offenses recognized by ancient Egypt. Slander was expressly forbidden by the law of Moses and by the ancient Romans. Under King Alfred of England a slanderer could lose his tongue, and the Normans made a slanderer publicly confess himself a liar while holding his nose.

In England, the ecclesiastical courts had jurisdiction over defamation, which was considered a sin. Libel developed primarily as a criminal action for seditious words or writings, triable before the infamous Star Chamber, a political tribunal set up to punish people who made statements tending to produce discord between the king and his subjects. Those people were punished even if the statements were true. The nobility were presumed to have good reputations, hence, the rule of presumed damages. After the Court of Star Chamber was abolished, the jurisdiction over libel was transferred to the common law courts. However, the courts retained the intricate rules developed over the centuries, notably strict liability and presumed damages. For a discussion of the history of libel law, see M. NEWELL, LIBEL AND SLANDER 2-4 (2d ed. 1898); Courtney, Absurdities of the Law of Slander and Libel, 36 AM. L. REV. 552 (1902); Eaton, The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer, 61 VA. L. REV. 1349 (1975) [hereinafter cited as Eaton]; Holdsworth, Defamation in the Sixteenth and Seventeenth Centuries, 40 LAW Q. REV. 302 (1924); Veeder, The History and Theory of the Law of Defamation, 3 COLUM. L. REV. 546, 570-71 (1903); Developments in the Law—Defamation, 69 HARV. L. REV. 875 (1956).


14. Prosser, supra note 13, at § 114, at 776.
persons and not on the plaintiff's own humiliation or mental suffering.\textsuperscript{15}

Even if the plaintiff made a prima facie case for liability, the defendant could resort to several defenses. Some were absolute, such as the defense of truth.\textsuperscript{16} Other defenses in the nature of qualified privileges developed.\textsuperscript{17} Because courts have long recognized society's interest in robust public debate, several qualified privileges developed to protect the freedom of the debate. These qualified privileges afforded the defendant substantial protection from libel suits by requiring proof of actual malice.\textsuperscript{18}

One qualified privilege was the right to report official proceedings.\textsuperscript{19} Most states required the report to be fair and accurate, although a substantially accurate summary was sufficient.\textsuperscript{20}

\textsuperscript{15} Id. § 111, at 737.

\textsuperscript{16} Truth is a complete defense to a libel suit in all but 11 states, which additionally require that the publication be made with good motives. Consent is another complete defense. In addition, in certain areas the law grants absolute privileges to defame because society's interest in uncensored communication outweighs its concern for an individual's reputation. Absolute privilege attaches to statements made by any participant in a judicial proceeding, administrative proceeding, or grand jury proceeding, and to statements made in legislative hearings. 1 A. Hanso, \textit{Libel and Related Torts} §§ 108-16 (1969) [hereinafter cited as \textit{Hanson}]. \textit{See also Note, Absolute Immunity in Defamation, 3 Colum. L. Rev. 465 (1909).} Federal officials have an absolute privilege to defame while acting within their official duties. Barr v. Mateo, 360 U.S. 564 (1969). Generally, state officials have this same privilege. \textit{E.g.}, Blair v. Walker, 64 Ill. 2d 1, 349 N.E.2d 385 (1976); Matson v. Margiotti, 371 Pa. 168, 88 A.2d 892 (1952). \textit{See Handler \\& Klein, The Defense of Privilege in Defamation Suits Against Government Officials, 74 Harv. L. Rev. 44 (1960).} A publisher may claim absolute privilege if publication is required by law. \textit{E.g.}, Becker v. Philco Corp., 234 F. Supp. 10 (E.D. Va. 1964), aff'd, 372 F.2d 771 (4th Cir.), cert. denied, 389 U.S. 979 (1967). Conversations between a husband and wife are privileged as are statements made to officials of the Catholic Church. Cimijotti v. Paulsen, 230 F. Supp. 39 (N.D. Iowa 1964), aff'd, 340 F.2d 613 (1965); Hanso, supra note 16, at 123.

\textsuperscript{17} In addition to the qualified privileges discussed in the text, other recognized privileges encompass statements which a publisher deems necessary to protect his own reputation and statements made to protect persons other than the publisher. A conditional privilege is also recognized for statements published to protect a common interest, such as those made by a labor union. \textit{See Prosser, supra note 13, at § 116, at 785-91; Note, Privileged \textit{Defamation}, 22 Va. L. Rev. 645 (1936).}


\textsuperscript{19} This privilege is limited to a release from liability for the repetition of defamatory matter appearing in the official report or proceeding. \textit{Hanson, supra note 16, at § 134.}

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privilege encompassed reports of judicial proceedings, including divorces.21

In addition, the defendant could rely on the traditional privilege to comment on matters of public interest. Traditionally, fair comment has been allowed about public officials,22 community leaders from the private sector,23 and celebrities such as artists24 and athletes.25 In most states, the privilege covered only statements of opinion. Any facts stated had to be true.26 Some courts recognized a privilege of good faith misstatement of fact in communications to the public about matters of vital public interest. These courts reasoned that the public interest in robust debate demands that the press furnish information without fear of a lawsuit.27 However, the majority of states did not recognize that privilege,28 rationalizing that such criticism would deter desirable candidates from seeking public office.29

If the plaintiff established a prima facie case for liability and the defenses failed, the plaintiff could recover damages. Damages were presumed in a case of libel per se—that is, when the words were clearly defamatory on their face.30 Courts presumed that such state-

23. E.g., Klos v. Zahorik, 113 Iowa 161, 84 N.W. 1046 (1901).
ments injured the plaintiff's reputation. However, a different rule applied in a case of libel per quod, when a reader must have additional information to recognize the defamatory nature of the statement. In libel per quod, plaintiff had to allege special damage, usually pecuniary loss, before damage to reputation was presumed. In either libel per se or libel per quod, the defendant could introduce evidence in mitigation of damages, such as evidence of plaintiff's prior bad reputation.

The Constitutional Law of Libel

In 1964, in New York Times Co. v. Sullivan, the Supreme Court created a constitutional privilege for media defendants. The Court held that first amendment protections for speech and press limit a state's power to award damages in a libel action by a public official against critics of his official conduct. Since New York Times, public officials must show actual malice to recover. The plaintiff must prove either that the publisher knew the statements were false or that he displayed a reckless disregard for the truth.

31. Prosser, supra note 13, at § 112, at 762. For two views on whether the plaintiff must prove special damages in libel per quod, see Eldridge, The Spurious Rule of Libel Per Quod, 79 Harv. L. Rev. 733 (1966); Prosser, More Libel Per Quod, id. at 1629.


34. 376 U.S. at 283.

35. Id. at 279-80. The New York Times standard requires evidence of the defendant's state of mind: "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." St. Amant v. Thompson, 390 U.S. 727, 731 (1968). Legal scholars have recognized a serious flaw in the actual malice standard in that only a review of the evidence by the Supreme Court can finally determine whether actual malice exists. See Hanson, supra note 16, at § 152.
reasoned that the defense of truth did not provide adequate protection for the press. The threat of large lawsuits would deter the press from publishing information which was not provably true, or which, even if provably true, might prompt expensive libel litigation.\textsuperscript{36} That threat of press self-censorship led to the new constitutional privilege.

Although Dean Prosser proclaimed this case "the greatest victory won by defendants in the law of torts," the victory was a limited one. Plaintiffs could still rely on strict liability and presumed damages. However, the new defense of constitutional privilege afforded media defendants substantial protection from libel suits.\textsuperscript{38} The holding of \textit{New York Times} was expansive. It was not long before the Court extended the privilege to statements concerning lower level officials.\textsuperscript{39} Three years later, the privilege was widened to include public figures.\textsuperscript{40} Supreme Court decisions found a college athletic director,\textsuperscript{41} a candidate for public office,\textsuperscript{42} a retired army general,\textsuperscript{43} and a local real estate developer\textsuperscript{44} to be public figures.

In \textit{Rosenblom v. Metromedia, Inc.},\textsuperscript{45} the Supreme Court made the final extension of the \textit{New York Times} rule. It expanded the actual malice standard to all areas of public interest. Now a private

\begin{footnotes}
\item[36] 376 U.S. at 279.
\item[37] Prosser, supra note 13, at § 118, at 819.
\item[38] See Anderson, \textit{Libel and Press Self-Censorship}, 53 Tex. L. Rev. 422, 430 (1975) [hereinafter cited as Anderson].
\item[39] Rosenblatt v. Baer, 383 U.S. 75 (1966). Justice Douglas argued that the actual malice standard should apply to influential private citizens:

\textit{Yet if free discussion of public issues is the guide, I see no way to draw lines that exclude the night watchman, the file clerk, the typist, or, for that matter, anyone on the public payroll . . . . And the industrialists who raise the price of a basic commodity? Are not steel and aluminum in the public domain?}

\textit{Id.} at 89 (Douglas, J., concurring).
\item[40] Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967). The Court noted:

\textit{Since the depression of the 1930's and World War II there has been a rapid fusion of economic and political power, a merging of science, industry, and government, and a high degree of interaction between the intellectual, governmental and business worlds . . . . [P]ower has also become much more organized in what we commonly considered to be the private sector.}

\textit{Id.} at 163.
\item[41] Id.
\item[45] 403 U.S. 29 (1971).
\end{footnotes}
defamation plaintiff, involved in an area of public concern, could not recover except on a showing of actual malice. Rosenbloom created a "newsworthiness" test to protect a publisher whenever the topic was a matter of public interest.46

For ten years the Court consistently expanded the New York Times rule. Then in Gertz v. Robert Welch, Inc.,47 it sharply curtailed the use of the actual malice standard. Moreover, while the prior constitutional law had dealt only with defenses to libel actions, in Gertz the Court began to comprehensively restructure libel law.

For the first time, changes were made in the underlying theory of liability. The Gertz Court abolished strict liability in libel actions even when private plaintiffs were involved. States were allowed to define their own standard for recovery, so long as they did not impose strict liability.48

Simultaneously, the Court limited the use of the constitutional privilege. The Rosenbloom "newsworthiness" test was abandoned. Publishers may now rely on the actual malice standard only when discussing public officials and public figures.49 The Court defined two types of public figures. The first category includes a person who achieves "such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts." 50 The second category encompasses the individual who "voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." 51 When a publisher discusses a private plaintiff, the constitutional privilege is no longer available, even if the plaintiff's conduct is newsworthy.

Finally, the Court imposed limitations on libel damages, abolishing presumed and punitive damages, at least when liability is not based on actual malice.52 Defamation plaintiffs are restricted to compensation for actual injury.53 The Court did not define this

48. Id. at 347.
49. Id. at 343.
50. Id. at 351. The Court referred to this group as those "who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures . . . " Id. at 342.
51. Id. at 351.
52. Id. at 349.
53. Id.
term, but it said that “the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering.” The Court voiced its hostility toward “gratuitous awards of money damages far in excess of actual injury.” Although libel actions had traditionally been brought to vindicate reputation, the compensation rationale formed the basis of the opinion.

The Gertz Court consciously balanced the need for a vigorous and uninhibited press with the states’ interest in redressing harm to reputation. The Court stated:

Our accommodation of the competing values at stake in defamation suits by private individuals allows the States to impose liability on the publisher or broadcaster of defamatory falsehood on a less demanding showing than that required by New York Times. This conclusion is not based on a belief that the considerations which prompted the adoption of the New York Times privilege for defamation of public officials and its extensions to public figures are wholly inapplicable to the context of private individuals. Rather, we endorse this approach in recognition of the strong and legitimate state interest in compensating private individuals for injury to reputation.

In striking that balance, the Court made concessions to both libel plaintiffs and defendants. On the one hand, plaintiffs benefitted by a limitation on the scope of the constitutional defense. Private individuals no longer needed to prove actual malice to recover damages. The actual malice requirement had been a formidable barrier precluding jury consideration of many cases brought by private individuals. On the other hand, the news media benefitted by the abolition of strict liability and presumed and punitive damages. Libel recoveries were limited to those plaintiffs who could prove negligence and actual injury to reputation. Such

54. Id. at 349-50.
55. Id. at 350. Justice Brennan observed that the opportunity for juries to punish unpopular opinions remained: “[T]he Court’s broad-ranging examples of ‘actual injury’ . . . inevitably allow a jury bent on punishing expression of unpopular views a formidable weapon for doing so.” Id. at 367 (Brennan, J., dissenting).
56. Id. at 349.
57. Eaton, supra note 12, at 1431-32. See also Z. CHAFFEE, GOVERNMENT AND MASS COMMUNICATIONS 105-07 (1947).
58. 418 U.S. at 348-49.
59. See Anderson, supra note 38, at 472-73.
60. See Appellant’s Reply Brief at 12, Time, Inc. v. Firestone, 424 U.S.

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limitations promised both to confine recoveries to deserving plaintiffs who could prove damage as a result of a libelous publication and to eliminate harassment of the press by frivolous libel suits. The Gertz case received praise as an equitable resolution of the tension between freedom of the press and compensation to injured plaintiffs. However, the balance was achieved mainly at the expense of press protections and was a significant retrenchment from the line of decisions since New York Times. The language of Gertz suggested that the Court regarded the balance struck there as its definitive pronouncement in the libel area. Yet no sooner had the Court achieved a tolerable balance in Gertz, than it proceeded to upset that balance in Firestone.

Time, Inc. v. Firestone—The Doctrinal Significance

In rejecting Time's claim for first amendment protection, the Supreme Court touched on every aspect of libel law—the theory of liability, the defenses and privileges, and the limitations on damages. The Court's treatment of each aspect of libel law will be given separate consideration.

The Negligence Standard

The Supreme Court remanded the case to the Florida court because it determined that Florida courts had not made a finding of fault as required by Gertz. Nevertheless, the Court stated: 'It may well be that petitioner's account in its 'Milestones' section

448 (1976). The Gertz Court emphasized that reputation is the protected interest—e.g., "the state law right to compensation for wrongful hurt to one's reputation," 418 U.S. at 343; "adverse impact on reputation," id. at 344; "the legitimate state interest in compensating private individuals for wrongful injury to reputation," id. at 348; "the strong and legitimate state interest in compensating private individuals for wrongful injury to reputation," id. at 348-49 (emphasis added).

418 U.S. at 349-50.


418 U.S. at 354 (Blackmun, J., concurring).

424 U.S. at 464.
was the product of some fault on its part..." and "[e]ven where a question of fact may have constitutional significance, we normally accord findings of state courts deference in reviewing constitutional claims here." The Court strongly suggested that it would be willing to uphold a finding of negligence in this case.

Nonetheless, there was considerable evidence of reasonable care on the part of Time. The divorce decree was rendered late Friday afternoon and Time's deadline was Saturday. Time received a wire service account of the divorce stating that Russell Firestone had been granted a divorce from Mary Alice, whom "he had accused of adultery and extreme cruelty." That account was substantially reprinted in the New York Daily News. Excerpts of the divorce decree referred to charges of adultery by both parties. Time's Palm Beach "stringer" reported that Mrs. Firestone's attorney had told him the technical ground for the divorce had been extreme cruelty and adultery. The divorce decree was so ambiguous that the two appellate courts reviewing it came to different conclusions about the grounds for divorce. The Florida Supreme Court found the decree had been awarded on a ground not recognized in Florida, lack of domestication. However, that court upheld the divorce, citing evidence of extreme cruelty.

The evidence of reasonable care by Time did not go unnoticed by members of the Supreme Court. Nevertheless, given the lan-

66. Id. at 463.
67. Id.
68. Justices Powell and Stewart wrote a concurring opinion in which they stated their reaction to the record. They found substantial evidence that Time was not guilty of negligence. Because the Court remanded the case to the Florida court for a determination of negligence, Justices Powell and Stewart did not find it necessary to decide whether the evidence established Time's due care. Id. at 469 (Brennan & Powell, JJ., concurring).
69. 424 U.S. at 466.
70. Because no news service can provide reporters in every town, stringers, or part-time reporters, are often contacted to cover local stories. Often the reporters work for several news organizations or for a local newspaper and "string" on occasion for major news services. See Vandenberg v. Newsweek, Inc., 507 F.2d 1024, 1028 n.5 (5th Cir. 1975).
71. Mrs. Firestone's attorney denied that he made these statements. Respondent's Brief in Opposition to Certiorari at 8, Time, Inc. v. Firestone, 424 U.S. 448 (1976).
72. The Florida district court upheld the divorce decree of the trial court. Firestone v. Firestone, 249 So. 2d 719 (Fla. 1971). The Florida Supreme Court, however, found that the divorce had been granted on grounds of extreme cruelty. Firestone v. Firestone, 263 So. 2d 223 (Fla. 1972).
73. Firestone v. Firestone, 263 So. 2d 223 (Fla. 1972).
74. See note 68 supra.
guage of the majority opinion, it appears that in the future the Court may sustain a jury finding of negligence in such a case. If a finding of negligence is permissible in a case like Firestone, the negligence standard will afford the media little protection. Indeed, Firestone suggests that the Gertz negligence standard differs little in practice from the old theory of strict liability.\textsuperscript{75}

The Defense of Constitutional Privilege

*Time* asserted that even if there was a prima facie case of liability, it had a constitutional defense: Mrs. Firestone had to establish that the publication was made with actual malice—with knowledge of the falsity or with reckless disregard for the truth. *Time* advanced two arguments in support of this contention. First, *Time* argued that Mrs. Firestone was a public figure. Second, *Time* maintained that reports of judicial proceedings deserve the protection of the actual malice standard. The Supreme Court rejected both arguments.

In holding that Mrs. Firestone was not a public figure, the Court did not discuss the first type of public figure described in Gertz—that is, a person who has achieved "such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts."\textsuperscript{78} Instead, the Court focused on the second category of public figures, those who "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved."\textsuperscript{77}

*Time* presented ample evidence to support its argument.\textsuperscript{78} Mrs. Firestone was prominent among the "400" of Palm Beach society. She received enough press attention to warrant subscription to a press clipping service. The seventeen-month divorce trial attracted

\textsuperscript{75} The Florida Supreme Court called the case a "flagrant example of 'journalistic negligence.'" *Time*, Inc. v. Firestone, 305 So. 2d 172, 178 (Fla. 1974). See Sprouse v. Clay Communications, Inc., 211 S.E.2d 674 (W. Va.), cert. denied, 423 U.S. 882 (1975). In this case the court upheld a $250,000 award even though the statements were apparently true. An alternative result is suggested by Professor Keeton. He argues that to recover for defamation, all plaintiffs must demonstrate that the defendant knew of the falsity of the statements or had no reasonable basis for believing them to be true. Keeton, *Defamation and Freedom of the Press*, 54 Tex. L. Rev. 1221 (1976).


\textsuperscript{77} 418 U.S. at 345.

\textsuperscript{78} The evidence is set out in Justice Marshall's dissenting opinion. 424 U.S. at 484-87 (Marshall, J., dissenting).
national news coverage, as well as forty-three articles in the Miami Herald and forty-five articles in the Palm Beach papers. Mrs. Firestone contributed to the publicity by holding several press conferences.

The Court reasoned, however, that Mrs. Firestone was not prominent in the affairs of society outside Palm Beach. Notorious divorce proceedings are not the sort of "public controversy" referred to in Gertz. The Court stressed that Mrs. Firestone had not been a voluntary participant in the divorce proceedings, but rather she had been required by law to use the courts to solve her marital difficulties.

This rationale is open to serious criticism. As Justice Marshall noted, it is beyond the power of any judge to evaluate the legitimacy of interest in a particular event. The Court’s function is not to determine which events are important and thus constitutionally protected. Furthermore, previous cases indicate that first amendment protections do not turn upon "the truth, popularity, or social utility of the ideas and beliefs which are offered."

The ruling in Firestone radically narrows the public figure category. The Court insisted upon a strong showing that the plaintiff had voluntarily injected herself into a public controversy. The decision indicates that reports about events of a private nature, even when they occur in the lives of prominent people, are not protected by constitutional privilege. Few people can be said to voluntarily involve themselves in controversies concerning such matters. The best indication of the strictness of the Court’s voluntariness test is the view that Mrs. Firestone’s press conferences did not create public figure status. Even people who actively seek out the press are not necessarily public figures under Firestone.

Time’s second argument was that reports of judicial proceedings should be protected by the actual malice standard. This argument

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79. Id. at 454.
80. Id.
81. Id. at 488 (Marshall, J., dissenting). In addition, Justice Marshall noted that it was the arbitrary nature of such a decision which led the Gertz Court to eschew the Rosenbloom public interest test. Id.
82. NAACP v. Button, 371 U.S. 415, 445 (1962). See also Buckley v. Litell, 539 F.2d 882 (2d Cir. 1976), in which the court stated: “Our constitution thus contemplates a bias toward unfettered speech at the expense, perhaps, of compensation for harm to reputation . . . .” Id. at 889.
has support in the common law, for some courts have held that the privilege of communicating matters of public interest extends to inaccurate reports. Several justifications for such protection exist. Reports of judicial proceedings guard against the miscarriage of justice by subjecting courts and court officers to public scrutiny. Courts have emphasized that the press must be allowed maximum freedom to report judicial proceedings. Also, trial publicity may draw into court witnesses who are not otherwise known to the parties.

Past Supreme Court decisions implied that reports concerning judicial proceedings were entitled to special protection. As early as 1947, the Court held that absolute accuracy is not required. New York Times suggested that the same rationale underlying public official protection applied to reports of judicial proceedings. Applying the New York Times standard, the Court in Time, Inc. v. Pape found a rational interpretation of an ambiguous document to be privileged. Errors of interpretation were not subject to a stricter standard of liability than errors of fact. After that case, it seemed certain that reports of judicial proceedings would benefit by the actual malice standard.

The Firestone case presented an ideal fact situation in which to extend the constitutional privilege to reports of judicial proceedings. Clearly the divorce decree had been ambiguous and had referred

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83. See cases cited in note 27 supra. The common law required a showing of malice when asserting such a privilege, which was very close to the constitutional privilege urged by Time.


86. Tanksley v. United States, 145 F.2d 58 (9th Cir. 1944).

87. Craig v. Harney, 331 U.S. 367 (1947). At 375 the Court stated: "Certainly a reporter could not be laid by the heels for contempt because he missed the essential point in a trial or failed to summarize the issues to accord with the views of the trial judge." Other cases indicate this view applies in libel cases. Time, Inc. v. Pape, 401 U.S. 279 (1971) (omitting word alleged amounted to adoption of one of a number of rational interpretations of an ambiguous document); McFarland v. Hearst, 332 F. Supp. 746 (D. Md. 1971); Edmiston v. Time, Inc., 257 F. Supp. 22, 25 (S.D.N.Y. 1966) (defendant need not show precisely accurate recounting of court's opinion). In Time, Inc. v. Hill, 385 U.S. 374 (1967), the Court stated: "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 . . . ." Id. at 389.

88. 376 U.S. at 272-73.

89. 401 U.S. 279 (1971).

90. Id. at 290.

91. FROesser, supra note 13, at § 118, at 832.
to adultery by both parties. The trial court had based the decree on a ground not recognized in Florida. Furthermore, the formal ground for the divorce had not been clarified until five years after *Time*'s report.

Nevertheless, the Supreme Court refused to consider judicial proceedings as a protected category. It argued that such a result would revive the public interest test and added that accounts of judicial proceedings neither deserve nor require a constitutional privilege.

The *Firestone* rationale emphasized the need to compensate private plaintiffs. The Court stated that constitutional protection for reports of judicial proceedings is undeserved and would depreciate the individual's interest in protection from defamatory statements. It found the public interest argument unpersuasive, remarking that reports of most court proceedings add almost nothing toward debate on public issues.

The Court stated that fair and accurate reports of judicial proceedings are adequately protected by its decision in *Cox Broadcasting v. Cohn*. In *Cox*, the father of a rape victim objected to publication of his daughter's name. He brought an invasion of privacy action for public disclosure of private facts. The *Cox* Court held that accurate reports of judicial proceedings are protected, but the *Firestone* Court believed that "inaccurate and defamatory reports of facts [are] matters deserving no First Amendment protection . . . ",

*Firestone* shows a significant change in the Supreme Court's analysis. Previous decisions emphasized the public interest in reports of judicial proceedings as a check on the practices of the courts. The majority in *Firestone* attached much less weight to that public interest. Since *New York Times* the Supreme Court had repeatedly granted false statements constitutional protection as the

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92. 424 U.S. at 455-60. This statement is puzzling in view of the Court's willingness to assess the public interest in a particular controversy in order to determine public figure protection.
93. Id.
94. Id. at 457.
95. Id. However, *Firestone* is an example of a courtroom battle which developed into a dispute over the vitality of the first amendment. *Amending the First Amendment*, Los Angeles Times, Mar. 21, 1976, pt. IV, at 2, col. 1.
97. 424 U.S. at 457.
98. See cases cited in note 84 supra.
price of robust public debate. Judicial proceedings certainly appear to be within the realm of public debate; nevertheless, the Court in *Firestone* stated that false statements deserve no first amendment protection. Just as *Firestone* augurs a retreat from *Gertz*’ negligence standard, the opinion represents a devaluation of the interest in public debate.

**The “Actual Injury” Requirement**

In *Firestone*, all claims for injury to reputation were withdrawn on the eve of trial. Notwithstanding the absence of evidence concerning reputation, the *Firestone* Court held that recovery for mental anguish alone is consistent with a defamation action. States may now base awards on elements other than injury to reputation. The Court cited with approval the Florida jury instruction that “damages which are a direct and natural result of the alleged libel may be recovered.” Several witnesses testified to Mrs. Firestone’s anxiety over the *Time* report, and Mrs. Firestone herself testified that she feared her young son would be adversely affected by the reports when he grew older. The Court concluded that this was competent evidence of mental anguish, capable of supporting a $100,000 judgment. That position is inconsistent with *Gertz*.

In *Gertz*, as a limit on damages, recovery was restricted to actual injury. Indeed, Justice White dissented in *Gertz* because he thought the requirement of actual injury to reputation reduced considerably any chance for adequate compensation. While *Gertz* mentioned mental anguish as a compensable injury, these damages were thought to be derivative—recoverable only after the plaintiff established either harm to reputation or pecuniary, tangible injury.

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99. See text accompanying notes 33–34 supra.
100. 424 U.S. at 460.
101. Id. Although modern tort law has expanded recovery to injured plaintiffs and abolished traditional immunities for defendants, the first amendment necessitates a different development in libel law. Justice Douglas long argued that no libel law can be constitutional and that the first amendment is absolute. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 355-56 (1974) (Douglas, J., dissenting).
102. 424 U.S. at 460.
103. 418 U.S. at 376. Justice White also argued that it would be almost impossible for a plaintiff to vindicate his reputation by an award of nominal damages. *But see Murnaghan, From Figment to Fiction to Philosophy—The Requirement of Proof of Damages in Libel Actions, 22 Cath. U. L. Rev. 1* (1972). *See also Note, State Tort Actions for Libel After Gertz v. Robert Welch, Inc.: Is the Balance of Interests Leaning in Favor of the News Media?, 36 Ohio St. L.J. 697 (1975).*
The dissents in Firestone relied heavily on Gertz. As Justice Brennan observed, allowing recovery for mental anguish alone “subverts whatever protective influence the ‘actual injury’ stricture may possess.” The dissents argued persuasively that by allowing recovery without proof of injury to reputation, the Court was resurrecting the old rule of presumed damages, supposedly abolished in Gertz. Viewed in this light, the holding altered the nature of the protected interest in defamation. Harm to reputation was formerly measured objectively; the essence of the tort was the plaintiff's lowered esteem in the community. In Firestone, recovery was allowed for Mrs. Firestone's fears that her young son would be adversely affected by the Time report, even though she introduced no evidence to support that contention. In this sense, she recovered for purely subjective harm to her reputation. However, the Court's language suggested that it found no harm to Mrs. Firestone's reputation. If the Court did not presume injury to reputation, it is clearly changing the basis of a defamation action. Mental anguish alone may give rise to an action for negligent infliction of mental distress, but it has not been the basis of a defamation action.

In addition, the result invites gratuitous awards of damages—the result Gertz sought to avoid. When coupled with the speculative nature of mental suffering awards, the large award in Firestone indicates that the jury retains wide latitude to punish unpopular opinions. Strangely, the actual injury requirement, imposed in Gertz as a limit on damages, operates in Firestone to the benefit of the libel plaintiff rather than the news media.

105. 424 U.S. at 475 n.3 (Brennan, J., dissenting).
106. HANSON, supra note 16, at § 114 (1969); PROSSER, supra note 13, at § 111, at 737. The Supreme Court has said that the primary harm compensated in libel cases is harm to reputation. Time, Inc. v. Hill, 385 U.S. 374, 384-85 n.9 (1967).
107. The Court stated: “Florida has obviously decided to permit recovery for other injuries without regard to measuring the effect the falsehood may have had upon a plaintiff's reputation. This does not transform the action into something other than an action for defamation . . . .” 424 U.S. at 460.
Firestone shifts the Gertz balance to greatly favor the libel plaintiff. Press protections are limited in each area considered. The negligence standard appears to be little different in practice from the old rule of strict liability. As for defenses to liability, the use of the constitutional privilege is sharply limited. Despite clear precedent for extending the privilege to reports of judicial proceedings, the Court refused to include such reports within the ambit of constitutional privilege. In addition, the new strict interpretation of the public figure category ensures that few plaintiffs will be hindered by the actual malice requirement. Finally, fundamental changes in the area of damages were made. Instead of limiting damages, the application of the actual injury requirement allows recovery of large mental suffering awards and permits recovery even to plaintiffs who have suffered no injury to their reputations.


time, Inc. v. Firestone—The Practical Significance

Because Time argued to the Supreme Court that the Florida decision hampered its ability to report news, particularly news of judicial proceedings, an examination of the effect Firestone will have on news media practices is appropriate. The Court's decision will have the greatest impact on court coverage and investigative reporting.

After Firestone, court coverage becomes exceedingly hazardous. For a number of reasons, reporting court proceedings involves inherent libel risks. Judicial proceedings are adversary; one person levels charges at the other, and charges that a person has committed a crime are generally libelous on their face. Moreover, court proceedings and decrees are often difficult for a reporter to interpret. After Firestone, the lay reporter's account of court proceedings must be strictly accurate, even though the court's language may be ambiguous. Publishers may require reporters to quote the court's language or demand to see a copy of the written order if the deadline permits. However, in many cases the deadline is so short that such a procedure is impractical. Furthermore, in a case like

111. See Anderson, A Response to Professor Robertson—The Issue Is Control of Press Power, 54 Tex. L. Rev. 271, 276 n.21 (1976). He suggests that besides reporters' deadlines, one must also consider the number of editing and production steps needed and the time and cost of changing the story during the production process. For a discussion of the increasingly complex

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Firestone, because of its ambiguity, seeing the written order would not be helpful.

Consider the requirements on the press in a case like Firestone. First, while working against a deadline, the reporter must obtain a copy of the decree. Then he must carefully analyze the case for legal rationale and consistency. Finally, the reporter must anticipate what a reviewing court will ultimately decide to be the grounds for the decision.112 This is no easy task. The Florida courts experienced difficulty identifying the grounds for divorce in Firestone.113 If those courts could not easily determine the grounds for divorce, it seems unreasonable to require a lay reporter to state the precise grounds with absolute certainty.

As a result of the risk of libel inherent in court coverage after Firestone, publishers will be hesitant to print court news.114 Daily court reporting will surely suffer, although it seems unlikely an editor would refrain from covering a major trial. The decision will increase the trend toward specialization in journalism. On large papers, advanced training and specialization are the norm for reporters.115 Science, business, and the environment are areas in which special knowledge is required. One paper employs a physician to write medical news,116 and some papers hire lawyers to cover legal affairs.117 Unfortunately, those professionals are too costly for many publishers, and Firestone may force these publishers to drastically curtail their reporting of judicial proceedings.

Like court coverage, investigative reporting involves great libel risks. The press' recent coverage of the Watergate scandal is an
excellent example of the genre. Investigative reporting goes into greater depth, is more time consuming, and involves greater research and analysis.\textsuperscript{118} It may involve months of research, interviewing, and examining documents. Often the story is hard to uncover. Reporters frequently rely on unofficial sources such as private individuals and lower level officials.\textsuperscript{119} These people have access to much important information, while official reports are often self-serving,\textsuperscript{120} uninformative, or even deliberately misleading.\textsuperscript{121}

In the short news story, the reporter goes to the scene of the newsworthy event, talks with witnesses, verifies names and addresses, and writes a news report. With investigative pieces, the reporter must distill the relevant facts from weeks of research and arrange them to tell the story. The temptation to draw conclusions for the reader is great.\textsuperscript{122} In addition, many news sources request that they not be named. In such a case, the report may not be provably true without revealing confidential sources.\textsuperscript{123}

\textsuperscript{119} See, e.g., C. Bernstein & B. Woodward, All the President's Men 65-71, 182-84 (1975).
\textsuperscript{122} See Transcript of Proceedings at the Urban Policy Research Institute on Investigative Reporting, in San Diego, Cal. (morning session, Jan. 10, 1976) (on file with the office of The San Diego Law Review). The libel risks described in the text were noted by the speakers at the session.
\textsuperscript{123} The problem of confidential sources is expected to increase in view of the Supreme Court's denial of certiorari in the Farr case. Bill Farr was imprisoned for contempt for refusing to reveal his source of inadmissible witness testimony in the Charles Manson murder trial. The court of appeals denied Farr's petition for habeas corpus, stating that the trial judge's duty to safeguard the defendant's due process rights outweighed the newsman's interest in protecting his sources. Farr v. Pitchess, 522 F.2d 464 (9th Cir. 1975), cert. denied, 96 S. Ct. 3200 (1976). In libel cases, courts have previously held that it was not necessary to disclose the sources of a defamatory article when plaintiff did not show he could meet his burden of proof. E.g., Cervantes v. Time, Inc., 330 F. Supp. 936 (E.D. Mo. 1971), aff'd, 499 U.S. 1125 (1973); Cerrito v. Time, Inc., 302 F. Supp. 1071 (N.D. Cal. 1969), aff'd per curiam, 449 F.2d 306 (9th Cir. 1971). But cf. Application of Cepeda, 233 F. Supp. 465 (S.D.N.Y. 1964) (after all other methods of obtaining information exhausted, author must reveal sources).
Firestone compounds the libel risks. In-depth reports often deal with people who are not public figures under Firestone. Doctors or hospital administrators, for instance, will not be public figures unless they voluntarily thrust themselves to the forefront of a public controversy. Nor would an accountant or attorney be a public figure even though his or her clients are public officials. In many investigative pieces the people involved have not voluntarily become part of a public controversy. Often the investigative piece first brings the controversy to public attention. Courts have repeatedly indicated that the media cannot transform a private individual into a public figure by writing several articles about the person. Consequently, investigative reports involving such people become extremely hazardous.

The risks will force the media engaged in investigative reporting to make a cruel choice among three options. The first is simply to run the risk of libel suits and judgments. This option seems economically prohibitive, for publishers have suffered numerous large libel judgments. Moreover, publishers often incur more expense in defending libel suits than in libel judgments themselves. By diluting the negligence standard, limiting defenses, and liberalizing the damages rules, Firestone will encourage plaintiffs to file suits.

The second option is to go to extreme lengths to avoid libel. Firestone requires extensive investigation into even a short news item. Time obtained four sources for its brief “Milestones” item, giving Time no reason to believe the divorce had been granted on grounds other than those claimed by Russell Firestone. Yet four sources could not protect Time from a costly lawsuit. To be safe, reporters must attribute statements to sources, preferably to sup-

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126. The defense in Rosenbloom v. Metromedia, Inc. is reported to have cost $100,000. Anderson, supra note 38, at 436.
porting documents. However, with many short news items, time and space limitations preclude that practice. Reliance on documents will necessitate considerable delay in reporting news, for many documents are not prepared until long after the event. Quoting documents is also restricted by space limitations; writers must eventually summarize and interpret the documents they discover.

In addition to requiring extreme precautionary measures in reporting short news items, Firestone may force a shift in reporting major items. Editors will be hesitant to publish reports which may subject their publication to suits and liability. The reluctance will be especially pronounced when the subject of the article does not clearly qualify as a public official or figure. Firestone will thus encourage the media to concentrate their investigative efforts on the traditional realms of government and to neglect the considerable power often wielded by private individuals.

The third and final option will be drastic curtailment of press coverage. Rather than taking elaborate precautions in reporting short news items, editors will often decide to omit the item altogether. The Court's contraction of the public figure category will

127. See Transcript, supra note 122, at 13. Attribution to supporting documents was recommended to those reporters in attendance.

128. Congressional hearings are a prime example of delayed publications. As Professor Anderson states: "The press has virtually no economic incentive to publish anything that might lead to a libel suit. In the case of daily newspapers, whatever incentive was once provided by the danger that a competitor would publish the suppressed material has largely disappeared along with the competition." Anderson, supra note 38, at 433. See also Sterling, Trends in Daily Newspaper and Broadcast Ownership, 1922-1970, 52 JOURNALISM Q. 247 (1975).

Some may argue that the monopoly position of the press requires even stricter libel laws. Certainly the press has great power to injure an individual. However, Professor Anderson argues persuasively that libel law is too discriminatory and uncertain to provide a solution to the problem of press accountability. Anderson, A Response to Professor Robertson—The Issue is Control of Press Power, 54 Tex. L. Rev. 271, 281-84 (1976). Moreover, large libel judgments make it difficult for any but the monopoly press institutions to remain profitable. See Kovar, Disturbing Trends in the Law of Defamation: A Publishing Attorney's Opinion, 3 Hastings L.Q. 363 (1976). For an alternative, see Peterson, Press Councils—A Look Towards the Future, 29 U. Miami L. Rev. 497 (1975).

130. Press attorneys caution editors to publish only items which fit into one of the recognized privileges—for example, fair comment or public figure protection. P. Ashley, SAY IT SAFELY 74 (4th ed. 1969). See Transcript, supra note 122, at 15.

131. Professor Anderson noted such a possibility after Gertz and argued that the result is a constitutional bias in favor of orthodox media. Because the public/private figure distinction favors more conventional publications that concentrate on the workings of officialdom, publishers with unpopular philosophies may receive less protection. Anderson, supra note 38, at 453-56.

132. See Transcript, supra note 122, at 42. See also McKenna, Time, Inc.
encourage the media to avoid even major items concerning people who arguably fall outside that category. If the media choose this option, the quality of investigative reporting in the United States will certainly suffer. Investigative reporting performs its most important function when it aggressively exposes abuses of public and private power, but Firestone may rob investigative reporting of its courage and aggressiveness. At a minimum, Firestone will limit quality investigative reporting to major news items concerning people who are indisputably public officials or figures.

CONCLUSION

In Firestone, the Supreme Court subverted the balance it had carefully constructed in Gertz and expanded recovery to private persons in several areas. Firestone represents a marked doctrinal shift which will have serious practical consequences for court coverage and investigative reporting. Because of the greater libel risks, readers can expect less aggressive reporting in these areas. In the final analysis, such a result harms not only publishers, but also the public.

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