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## Private Defamation: Mary Firestone, Mary Firestone

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## PRIVATE DEFAMATION: "MARY FIRESTONE, MARY FIRESTONE?"

### INTRODUCTION

Historically, private defamation received little attention until the 1974 Supreme Court Term when the High Court rendered its controversial decision in *Gertz v. Robert Welch, Inc.*<sup>1</sup> Then, almost two years later, the Court decided *Time Inc. v. Firestone*,<sup>2</sup> the first legitimate offspring of the 1974 *Gertz* decision. The *Firestone* case not only exemplified the complexity and imprecision of the private defamation law announced in *Gertz*, but also illustrated the difficulty encountered by the state courts in the interpretation and implementation of the *Gertz* standards.<sup>3</sup>

In theory, *Firestone* began where *Gertz* ended, and represented an attempt by the Supreme Court to clarify rather than confuse; however, true clarification of the Court's position and the principles controlling private defamation law was not forthcoming in the *Firestone* decision. Since the Court was content to decide *Firestone* on the basis of a technical flaw in the procedure used by the Florida Supreme Court in its application of the *Gertz* fault standard, it was able to postpone an immediate decision on the underlying question: what constitutes sufficient journalistic fault to impose liability on the press in a private defamation action?<sup>4</sup>

In order to examine the full import of the *Firestone* opinion, it is first necessary to explore the constitutional aspects of defamation law.<sup>5</sup> In the early 1960's, history and current events dictated the need for an expanded interpretation of the first amendment protection of speech and press, in order to counteract the force of common-law libel actions brought by public officials against those critical of their public activities. In the ten years which followed, the seemingly boundless and ever-expanding scope of the first amendment protection forced the Court to place limits on its application. For this specific purpose, the Court designed and employed the public/private distinction. The Court's usage of the public/private distinction is essential to a comprehensive understanding of the *Firestone* case and present-day private defamation law.

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1. 418 U.S. 323 (1974). *But cf.* *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971).

2. —U.S. — 96, S. Ct. 958 (1976).

3. 418 U.S. at 347, 350.

4. —U.S. —, 96 S. Ct. at 970.

5. For a detailed discussion see Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349 (1976). [hereinafter cited as Eaton]. For a survey of the law of defamation prior to the 1960's, see *Developments in the Law—Defamation*, 69 HARV. L. REV. 875 (1956).

## THE PUBLIC/PRIVATE DISTINCTION

In the decade of decisions which preceded *Gertz* and *Firestone*, the political and social turmoil in America weighed heavily on the Court.<sup>6</sup> Although the extent of its effect is difficult to measure, its influence cannot be ignored. Internally, the country was plagued by racial violence, while abroad American soldiers died on the battlefields of Vietnam. The magnitude of these problems forced the Court and country to realize that "voluntary or not, we are all public men to some degree."<sup>7</sup>

It was against this background that the Supreme Court announced its revolutionary holding in *The New York Times Co. v. Sullivan*.<sup>8</sup> In *New York Times*, the Court began the delicate task of formulating the "proper accommodation" between first amendment constitutional freedoms and the socially desirable reputational interests protected by the maintenance of state defamation law. The *New York Times* opinion molded a constitutional privilege to curb the use of state defamation law as a tool to suppress public criticism of governmental action. The Court took the firm position that no state law should be permitted to sabotage the constitutional mandate of the first amendment, by impeding the publication of "public speech" or by interfering with the "citizen-critic."<sup>9</sup> Thus, in *New York Times*, the Supreme Court voiced its strong commitment "to the principle that debate on public issues be uninhibited, robust and wide-open",<sup>10</sup> and sought to free the press from the threat of state-imposed strict liability in instances where the press inadvertently published information which was factually inaccurate or defamatory.<sup>11</sup> The Court stated:

The constitutional guarantees require, we think a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice.'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.<sup>12</sup>

In 1964 this enlightened constitutional privilege was not conceived as an open-ended license.<sup>13</sup> It could be claimed by the press only in clearly defined

6. See Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191.

7. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 48 (1971).

8. 376 U.S. 254 (1964). Mr. Sullivan, Commissioner of Public Affairs of Montgomery, Alabama, brought a civil action against the New York Times Company for allegedly libelous statements in a full-page advertisement printed on March 29, 1960. The advertisement criticized Mr. Sullivan's public conduct in his role as a public official.

9. Meikeljohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245.

10. 376 U.S. at 270.

11. Prior to the Supreme Court decision in *New York Times Co. v. Sullivan*, "libelous utterances" were not within the scope of first amendment protection. *Roth v. U.S.*, 354 U.S. 476, 483 (1957).

12. 376 U.S. at 279-280. The privilege cited is referred to interchangeably in the text as the *New York Times* privilege or the constitutional privilege.

13. For a complete discussion of constitutional privilege, see W. PROSSER, *HANDBOOK OF THE LAW OF TORTS*, § 118, at 819-833 (4th ed., 1971) [hereinafter cited as PROSSER].

fact situations. With deliberate care, the Court limited the applicability of the *New York Times* privilege to press reports or articles concerning the public activities of public officials.<sup>14</sup>

The concurrence of Justice Goldberg, joined by Justice Douglas, in *New York Times* served to reinforce the boundaries of the majority opinion:

This is not to say that the constitution protects defamatory statements directed against the private conduct of a public official or private citizen. . . . Purely private defamation has little to do with the political ends of a self-governing society. The imposition of liability for private defamation does not abridge the freedom of public speech. . . . This, of course, cannot be said 'Where public officials are concerned or where public matters are involved . . . .'<sup>15</sup>

Thus, a constitutional privilege was designed to assure public access to public information. However, the rationale underlying the privilege did not extend to encompass private defamations published by the press. This was outside the sphere of legitimate public information.

Three terms later, the Supreme Court in *Curtis Publishing Co. v. Butts*<sup>16</sup> sought a further accommodation of state defamation law and the constitutional freedoms of the first amendment:

Lest the *New York Times* rule become a talisman which gives the press constitutionally adequate protection only in a limited field, or what would be equally unfortunate, one which goes too far to immunize the press from having to make just reparation for the infliction of needless injury upon honor and reputation through false publication.<sup>17</sup>

Whereas the Court justified its 1964 decision in *New York Times* as a method to protect political discussion, the determination in *Curtis* was not "an adjudication which lay close to seditious libel."<sup>18</sup> The question before the *Curtis* Court was whether the *New York Times* privilege would expand to protect the press from libel actions brought not by public officials but by "public figures":

[W]hose views and actions with respect to public issues and events are often as much concern to the citizen as the attitudes and behavior of public officials with respect to the same issues and events.<sup>19</sup>

14. See PROSSER, *supra*, note 13. For some definitions of public officials, see *Greenbelt Cooperative Publishing Ass'n v. Bressler*, 398 U.S. 6 (1970), *St. Amant v. Thompson*, 390 U.S. 727 (1968), *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81 (1967), *Rosenblatt v. Baer*, 383 U.S. 75 (1966).

15. 376 U.S. at 301-302. W. DOUGLAS, *THE RIGHT OF THE PEOPLE*, p. 41 (1958).

16. 388 U.S. 130 (1967). Mr. Butts, Athletic Director of the University of Georgia, sued *Curtis Publishing Company* for libel, based on an article in the *Saturday Evening Post* which accused Mr. Butts of conspiring to fix a football game between the University of Georgia and the University of Alabama.

17. *Id.* at 135.

18. *Id.* at 153. See Kalven, *The Reasonable Man and the First Amendment: Hill, Butts, and Walker*, 1967 SUP. CT. REV. 267 [hereinafter cited as Kalven].

19. 388 U.S. 130, 162. (Warren, C.J., concurring).

In holding that the privilege would expand to libel suits brought by public figures, the Court relied on the similarities between the two classes of public defamation plaintiffs.<sup>20</sup> Moreover, the Court conditioned the applicability of the constitutional privilege for the protection of the press on two factors: the plaintiff's public status, and the legitimate public interest in the subject matter of the publication.<sup>21</sup>

In *Curtis*, the Court again defined limits: “. . . nor does anything we have said touch, in any way, libel or other tort actions not involving public figures or matters of public interest.”<sup>22</sup> The Court disavowed any extension of the constitutional privilege to matters or persons outside the public realm and thereby excluded any possible application of the *Curtis* rationale to purely private defamation actions.

The Supreme Court's next major defamation decision, *Rosenbloom v. Metromedia, Inc.*<sup>23</sup>, presented another variation on the “public” theme. In *Rosenbloom*, the plurality premised its decision, and justified the extension of the constitutional privilege for the press, solely on the independent basis of the legitimate public interest in the publication.<sup>24</sup> Unlike *Curtis*, the public status of the plaintiff was no longer considered necessary to buttress the constitutional incursion into state defamation law. The focus of *Rosenbloom* was the public's need to know and its legitimate right to the published information:

Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period. *Thornhill v. Alabama* 310 U.S. 88, 102, 60 S. Ct. 736, 744, 84 L.Ed. 1093 (1940).<sup>25</sup>

However logical the progression from public official to public figure to public interest, the *Rosenbloom* plurality decision transformed the constitutional privilege of *New York Times* and *Curtis* from one designed to protect statements and reports concerning public persons and their activities, to a privilege capable of insulating the publication of any so-called matter of general or public interest.<sup>26</sup> As Justice Brennan, writing for the plurality, explained:

It is clear that there has emerged from our cases decided since *New York Times* the concept that the First Amendment's impact upon state libel laws derives not so much from whether the plaintiff is a “public official”, “public figure” or “private individual”, as it

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20. *Id.* at 155. See *Kalven, supra*, note 18, at 288, 289.

21. 388 U.S. at 154.

22. *Id.* at 155, n. 19.

23. 403 U.S. 29 (1971).

24. *Id.* at 44-45. For an interesting discussion of *Rosenbloom v. Metromedia, Inc.* see Note, *The Expanding Constitutional Protection for the News Media from Liability for Defamation: Predictability and the New Synthesis*, 70 MICH. L. REV. 1547, 1556 (1972).

25. 403 U.S. at 41.

26. *Supra* note 24, at 1547.

derives from the question whether the allegedly defamatory publication concerns a matter of public or general interest (citations omitted). [W]e think the time has come forthrightly to announce that the determinant whether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of public or general concern. . . .<sup>27</sup>

Accordingly, the plurality encountered no difficulty in dismissing the previously relevant consideration of the "status" of the defamed plaintiff. The plurality stated:

If a matter is the subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not 'voluntarily' choose to become involved.<sup>28</sup>

Although the Supreme Court was able to muster a plurality opinion in *Rosenbloom* favoring the extension of the *New York Times* constitutional privilege to protect the press and media when its publications were in the public or general interest, this endorsement was shortlived. In *Rosenbloom* there was general dissension among the Justices caused by the seemingly infinite elasticity of the *New York Times* privilege.<sup>29</sup> The scope of the privilege as enunciated in *Rosenbloom* afforded the press such boundless freedom that apparently it could publish to satisfy even the public's most mundane and superficial curiosity, and still be protected from defamation liability.<sup>30</sup> The long search for the proper accommodation of the competing state and constitutional interests appeared to be abandoned. The constitutional concern for free publication of information in the public interest now dominated to the virtual exclusion of any state interest in protecting a person's reputation, even where the press published defamatory falsehoods directed against private individuals.<sup>31</sup>

While *Rosenbloom* carefully sidestepped a direct discussion of the applicability of the *New York Times* privilege to purely private defamations, it was the first major decision to include private figures within the bounds of the constitutional privilege.

Thus, the idea that certain 'public' figures have voluntarily exposed their entire lives to public inspection, while private individuals have kept theirs carefully shrouded from public view is, at best a legal fiction. Such a distinction could produce the paradoxical result of dampening discussion of issues of public or general concern because they appear to involve private citizens while extending constitutional encouragement to discussion of aspects of the lives of 'public figures' that are not in the area of public or general concern.<sup>32</sup>

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27. 403 U.S. at 44. (footnotes omitted) (emphasis added).

28. *Id.* at 213. Cf. *Kalven supra*, note 18.

29. 403 U.S. 29, 62. (Harlan, J. dissenting); *Id.* at 78. (Marshall, J. and Stewart, J. dissenting).

30. See Meikeljohn, *Public Speech in the Supreme Court since the New York Times v. Sullivan* 26 SYR. L. REV. 819 (1975).

31. 403 U.S. at 41-45.

32. *Id.* at 48.

This over-inclusiveness of the plurality opinion was denounced by the dissenting justices in *Rosenbloom*.<sup>33</sup> While they believed the press deserved some degree of constitutional protection, they were unanimously opposed to extending *Rosenbloom*'s carte-blanche version of the *New York Times* privilege to purely private defamation suits.<sup>34</sup>

Thus, ten years after the *New York Times* decision, the Supreme Court, dissatisfied with the rationale and result of *Rosenbloom*, rendered its opinion in *Gertz v. Robert Welch, Inc.*<sup>35</sup> In *Gertz*, the Court, for the first time, focused directly on private defamation and the plight of the involuntary private defamation plaintiff. Although there was questionable factual similarity between *Rosenbloom*<sup>36</sup> and *Gertz*<sup>37</sup>, the legal question was the same in both cases: Would the constitutional privilege of *New York Times* protect a publisher from liability for defamation of a private citizen? While the 1970 Supreme Court in *Rosenbloom* answered this question affirmatively, four years later in *Gertz*, the Court rejected the *Rosenbloom* rationale that ". . . a private citizen involuntarily associated with a matter of general interest had no recourse for injury to his reputation unless he could satisfy the demanding requirements of the *New York Times* test."<sup>38</sup> The *Gertz* Court stated that ". . . the state interest in compensating injury to reputation of private individuals require[d] that a different rule should obtain. . . ."<sup>39</sup>

The opinion began with a careful analysis of the three approaches advocated for the purpose of reconciling the objectives of state defamation law within the constitutional protections embodied in the first amendment.

One approach has been to extend the *New York Times* test to an expanding variety of situations. Another has been to vary the level of constitutional privilege for defamatory falsehood with the status of the person defamed. And a third view would grant to the press and broadcast media absolute immunity from liability for defamation.<sup>40</sup>

*Gertz* cited as inappropriate *Rosenbloom*'s application of the first approach in purely private defamation cases, since ". . . the need to avoid self-censorship by the news media [was] however not the only societal value at issue."<sup>41</sup> According to the Court, the legitimate state interest served by the

33. *Id.* at 62-86.

34. *Id.*

35. 418 U.S. 323 (1974).

36. 403 U.S. 29 (1971). Mr. Rosenbloom was a magazine distributor; a private individual who sued a local radio station which broadcast news stories of his arrest for possession of obscene literature.

37. 418 U.S. 323 (1974). Mr. Gertz, an attorney and private citizen, sued the publisher of a magazine for libel when it published an article about a murder trial of a police officer which contained statements describing Gertz (the lawyer who represented the family of a murder victim in a civil action for damages against the officer) as a "Communist-fronter", "Leninist" and participant in various "Marxist" and "Red" activities.

38. 418 U.S. at 337.

39. *Id.* at 343.

40. *Id.* at 333.

41. *Id.* at 341.

law of defamation, in providing private individuals with compensation for injury resulting from defamatory publications, also deserved proportionate recognition. The Court found that the proper balance of these competing interests would not be served either by the constitutional *New York Times* standard of actual malice or by the common-law standard of strict liability, since both standards produced severe results.<sup>42</sup> Therefore, a different standard was required when the defamed was a private citizen,<sup>43</sup> and “. . . where, as here, the substance of the defamatory statement [made] substantial damage to reputation apparent.”<sup>44</sup>

To adequately protect the private defamation plaintiff, the *Gertz* Court found itself compelled to follow the second approach: “. . . varying the level of constitutional privilege . . . with the status of the person defamed.”<sup>45</sup> To implement this approach and formulate a new standard, *Gertz* resurrected the public status test of *New York Times*, as modified in *Curtis*, to provide the lower courts with guidelines to apply in differentiating between public and private defamation plaintiffs.<sup>46</sup> The *Gertz* decision was designed to delineate those public persons, not protect them. Their reputational interests were already adequately protected by the *New York Times* standard, and, as to them *Gertz* made it clear that:

the communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them.<sup>47</sup>

The *Gertz* opinion was unique in that it focused on providing protection for the private citizen. As to him, the press is entitled to make no assumptions. He has not relinquished his right to legal protection of his good name or reputation. “He has not voluntarily exposed himself, he has not accepted public office nor assumed an ‘influential role in ordering society.’ He is more vulnerable to injury and more deserving of recovery.”<sup>48</sup> To protect *his* rights and interests, the majority in *Gertz* promulgated new law. In order to assure *his* protection *Gertz* announced that: “The states should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual.”<sup>49</sup> For private citizens, *Gertz* permitted the states to hold the press liable for defamatory error under a fault standard. At the same time, to afford sufficient protection for the news

42. *Id.* at 346.

43. See Note, *Gertz v. Welch: Reviewing the Libel Action*, 48 TEMP. L.Q. 450 (1975).

44. 418 U.S. at 348, n. 11, citing *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155 (1967).

45. 418 U.S. at 333. See Note, *Adjusting the Defamation Standard*, 46 MISS. L.J. 279 (1975).

46. *Gertz* defined public plaintiffs as follows: Persons who “occupy positions of such persuasive power and influence” (418 U.S. at 345); persons who by their “pervasive involvement in the affairs of society” (*Id.* at 352); or by the “notoriety of their achievements” (*Id.* at 342), have “general fame or notoriety in the community” (*Id.* at 351-352.).

47. 418 U.S. at 345.

48. *Id.*

49. *Id.* at 345, 346.

media, the states' "substantial latitude" had court-defined boundaries. These boundaries prevented the states from imposing liability without fault (strict liability) and from awarding unjustified money damages in excess of the actual injury.<sup>50</sup> *Gertz* limited the legal remedy which the states could legitimately afford the private defamed to compensation for actual injury, and allowed recovery of presumed or punitive damages only upon proof of actual malice.<sup>51</sup>

"MARY FIRESTONE, MARY FIRESTONE?"

The scenario for the Supreme Court's most recent pronouncement on the law of defamation<sup>52</sup> closely resembled a melodramatic episode in the finest tradition of a television soap opera. The facts told the story of a highly contested, highly publicized, divorce action between the heir of a tire fortune and his ex-school teacher wife. The action took place in Palm Beach, Florida—heaven of the gossip columnist and haven of the socially prominent, money-made, money-married American aristocracy. And so the plot unfolded.

Mary sued Russell for separate maintenance, but no divorce. Russell counterclaimed for divorce on grounds of extreme cruelty and adultery. The Florida Circuit Court granted the counterclaimed divorce stating that ". . . neither party [was] domesticated, within the meaning of that term as used by the Supreme Court of Florida, therefore, the marriage should be dissolved."<sup>53</sup>

After receiving information from four news sources, *Time*, "The Weekly News Magazine" published in *Milestones*,<sup>54</sup> this report:

Divorced. By Russell A. Firestone, Jr., 41, heir to the tire fortune: Mary Alice Sullivan Firestone, 32, his third wife; a one time Palm Beach school-teacher; 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.'<sup>54</sup>

Shortly thereafter, Mary asked *Time* to retract. *Time* refused and Mary brought suit against *Time* for libel in the Florida Circuit Court.<sup>55</sup> The jury rendered a verdict for Mary and the court assessed a \$100,000 damage award against *Time*. In due course, both the Florida District Court of Appeals<sup>56</sup> and the Supreme Court of Florida<sup>57</sup> affirmed the lower court judgement for Mary.

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50. *Id.* at 349, 350. See Note, *Defamation Law in the Wake of Gertz v. Robert Welch, Inc.*: THE IMPACT ON THE STATE LAW AND THE FIRST AMENDMENT, 69 NW. L. REV. 960 (1975).

51. 418 U.S. at 349, 350.

52. *Time, Inc. v. Firestone* — U.S. —, 96 S. Ct. 958 (1976).

53. *Id.* at 958.

54. TIME MAGAZINE, December 22, 1967 at p.77.

55. — U.S. —, 96 S. Ct. 958, 964 at n. 1.

56. 279 So. 2d 389 (1973).

57. 305 So. 2d 172 (1974).

The case reached the United States Supreme Court on a writ of certiorari by Time. Time argued that the Florida judgement “violat[ed] its rights under the First and Fourteenth Amendments to the United States Constitution.”<sup>58</sup>

Time’s first contention was that the Florida judgment awarding damages to Mary was unconstitutional in light of the Supreme Court’s prior holdings in *New York Times*<sup>59</sup> and *Curtis*,<sup>60</sup> which prohibited state courts from awarding damages to both public officials and public figures based on defamation, unless it proved that the publication was made with “actual malice.”<sup>61</sup>

Secondly, Time claimed that the constitutional strictures enunciated in *New York Times* and later applied in *Rosenbloom*,<sup>62</sup> clearly required that the publication of accounts of judicial proceedings, as a matter of inherent general or public interest, must be afforded constitutional protection. Time rationalized that even false or defamatory interpretations of facts and conclusions in public judicial proceedings deserved the constitutional protection of the *New York Times* standard.<sup>63</sup>

The *Firestone* Court, taking a firm and unequivocal stand against greater constitutional protection for the press in private defamation cases, rejected both of Time’s arguments.<sup>64</sup> The Court analogized *Firestone* to *Gertz*, rejecting the claim of the *New York Times* constitutional privilege and relegating Time to the alternative protections available under the *Gertz* private defamation standard.

At the outset, the Court found Mary not to be a “public figure” as defined in *Gertz*.<sup>65</sup> After restating the *Gertz* description of voluntary public figures, the Court concluded that Mary’s only conceivable role of “especial prominence”<sup>66</sup> was related solely to her participation in the social activities of Palm Beach society. While for the residents of Palm Beach and perhaps other similarly wealth-oriented communities her divorce was a “cause celebre,”<sup>67</sup> for Mary, it was the legal vehicle of escape from a troubled marriage. The Court found that Mary did not “thrust herself to the forefront of any particular public controversy in order to influence the resolution. . . .”<sup>68</sup> Instead, she was involuntarily thrust to the forefront by the press and made the brunt of a press-created public controversy. To satisfy the public’s curiosity and desire for gossip, knowing that the sordid details of a millionaire’s divorce sell

58. — U.S. —, 96 S. Ct. at 958.

59. 376 U.S. 254 (1964).

60. 388 U.S. 130 (1967).

61. Actual malice was defined by the Supreme Court as: “Knowledge that (the statement) was false or reckless disregard of whether it was true or not.” *New York Times Co. v. Sullivan* 376 U.S. 254, 279-280 (1964).

62. 403 U.S. 29 (1971).

63. See *Time Inc. v. Pape*, 401 U.S. 279 (1971).

64. — U.S. —, 96 S. Ct. at 965.

65. *Id.* at 965-966. But see *Id.* at 979 (Marshall, J. dissenting).

66. — U.S. —, 96 S. Ct. at 965.

67. *Id.*

68. *Id.*

magazines,<sup>69</sup> Time made Mary's intensely private struggle to obtain a divorce a "public controversy", and transformed Mary into a press-made "public figure."

The *Gertz* decision recognized that active and volitional involvement in certain public controversies would raise a private person to the status of a public figure; but *Firestone* held that "dissolution of a marriage through judicial proceedings [was] not the sort of "public controversy" referred to in *Gertz*. . . ."<sup>70</sup> Moreover, the Supreme Court made it clear that "all controversies of interest to the public"<sup>71</sup> were not by legal and judicial definition, "public controversies." The Court rejected Time's argument that involvement in a public judicial proceeding automatically transformed the participants into public figures. The Court commented that:

. . . the majority . . . [were] drawn into a public forum largely against their will in order to attempt to obtain the only redress available to them or to defend themselves against actions brought by the State or by others.<sup>72</sup>

The Court refused to make private individuals sacrifice their private interests by their presence in the public court room or by their participation in the legal process. According to the *Firestone* majority, Mary was neither a voluntary nor involuntary "public figure", but rather a private citizen.

Thus the Supreme Court rebuffed Time's claim to the constitutional protection of the *New York Times* privilege, holding that no privilege attached when a purely private citizen was defamed. Only proof of fault, not proof of "actual malice", need be adduced by the private defamation plaintiff.<sup>73</sup> Unquestionably, the Court found that under the circumstances in *Firestone*, Time's limited interest was sufficiently protected by the constitutional limitations stated in *Gertz*.

Next, the Court explicitly denied Time's request for an automatic extension of the *New York Times* constitutional privilege to all press reports of judicial proceedings.<sup>74</sup> While the Supreme Court reaffirmed its commitment to protect the "publication of truthful information contained in official court records open to public inspection",<sup>75</sup> it denied the argument that all press reports of judicial proceedings deserved unqualified first amendment protection. Unequivocally, the Court declined to extend the rationale of *Cox Broadcasting Corp. v. Cohn*<sup>76</sup> to press reports such as those in *Gertz* which

69. For a general discussion, see Shapo, *Media Injuries to Personality: An Essay on Legal Regulation of Public Communications*. 46 TEX. L. REV. 650 (1968).

70. — U.S. —, 96 S. Ct. at 965.

71. *Id.*

72. *Id.* at 967.

73. *Id.* at 966.

74. *Id.* See PROSSER note 13 *supra* § 114, at 778. The common-law provided an absolute privilege for the participants in judicial proceedings.

75. — U.S. —, 96 S. Ct. at 966, *Citing* *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). The *Cox* case was an action for invasion of privacy.

76. *Id.* In *Cox* the Court commented on the availability of the defense of truth: "The Court

contained inaccurate, defamatory or false statements: "Our decision in that case should make it clear that no such blanket privilege for reports of judicial proceedings is to be found in the Constitution."<sup>77</sup> Moreover, the *Firestone* denial of a blanket constitutional privilege for reports of judicial proceedings served to further expand the Court's basic premise in *Gertz*, that first amendment constitutional protection could no longer be invoked on the basis of subject matter classifications.<sup>78</sup> Thus, whenever the press is compelled by the public interest to report particular judicial proceedings, the appropriate protection is extended on the basis of factual correctness.<sup>79</sup> If the publication is truthful and accurate then it is protected under the Supreme Court's decision in *Cox*;<sup>80</sup> however, should the publication contain incorrect or false information then no first amendment or common-law privilege attaches.

Furthermore, the *Firestone* Court held that Time's other first amendment claim premised on the Court's holding in *Time, Inc. v. Pape*<sup>81</sup> did not apply in a case of private defamation.<sup>82</sup> When reporting about private citizens, the press is only protected by the rules announced in *Gertz*: "These are a prohibition against imposing liability without fault . . . and the requirement that compensatory awards be supported by competent evidence concerning the injury."<sup>83</sup> According to *Firestone*, the imposition of a fault standard "provide[d] an adequate safeguard for the constitutionally protected interests of the press and afford[ed] it a tolerable margin for error . . . ."<sup>84</sup>

Thus, having chosen to adhere strictly to the *Gertz* precedent the *Firestone* Court was compelled to determine whether the evidence produced by Mary satisfied the requirements of *Gertz*.<sup>85</sup> The *Firestone* Court had no problem with "the requirement that compensatory awards be supported by competent evidence concerning the injury."<sup>86</sup> It found that the jury was properly

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. . . carefully left open the question whether the First and Fourteenth amendments require that truth be recognized as a defense in a defamation action brought by a private person as distinguished from a public official or public figure." *Id.* at 490.

77. — U.S. —, 96 S. Ct. 958, 966. (The Court here is referring to the decision in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). "Indeed, this article upon which the *Gertz* libel action was based purported to be a report on the murder trial of a Chicago police officer. See 418 U.S. at 325-326.")

78. 418 U.S. at 344-346.

79. *Cox Broadcasting Corp. v. Cohn* 420 U.S. 469 (1975). See Note, *The Right of Privacy versus Freedom of the Press*, 24 EMORY L.J. 1205 (1975).

80. *Id.* Since no constitutional privilege attached on the basis of subject matter, the fact that a judicial proceeding is a matter of public interest or concern was of no consequence; the press would only be protected when it could demonstrate the truth and accuracy of the report.

81. 401 U.S. 279 (1971).

82. — U.S. —, 96 S. Ct. 958, 967, at n.4. In *Time Inc. v. Pape*, the Court apparently based its distinction on plaintiff Pape's status as a public official, and therefore applied the actual malice standard. The Court found that a "rational interpretation of an ambiguous document" did not amount to proof of "actual malice"; therefore the press report was protected by the New York Times privilege. But, in *Firestone* the plaintiff was not a public official nor a public figure, so the press was not entitled to claim the constitutional protection of actual malice in the first instance.

83. 418 U.S. at 347, 350. See Eaton at n. 5 *supra*.

84. — U.S. —, 96 S. Ct. at 967 (citations omitted).

85. *Id.* at 968-969.

86. *Id.* at 968.

instructed, and the verdict for Mary affirmatively reflected the finding that Time's inaccurate publication, referring to Mary as an adulteress, had in fact caused Mary great concern and anxiety, especially in relation to the effect it would have on her young son when he grew older.<sup>87</sup> Moreover, the Court matter of factly dismissed Time's argument that Mary could not recover for defamation since she did not claim injury to her reputation. Again, the *Firestone* Court sought support from *Gertz*.

In that opinion we made it clear that States could base awards on elements other than injury to reputation, specifically listing . . . 'personal humiliation and mental anguish and suffering' as examples of injuries which might be compensated.<sup>88</sup>

Therefore, the fact that Mary withdrew her claim for damages based on injury to her reputation was of no consequence. The Court totally rejected Time's argument and held that there *could* be recovery for defamation absent a claim for reputational injury, since "Florida ha[d] obviously decided to permit recovery for other injuries."<sup>89</sup> In conclusion, the *Firestone* Court, finding no basis to interfere with the Florida jury's findings of fact, would not conterm-and the damage award for Mary.<sup>90</sup>

It was the initial *Gertz* requirement, necessary to support Mary's damage award, which proved to be lacking and finally fatal in *Firestone*. *Gertz* required a finding on the state court level of "evidence of some fault on the part of the defendant charged with the publishing of the defamatory material."<sup>91</sup> Unfortunately for Mary, the Supreme Court held that this finding of fault had never been made by the Florida jury or at any time by a higher Florida court. Indeed, the question of fault had never been submitted to the jury:

. . . under Florida law the only findings required for determination of liability were whether the article was defamatory, whether it was true and whether the defamation, if any, caused . . . harm.<sup>92</sup>

Nor had the Florida Supreme Court made a sufficient finding of fault to meet the *Gertz* requirement. The *Firestone* Court circuitously noted the fatal flaw in the Florida Supreme Court holding: "There is nothing in the Court's opinion which appears to make any reference to the relevance of some concept of fault in determining petitioner's liability."<sup>93</sup> Thus, in the final

87. *Id.*

88. *Id.*

89. *Id.*; Cf. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 275 (1971). In *Monitor* the Supreme Court stated that "damage to reputation is, of course, the essence of libel."

90. See *Time Inc. v. Firestone*, 279 So.2d 389 (Fla. App. 1973), *rev'd* 305 So.2d 172 (Fla. 1974) *cert. granted* 421 U.S. 909 (1975).

91. — U.S. —, 96 S. Ct. at 968.

92. *Id.*

93. *Id.* at 969 and note 7. "Furthermore, this erroneous reporting is clear and convincing evidence of the negligence in certain segments of the news media in gathering the news. *Gertz v. Welch, Inc.*, *supra*. Pursuant to Florida law in effect at the time of the divorce judgment, Section 61.08, Florida Statutes, a wife found guilty of adultery could not be awarded alimony. Since petitioner had been awarded alimony, she had not been found guilty of adultery nor had the

analysis, the Supreme Court vacated the Florida Supreme Court judgment and remanded the case for further proceedings based on the following conclusion:

. . . Without some finding of fault by the judge or jury in the circuit court, we would have to attribute to the Supreme Court of Florida . . . not merely an intention to affirm the finding of the lower court, but an intention to find such a fact in the first instance.<sup>94</sup>

In the absence of a conscious and definitive finding of fault at some level of the state court system, there could be no constitutionally permissible imposition of liability on the press.<sup>95</sup>

### CONCLUSION

Major questions in the area of private defamation law remain unanswered by the *Firestone* opinion. Perhaps the most perplexing aspect of *Firestone* was its general ambiguity and lack of new direction. The Court did not clearly explain the concept of journalistic fault, and its constitutionally permissible application in private defamation suits remained elusive. The Court continued in its refusal to define explicitly for the states what type of fault standard would be held in compliance with *Gertz* and under what circumstances. In private defamation suits where "the substance of the defamatory falsehood [made] substantial damage to reputation apparent,"<sup>96</sup> the concurring opinion of Justices Powell and Stewart indicated that, "there [was] no first amendment constraint against allowing recovery upon proof of negligence."<sup>97</sup> In fact, the concurrence actually explored and hypothesized the outcome of *Firestone* on the assumption that, in the future, Florida would apply a negligence standard.<sup>98</sup> The majority, however, was silent. The ultimate determination of the definition and correct application of a fault/negligence standard in the context of professional journalism was not reached by the *Firestone* majority. Moreover, the forceful dissent of Justice Brennan,<sup>99</sup> cautioned the Court in *Firestone* to remember the rationale of *Cox*,<sup>100</sup> and the importance of exposing public judicial proceedings to public scrutiny.

Crucial . . . was the determination that a 'reasonable man' standard for imposing liability for invasion of privacy interests is simply

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divorce been granted on the ground of adultery. A careful examination of the final decree prior to publication would have clearly demonstrated that the divorce had been granted on the grounds of extreme cruelty, and thus the wife would have been saved the humiliation of being accused of adultery in a nationwide magazine. This is a flagrant example of 'journalistic negligence'." 304 So.2d, at 178.

94. *Id.* at 970.

95. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); Note, *Defamation Law in the Wake of Gertz*, 69 Nw. L. Rev. 960 (1975); Eaton at note 5 *supra*.

96. — U.S. —, 96 S. Ct. 958, 970. (Citations omitted). See also RESTATEMENT (SECOND) OF TORTS § 569 (Tent. Draft No. 12, 1966).

97. — U.S. —, 96 S. Ct. at 970.

98. *Id.*

99. *Id.* at 973.

100. 420 U.S. 469 (1975).

inadequate to the task of safeguarding against 'timidity and self-censorship' in reporting judicial proceedings.<sup>101</sup>

For Justice Brennan, *Cox* permitted only one conclusion: "Clearly, the inadequacy of any such standard is no less in the related area of liability for defamation resulting from inadvertent error in reporting such proceedings."<sup>102</sup>

Since, in the area of private defamation law, *Firestone* failed to supply the missing constant—proper application of the fault standard—the constitutional equation sought after in *Gertz* remained incomplete and unbalanced. Perhaps the message of *Firestone* is that further state legislative and judicial experiments are needed before *Gertz* becomes a truly workable formula for imposing liability on the press for private defamation.

CONSTANCE M. LEWIS

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101. — U.S. —, 96 S. Ct. at 975.

102. *Id.*