

In the

# Supreme Court of the United States

TIME, INC.,

Petitioner,

v.

MARY ALICE FIRESTONE,

Respondent.

No. 74-944

Washington, D.C.  
October 14, 1975

Pages 1 thru 50

Duplication or copying of this transcript  
by photographic, electrostatic or other  
facsimile means is prohibited under the  
order form agreement.

HOOVER REPORTING COMPANY, INC.

Official Reporters  
Washington, D. C.  
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

----- X  
: TIME, INC., :  
: Petitioner, :  
: :  
: v. : No. 74-944  
: :  
: MARY ALICE FIRESTONE, :  
: :  
: Respondent. :  
: :  
----- X

Washington, D. C.

Tuesday, October 14, 1975

The above-entitled matter came on for argument at  
1:40 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States  
WILLIAM O. DOUGLAS, Associate Justice  
WILLIAM J. BRENNAN, JR., Associate Justice  
POTTER STEWART, Associate Justice  
BYRON R. WHITE, Associate Justice  
THURGOOD MARSHALL, Associate Justice  
HARRY BLACKMUN, Associate Justice  
LEWIS F. POWELL, JR., Associate Justice  
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

JOHN H. PICKERING, Esq., 1666 K Street, N.W.,  
Washington, D. C. 20006; for the Petitioner.

MISS EDNA L. CARUSO, P. O. Drawer 3626, West Palm  
Beach, Florida 33402; for the Respondent.

C O N T E N T S

<u>ORAL ARGUMENT OF:</u>	<u>PAGE</u>
John H. Pickering, Esq. For the Petitioner	3
In Rebuttal	46
Miss Edna L. Caruso For the Respondent	30

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 74-944, Time against Firestone.

Mr. Pickering, I think you may proceed when you are ready.

ORAL ARGUMENT OF JOHN H. PICKERING, ESQ.,

ON BEHALF OF THE PETITIONER

MR. PICKERING: Thank you, Mr. Chief Justice. May it please the Court:

This case is here on certiorari to the Supreme Court of Florida to review decisions of that court upholding a \$100,000 libel judgment against the petitioner, Time, Inc., and rejecting Time's claims to the protection of the guarantees of freedom of the press and freedom of the speech under the Constitution of the United States.

The article in suit is a short one, reporting the facts of the divorce of the respondent, Mary Alice Firestone, by her husband, Russell Firestone. It appeared in the "Milestones" section of Time Magazine, a section which is used to record events in the lives of important people. The article reads in its entirety as follows, and I quote: "Divorced"--

/ Q Where are you quoting from?

MR. PICKERING: I am quoting, Mr. Justice Rehnquist, from pages 4 and 5 of our brief. The article also is Plaintiff's Exhibit 1 in the tan record at page 522. I am quoting from my



brief: "Divorced. By Russell A. Firestone, Jr., 41, heir to the tire fortune: Mary Alice Sullivan Firestone, 32, his third wife; a onetime 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 extra-marital adventures on both sides, said the judge, 'to make Dr. Freud's hair curl.'"

That brief report--

Q Before you go on, Mr. Pickering, I noticed in your brief you follow that with a reference to the Associated Press dispatch that came apparently after the Time Magazine was--at least in the sequence indicated.

MR. PICKERING: No, Your Honor, I am coming to that. The article published in Time Magazine was based on four items. The first item on which it is based is the Associated Press dispatch to which you refer, which is quoted in my brief.

Q And you will deal with the difference in language?

MR. PICKERING: I will deal with those right now, Your Honor.

Q Do you concede that the article was inaccurate?

MR. PICKERING: No, I do not, sir.

Q You think that her husband was granted a divorce on grounds of adultery?

MR. PICKERING: From the language of the decree

itself, which I will come to. That is one of our six points, that this was a truthful report of a judicial decision and as such is protected under Cox Broadcasting, Your Honor. That is not essential to our position; it is one of six points, any one of which we say we prevail on. But it is one, and I do not concede that it is inaccurate, and I will come to that in due course.

Let me say why it is not inaccurate or set the stage as to why it is not inaccurate by stating that this dispatch, this item, was based on an Associated Press dispatch, which the Chief Justice referred to, an article in the New York Daily News, and two dispatches from Time's Miami office. The Firestone divorce decree was handed down in the late afternoon of a Friday, December 15, 1967 in Palm Beach County, Florida.

Within two hours after that, Time received this Associated Press dispatch in its New York office. That dispatch stated that Russel Firestone had been granted a divorce from the respondent here, whom he had accused of extreme cruelty and adultery; and the dispatch also described the judge's statement about some of the testimony of extra-marital affairs being of a nature which would make Dr. Freud's hair curl.

Q Right there, Mr. Pickering, do you say the Associated Press dispatch tells the reader the same thing that the Time Magazine--

MR. PICKERING: No, it is not, Your Honor. And let me come onto that. The New York Daily News article was the next in the progression. That was received in the early evening of Friday, December 15th by Time, and that item is Defendant's Exhibit 3 in the record at page 545. That item reported also that Russell had been granted a divorce from his wife. That said simply that he had accused her of adultery, no reference to any extreme cruelty. It said accused of adultery. And it again referred to the testimony about extra-marital affairs.

At that point, Time decided to run a piece on this, and it sent a query to its Miami bureau asking for further details, including the grounds for the divorce in the words of the judge.

Two responses were received to that query. The first came from the head of Time's Miami bureau, Mr. Duncan, giving some of the details requested and stating that others would follow. That was received Saturday morning, December 16th.

The second dispatch, received in response to that query, was from a Palm Beach stringer for Time, one Delaney. That dispatch received in early afternoon of Saturday, December 16th, said--that is Plaintiff's Exhibit 4 in the record. It appears in the tan copy at page 532. That stated that the technical grounds of divorce, according to Joseph Farish, the attorney for the respondent, Mrs. Firestone--and

here I quote--"were given as extreme cruelty and adultery."

So, Time then had from its stringer a statement from the attorney of Mrs. Firestone what the grounds of divorce were.

With those four items, the AP dispatch, the New York Daily News article, and the two responses to its query to its Miami bureau--

Q Did Time ever ask for the court record?

MR. PICKERING: Time did not have at that point, Your Honor--

Q So, it did not ask for it?

MR. PICKERING: Subsequently, subsequently.

Q I do not understand why the Time contacts down there did not go look for it when you asked for it.

MR. PICKERING: It was a Saturday. The deadline for that edition of Time Magazine was that Saturday night. The decree had come down about 5:00 o'clock on a Friday. Time was satisfied. And I submit that with the findings that were made below there was no actual malice on its part, that it followed a careful editorial process and took reasonable precautions.

Q What was the source of Mr. Duncan's quote of the judge?

MR. PICKERING: What?

Q What was the source of Mr. Duncan's quote of the judge?

MR. PICKERING: The divorce decree itself as--

Q No, no. I am looking at the bottom of page 5--

MR. PICKERING: Knott commented.

Q "...Judge James Knott commented"--and then you have an inner quotes.

MR. PICKERING: Right.

Q Where did Mr. Duncan get that quote from?

MR. PICKERING: That came from, I believe, the Associated Press dispatch, and it is an exact quote from the language of the divorce decree itself, which is Plaintiff's Exhibit 2, and appears in the record at page 523.

Q You have told us already that Mr. Duncan had not seen the divorce decree itself.

MR. PICKERING: That is correct. That is correct.

Q So, my brother Brennan's question is, Where did Mr. Duncan get this quote?

MR. PICKERING: That quote, as far as I know, as far as the record shows, came from the Associated Press dispatch.

Q In other words, he did not do anything in Florida for Time that Time could not have done just reading the AP ticker in New York; is that right?

MR. PICKERING: That is correct. Now, Delaney, the stringer, did contact Judge Knott, the divorce judge. He contacted him late Saturday afternoon and verified a couple of quotes which they had had from the divorce decree. But the testimony was that he did not ask, nor did the judge tell him,



what the grounds for divorce had been. Delaney was satisfied and, we submit, properly so. He had it from Mr. Farish.

Q When did Time Magazine first see the decree?

MR. PICKERING: The record does not establish--

Q After this lawsuit was filed, was it not?

MR. PICKERING: What?

Q After the lawsuit was filed?

MR. PICKERING: I think that is correct, Your Honor, although I cannot be categorically certain. It was some time, and I think that is all the record shows. It was some time after the article, long after the article perhaps, that they got a copy.

Q Would not a normal cautious editor ask a normal cautious reporter or stringer that "I want the inside information on a court decree"? Would not both of them assume that somebody would go to the--guess what--court to see it? Would not that be normal?

MR. PICKERING: No, I do not think it is. You can check with the attorneys. You have the attorney for one of the parties saying what the technical grounds were. You have the AP dispatch which stated that a divorce had been granted, that the wife had been accused on two grounds, extreme cruelty and adultery; and you had a wire coming from the stringer saying that the attorney said thus and so much.

Let me try to say that there should not be a rule that

makes a difference in Constitutional liability, depending on whether or not you have seen a copy of an opinion if in fact you have reported that opinion correctly.

Q You started out earlier and now you are at the point where you were going to explain why the Time Magazine article was accurate, an accurate reflection of the court decree. And you say in your brief that the judge actually found adultery.

MR. PICKERING: What I say is that that is a reasonable, that is an accurate--fairly and accurately reports what the divorce decree says.

Q If you are right, it really does not make much difference where you got the information.

MR. PICKERING: Exactly.

Q If it is accurate, I suppose.

MR. PICKERING: Exactly.

Q Give me the decree and tell me where there is a finding of adultery.

MR. PICKERING: In the first place, the article does not say, Mr. Justice, that she was found guilty of adultery. This may be semantics but I think it is important to be absolutely precise. The article itself says that she was divorced on grounds of extreme cruelty and adultery.

Q How does an ordinary reader read that?

MR. PICKERING: What?

Q Does an ordinary reader read it any other way than that is what the decree says?

MR. PICKERING: No, I say it is a matter of semantics.

Q Certainly that is what your stringer said.

MR. PICKERING: The stringer said the technical grounds for divorce.

Q Were adultery.

MR. PICKERING: That is correct.

Q All right, then that is what you had; that is what was reported to you.

MR. PICKERING: Let us look at the final judgment.

Q So, let me ask you, you say your stringer was correct too then?

MR. PICKERING: Yes.

Q Mr. Pickering, before you go on, what was the relationship between the stringer and Time?

MR. PICKERING: The stringer is--it is the usual stringer relationship, Your Honor, of someone who was available to do work on an hourly basis.

Q He was paid on a piecework basis?

MR. PICKERING: Paid on a piecework basis. He was not an official part of the Time organization but had been used as a stringer for various items. He had been in the Palm Beach area and, therefore, he checked this out.

Q Does the record show his employment background,

what he did regularly for a living?

MR. PICKERING: Yes.

Q What?

MR. PICKERING: It is set forth. He had been a reporter in the Palm Beach area. He had been a newsbroadcaster. And his present job at that time was as a news commentator and this part time. But he had been in journalism of one sort and another for over 20 years, Your Honor.

Q Where is this?

MR. PICKERING: That appears at--beginning in the record at page 346.

Q Does the record show whether he read the Miami Herald of December 16th in which the article itself says, quote: "The judge added that he discounted much of the testimony in the case as unreliable"?

MR. PICKERING: No; the record, I do not believe, shows that. The Associated Press dispatch, which was the thing that triggered the Time interest in that, also contained that same statement about being discounted.

But let me say why this was the final report of what the judicial decree said. Page 523 of the record is where the final judgment of the divorce decree begins. In the first paragraph it says--and I will skip the immaterial parts--"The cause came on for final hearing before the court upon the wife's second amended complaint...the defendant husband's answer and

counterclaim for divorce on grounds of extreme cruelty and adultery...."

So, the husband counterclaimed for divorce on grounds of extreme cruelty and adultery. The decree goes on, at the bottom of page 523, to refer to certain testimony about the extra-marital escapades of the plaintiff of such a nature as would make Dr. Freud's hair curl, states that the court is inclined to discount much of this as unreliable. Nevertheless, it is the conclusion and finding that neither party is domesticated.

Q What does that mean?

MR. PICKERING: That illustrates the difficulty, Your Honor--

Q Does that mean she is guilty of adultery?  
Is that a finding, that she is guilty of adultery?

MR. PICKERING: Not clear, not clear.

Q Not clear?

MR. PICKERING: At that moment exactly. We would say that lack of domestication in the circumstances of this case-- in the first place, it was not a ground for divorce, statutory ground for divorce in Florida at the time.

It recites the counterclaim on grounds of extreme cruelty and adultery--

Q They go on and define, I gather, domestication from Chestnut v. Chestnut, "When the bride and groom are both



devoid of a yen for domestication, the marital bark puts out to sea with its jib pointed to the rocks." [Laughter]

MR. PICKERING: But the final--

Q I still want to know, Mr. Pickering, are you suggesting there is anything in that which imports a finding that--

MR. PICKERING: No, I am not suggesting that necessarily comes from lack of domestication. I say what it comes from then is page 528, Mr. Justice Brennan, where the judge says: "Ordered and adjudged as follows:

"1. The the equities in this cause are with the defendant; that defendant's counterclaim for divorce be, and the same is hereby granted...."

What was the counterclaim for? It was for a divorce on the grounds of extreme cruelty and adultery.

Q Pontifically in a pleading you may seek a form of relief and urge ten different reasons for it, and the fact that the court grants your prayer does not mean that it is affirming all ten grounds that you sought it on.

MR. PICKERING: When the language is this clear, as the Florida District Court of Appeal found, it said that Time carefully, fairly and accurately reported the final decree.

Q The Supreme Court of Florida found otherwise. So, you may prove to us as a Constitutional fact that the thing was accurate. But surely you cannot rely on the language

of an inferior Florida court to supersede the language of the Supreme Court of Florida.

MR. PICKERING: I am saying that is much closer to the mark, Your Honor, than the Supreme Court of Florida; and, in any event, it is this Court's function to decide that issue as a Constitutional matter.

Q Which is what we are trying to get at right now in asking you questions and hoping to get answers from you.

MR. PICKERING: Yes.

Q Can you tell me, Mr. Pickering, is alimony awardable to a defendant divorced on grounds of adultery in Florida?

MR. PICKERING: It is my understanding--and again I am not an expert in Florida law--it is my understanding that alimony is not awardable and that alimony was of course awarded in this case. Lack of domestication also. Suppose Time had printed that the divorce was granted on grounds of lack of domestication--

Q You probably would not be here then, would you?

MR. PICKERING: Well, I do not know. The lack of domestication may be a defamatory statement too, spanking as it does with this testimony and so on of unmarital--

Q At least you could say the decree said that, and it does not say what Time said it said.

MR. PICKERING: I must submit, Mr. Justice, that I

think it affords a basis for saying precisely that because it said the counterclaim was granted. We say that it was a truthful report, We also say that at the worst it is a rational interpretation of an ambiguous document.

Q What would the judge say if he did not find adultery but he found cruelty, extreme cruelty, and then he got down to saying, "I am going to grant the divorce"?

MR. PICKERING: He could have said, "I will grant it on grounds"--

Q He would say, "I would grant it on the counter-claim."

MR. PICKERING: I think it is perfectly open to responsible reporting; the complexities of reporting judicial decisions--members of this Court well know what the problems are that the press faces in matters of legal reporting, and again I return to the decision of the Florida intermediate Court of Appeals which I think put the nub of what we are wrestling with, saying that if the press were charged with directly analyzing the legal intricacies of each news item, their pages would remain empty of substance.

I say that Time did correctly analyze the divorce decree on the basis of what they had.

I further say that Time was not guilty of fault or negligence, and that liability has been imposed here without fault.

Q In that respect, Mr. Pickering, was this jury instructed?

MR. PICKERING: Only on truth, Your Honor.

Q Only on what?

MR. PICKERING: All that went to the jury was the issue of truth. The instructions appear at 585.

Q So that there is no instruction to this jury on the issue of fault?

MR. PICKERING: On the issue of fault, that is correct. Also it went to the jury with instructions that if they found Time was guilty of malice, they could impose punitive damages. They awarded compensatory damages but refused to find punitive damages.

Q Is it your position that if there is a lack in this record of an instruction on fault, that you are entitled to a new trial?

MR. PICKERING: No. Our position is, Your Honor, as a matter of law that the malice standard should apply here and also alternatively all of these are alternative arguments. Let me just outline very briefly what our legal points are.

Q I am speaking of the Gertz case, which came along afterward.

MR. PICKERING: Yes.

Q Have you abandoned any position that you are protected in part by the thesis of Gertz?

MR. PICKERING: By the which? By the thesis of Gertz?

Q Yes.

MR. PICKERING: No. We take the position that liability was imposed without fault, for three reasons. One, that Time truthfully reported, and we are protected by Cox Broadcasting. Second, that there was no error or fault. Nothing was found below, no fault of any kind, that was not submitted on negligence. The Florida Supreme Court characterization of the article as an example of journalistic negligence rested simply on its statement that Mrs. Firestone was not divorced on grounds of adultery.

Q What I am trying to get at is whether you feel you were entitled to an instruction on fault.

MR. PICKERING: We submit that the editorial process disclosed by this record, discussed in our brief and commented on by the District Court of Appeal precludes finding Time liable as a matter of law in this case. We have our fault arguments, the last of which is that this was a rational interpretation of an ambiguous document. The ambiguities that are in it have already been pointed out, the lack of domestication, what the grounds were, and the simple granting of the counterclaim. Those are our three under no--the lack of any fault.

Q Then you are not urging an instruction of the kind to which I referred?

MR. PICKERING: If we would have to have a trial, yes.



We raised all of this.

Q This is what I am trying to get at, is whether you take this at least now as a secondary position.

MR. PICKERING: Yes, I would take that as a secondary position, Your Honor.

Q You might lose your primary one.

MR. PICKERING: Exactly. And I have three more primary ones before I am driven back to that.

Q Before you get to those, let me ask you a question about your response to Mr. Justice Blackmun. Is there any reason why, as a matter of federal Constitutional law Florida cannot provide for fact finding on the issue of negligence by its appellate court rather than having to submit it all to a jury?

MR. PICKERING: No, as long as they properly decide as a matter of law whether there was or was not negligence.

Q So, if there is sufficient evidence in this record to support a finding of negligence by someone, then the finding of the Supreme Court of Florida is adequate for a Constitutional test.

MR. PICKERING: Subject, of course, to the independent review of this Court.

Q Certainly.

Q I think you go beyond that, do you not, Mr. Pickering? You say in any event the negligence or

carelessness standard is not the proper one, that she is a public figure and therefore the standard that had to be applied was the New York Times--

MR. PICKERING: Yes. And we say that--

Q That is your--

MR. PICKERING: Yes. That is our additional one.

We first say there was no fault, for three reasons, which I have touched on. We also say that--in other words, as I have said, there was no finding of negligence below except for the Supreme Court of Florida; it was not submitted to the jury on any negligence theory.

We say that in addition to negligence, an actual malice standard should apply for three reasons. One, this is a report of a judicial proceeding. Our starting point for all of this is the long recognition that this Court has given to the important function of the press in reporting on public procedures in the judicial forum and the need to be protected in order to perform that function. And if in reporting a matter of this kind we do not come within the truthful protection of Cox Broadcasting, we say that there should--and here we would rely most strongly on Mr. Justice White's concurring views in the Metromedia case--that the actual malice standard should apply to reports of public proceedings.

We say, and that is particularly true in the case of the litigants themselves in that proceeding, that they can be

decided to be public figures for the purpose of the New York Times--

Q What is it that makes Mrs. Firestone a public figure in the New York Times sense?

MR. PICKERING: Two things--

Q Other than the journalism profession itself made her such.

MR. PICKERING: She began this litigation. It was a sensational piece of divorce proceeding that spanned almost two years, received nationwide notoriety. Mr. Firestone was a very prominent wealthy individual--

Q She received nationwide notoriety because the media itself gave her that notoriety.

MR. PICKERING: That is correct. But how does one become a public figure other than coming to the attention of the press in some way?

Q Oh, by becoming President of the United States or a United States Senator maybe.

MR. PICKERING: Then he becomes a public official, Your Honor, yes. But the Gertz test, we submit, is satisfied here for determining who is a public figure. She started this. It received national publicity. And we say that a rule to protect the press is required here where the--in order to report on judicial proceedings, and we think it is a nice narrow, manageable--it is not the broad public--

Q I guess she is not a public figure in the sense that General Walker was.

MR. PICKERING: That is correct. She is not for all purposes.

Q And she is not in the sense--what was his name, Rosen--the Metromedia case? He was enmeshed in a police campaign.

MR. PICKERING: But she is a public figure, Your Honor.

Q But only because--only, I gather from what you have said--only because this was a sensational divorce involving people of wealth.

MR. PICKERING: Considerable social prominence and wealth.

Q Was she a public figure before she brought the lawsuit?

MR. PICKERING: Yes. She was a prominent of member of Palm Beach society as a wife of Russell Firestone.

Q A public figure in the sense that it has been used in opinions of this Court?

MR. PICKERING: Not for all purposes and for all things. We do not have to go that far, Mr. Chief Justice. We say that she is a public figure in the purposes and for the context of this case, and that there is a concurrence of the interest in protecting the press and reporting on judicial proceedings so

far as the litigants themselves are concerned.

Q I wonder if this is not key to whether or not you succeed or fail, because if she is not a public figure, if indeed she is a private person in the sense of Gertz--

MR. PICKERING: In the sense of Gertz--

Q --then--

MR. PICKERING: --then the negligence would apply.

Q Then the Supreme Court of Florida had the option to adopt the Times malice test under Gertz or the negligence, and they have apparently adopted negligence.

MR. PICKERING: That is correct.

Q And then all that is left of your case is whether or not we agree with you.

MR. PICKERING: We agree that we were negligent, that is correct, Your Honor.

There is one additional malice point, however, and that is that Mrs. Firestone was allowed to waive at the eve of trial, withdraw her claim for damage to reputation. We say that really should have been the end of the libel case at that time, and we so urge. We rely here on the Gertz case itself for saying that there must be proof of actual damage. There is a Constitutional matter. The protected interest is reputation itself. And having withdrawn that claim, she should not be allowed to press, and that the actual malice--rather that the actual malice test should then apply because you



weigh in the scales the First Amendment rights and the rights of the party. And when reputation is taken out as an ingredient of injury, the scale we say should come down on the balance of the preferred First Amendment freedom.

Q You are taking out completely reputation?

MR. PICKERING: That is correct, Your Honor. She waived it, took it out. We have referred to a case in our reply brief in appendix A, the Cardillo case in the Second Circuit, which we believe supports the idea that libel proof for people who have not claimed damage to reputation should not be--stay in court in view of the First Amendment. That is now officially cited, and I would like to give the Court the citation. It is 518 F. 2nd 638.

And on the matter of the stringer and the statement that came from him, we submit that Time was entitled to rely on that stringer, despite the fact that there may have been a conflict between the attorney and the stringer at trial over who said what to whom. We say that Time was just as entitled to rely on that stringer as the Associated Press was to rely on its reporter who Major General Walker had disputed, but this Court found for the Associated Press in the Walker case.

Q In the Walker case the Court found that there was no malice. Here you would be using the same finding to urge a conclusion that there was no negligence.

MR. PICKERING: Yes, but it seems to me it is a

Constitutional standard in either event.

Q Yes, but it is not the same standard surely. Less evidence will support a finding of negligence than would support a finding of malice.

MR. PICKERING: Certainly, Your Honor, and I say if we can establish malice, lack of actual malice, we should be home free under one branch of our argument. We also submit that the evidence is not sufficient to find negligence here.

Q Mr. Pickering, could I ask you one more question. Let us assume that your stringer or your office down there was admittedly deficient or negligent. Are you responsible? Would Time be responsible?

MR. PICKERING: No.

Q Let us assume the stringer sent in and said, "I have read the decree and it said so and so," and as a matter of fact that is just false, and Time nevertheless reported in its magazine exactly what the stringer said.

MR. PICKERING: No, the stringer had nothing--the persons responsible for that article, Mr. Justice, those who are in the editorial process, are the people back in New York, the writer, the researcher, and the editor. And the knowledge of that stringer is not imputable to those persons.

Q Or to Time Magazine?

MR. PICKERING: Or to Time Magazine, and here I rely on the situation of the photographer in Cantrell v. Forest City

Publishing.

Q But you do not make that argument here because--

MR. PICKERING: Yes, I do.

Q But the argument nevertheless is that you knew what the stringer was relying on, and you should have relied on something more.

MR. PICKERING: No. Our argument on that point--and it is spelled out in the reply brief quite fully--our argument is that we are relying on the report of the stringer. We were entitled to and we did, and that that cannot be malice and it certainly cannot be negligence either, in our view, and it is not imputed back to the people--

Q You are saying you make the Walker type of argument.

MR. PICKERING: Exactly. Exactly.

Q On that theory a publisher is never liable for the negligence of his servants then.

MR. PICKERING: Until that has come home to the people responsible for it, if they knew of a conflict, Your Honor, and so on; or if the person were a notorious--there is nothing in this record to indicate that they had reason not to rely on this stringer. He sends a straight cable in to them saying what the technical grounds for divorce were according to the respondent's attorney.

Q Is it reasonable to believe that the stringer had

not read the Miami Herald account in which the article itself pointed out that the judge said the testimony on these subjects was unreliable?

MR. PICKERING: He was inclined to discount much of it as unreliable. He did not say he was discounting it all. And that is another reason why we were not negligent.

Q Does that not put a reader on notice that he had better check and see what the judge might have felt was unreliable?

MR. PICKERING: He called up the attorney for the offended party.

Q There is a dispute about what the attorney said, is there not?

MR. PICKERING: That is correct. But that was not reflected or that was not known back at Time's home office when they wrote the piece.

Q Mr. Pickering, is there anything in the record about the relationship of this particular stringer? Was he a contract employee?

MR. PICKERING: Yes--well, no. He was simply the usual relationship of stringer. He was available to be called upon to do work for Time--

Q And he was in a sufficient position to let Time be excused for anything?

MR. PICKERING: I am sorry, I did not hear.

Q And therefore Time is excused because of a man that--

MR. PICKERING: I would take the same position, Your Honor, if it were the head of the Miami Bureau, as long as there was nothing to put Time's office back in New York on notice that something was wrong with that.

Q How long had he been a stringer? I mean, what makes him so reliable?

MR. PICKERING: He had been in news work for a number of years. His testimony appears beginning at page 346. He says, "A stringer is usually someone who is employed full time elsewhere and works in a part time capacity for Time magazine." He says, "I worked part time."

Not on any guaranteed salary?

No.

Then his entire background is gone into.

Q Is he as reliable as a staff man of Time or not?

MR. PICKERING: Until something comes to the attention of those who are responsible for the publication that he is not to be relied on, yes, Your Honor.

Q I gathered from you that he is more reliable than a staff member.

MR. PICKERING: No.

Q You are not saying that?

MR. PICKERING: Oh, no, I am not saying that.



Q You are not saying he is in a special category? That is all I wanted to get.

MR. PICKERING: I would say that the head of the Miami bureau's information is not to be imputed back to those who were responsible for the organization any more than the stringer. The knowledge really has to be brought home to the people who are responsible for what goes into the magazine.

Sure, they cannot just shut their eyes to matters. To answer your precise question about whether he had seen and your question about whether he had seen--

Q The Miami Herald.

MR. PICKERING: --the Miami Herald, the best answer I can give there is that he had at least talked to the Associated Press people in checking this out, and they had the same thing in the Associated Press dispatch, that the judge was inclined to discount much of this testimony as unreliable. But he did not rule it out, and that is one reason we say that Time was not negligent.

Q Actually what the stringer said was a lot more accurate than what Time said, was it not?

MR. PICKERING: No.

Q The stringer's dispatch I think is hard to fault.

MR. PICKERING: It says the technical grounds for divorce were extreme cruelty and adultery, and that in effect

is what the Time article said, on grounds of extreme cruelty and adultery, Mr. Justice Rehnquist.

Q I was reading Duncan. Yes, I see.

MR. PICKERING: Duncan says nothing about the grounds for divorce.

Q Duncan is completely accurate, as I see it, but he is not the stringer.

MR. PICKERING: That is correct.

Any further questions?

MR. CHIEF JUSTICE BURGER: Mr. Pickering, in order for you to make your plans, you may have observed that we have taken a little bit of your time. We will enlarge the time of your friend and we will allow you four minutes for rebuttal.

MR. PICKERING: Thank you.

MR. CHIEF JUSTICE BURGER: Your time will be enlarged correspondingly.

MISS CARUSO: Thank you.

MR. CHIEF JUSTICE BURGER: You may proceed, Miss Caruso.

ORAL ARGUMENT OF MISS EDNA L. CARUSO

ON BEHALF OF THE RESPONDENT

MISS CARUSO: Thank you. Mr. Chief Justice, and may it please the Court:

In this case I would like to stress at the very beginning that throughout the appellate process in the case,

Time, Inc. has never ever argued until today that it is entitled to a new trial. The briefs that have been filed throughout the appellate courts in Florida and the briefs that are filed here today solely urge that they are entitled to a judgment as a matter of law. That does not mean to say that I do not think the Court has the power to decide that a new trial should be granted, but that question has never been argued by Time and has never been briefed.

Starting with point one on appeal, that is their argument, that they truthfully reported a judicial decision and this was an accurate reflection of what the divorce decree stated. And we would simply point out to the Court that while the husband in this case counterclaimed for divorce on the grounds of adultery and mental cruelty, the divorce decree solely stated that the husband's counterclaim for divorce was granted.

They argue that that allows them to assume that it was granted on all grounds, and I think we all know that the only thing it allows us to assume is that the judge found in favor of the husband on one of the grounds.

Q Did the Intermediate Court of Appeals, Miss Caruso, say that at least it was ambiguous and would lend itself to a reading that it was based on adultery and also to the contrary?

MISS CARUSO: I think the District Court of Appeal

did hold that.

Q What do we do with that? That is an interpretation by a state court of your state court decree.

MISS CARUSO: I think that the Florida Supreme Court later overruled that, and I think very clearly that the document was not ambiguous.

Q You are saying the Supreme Court position and opinion has superseded all that went before, the Court of Appeals?

MISS CARUSO: Yes, sir.

I think anyway in regard to this, in regard to whether the article adequately stated what was in the divorce decree in this case, the jury was instructed there can be no recovery in this case if you find from the greater weight of the evidence that the article as published had no different effect on the mind of the reader than the divorce judgment and/or that the article was substantially true. And of course the jury found in favor of Mrs. Firestone, and therefore they found that the article did have a different effect on the mind of the reader than the divorce decree.

If anything, we would submit that this was a question for the jury, and the jury found against the position that my opponent is urging here today.

Time, Inc. argues that there was absolutely no evidence of negligence in this case on their part as a matter

of law, and we would submit to the Court that that is not true. They first argued that of course their interpretation was correct, and we submit that it was not. They argued that their editorial procedure was without fault, that there was no negligence.

In this case we know that Time had received three documents, dispatches, and articles, and also a dispatch from a Mr. Delaney who was their stringer. The three articles and dispatches other than Delaney's did in no way, we would submit, say that the divorce was granted on the grounds of adultery. Each of those articles or dispatches stated Mrs. Firestone was accused of adultery or her husband had counterclaimed for adultery.

They did receive the dispatch their stringer, and he stated that he had checked with her attorney and that the technical grounds for the divorce were mental cruelty and adultery.

However, we would submit to the Court that the evidence shows that even then, regardless of the dispatch from Delaney, there was serious doubt in Time, Inc.'s mind as to whether or not this was an accurate statement because there was testimony to the effect that a Miss Nadasdy, who was a legal researcher for Time, was supposed to, after the article was written, take the article and run what they call an accuracy check on the article, and she was to make a determination that each and every



word was accurate and it was supportable.

She did not mark the word "adultery." She marked the other words in the article, I think with the exception of a few, but she did not mark the word "adultery."

Q What is the significance of the mark?

MISS CARUSO: Pardon me?

Q What is the significance of a mark, that it is accurate?

MISS CARUSO: Yes. On top of each word she made a little mark, and that means that she had checked it out and it was her determination that that word was accurate.

We think that this testimony clearly indicates that there was a serious doubt in her mind as to whether or not they had sufficient information to support that or whether or not they had sufficient sources to support the publication that Mrs. Firestone had been found guilty of adultery.

However, of course, we know that Time went ahead and released this publication saying that she had been found guilty of adultery, and we would submit to the Court because the divorce decree was rendered on a Friday night about 5:00 o'clock and their deadline for publication was Saturday night at about 8:00 o'clock--so, they were pressed for time.

We think that that clearly indicates, if not negligence--I mean, not only negligence but a reckless disregard on the part of Time, Inc. for going ahead and publishing

the article when the employees did not even follow the requirement which they admitted that Time, Inc. imposed upon them to follow.

Q I suppose you are taking the position that that would in any event support a determination of negligence on the part of Time Magazine in New York as distinguished from its stringer in Florida?

MISS CARUSO: Yes. Yes. I was just getting ready to make that statement. They argued that they should not be held liable and cannot, under the law, be held liable for the negligence on the part of--the negligence--excuse me--cannot be held liable for negligence of their stringer in investigating, and we would submit to the Court that we are not here or have not been attempting to make Time, Inc. account for the negligence of their stringer. We are trying to make them account for the negligence of their own employees for going ahead and publishing this article when there was serious doubt in their mind that the article was correct. These are the acts of negligence that we are attributing--

Q At the home office?

MISS CARUSO: Yes, sir.

Q People who actually authored the article or helped prepare it.

MISS CARUSO: Yes, sir. Yes, sir.

Their point two is the argument that this was a

rational interpretation of an ambiguous document, and of course, as you know, the first argument in my brief is that the Pape Case is not even applicable to this case, and perhaps from some of the comments here I might see that you do think that it is applicable, but I think that the Pape decision says that when you have an ambiguous document and the publisher reads that document and relies upon a rational interpretation of the language in that document, then there is no malice as a matter of law.

That does not mean that I think that everybody has to go and read a document, that I think that if someone does not read a document and there is a rational interpretation, that they have to be held liable. I am just saying that the Pape case does not apply. And I think you are talking about perhaps common law qualified privilege outside the Pape case.

However, if we apply Pape to this situation, I think clearly that it does not become a question as a matter of law. I think clearly that it would be a question for a jury to decide; and in this case Time, Inc. never--they never asked for an instruction. They never asked for the jury to be instructed that if you find that the article was a reasonable interpretation of an ambiguous document, then there is no malice. The only instruction they asked for was an instruction to the effect that you are instructed that a reasonable interpretation of that divorce decree is that adultery was one of the grounds

for the divorce.

So, we would submit to the Court that in the trial court they have not sufficiently laid the groundwork to raise this point on appeal.

Then we come to the actual malice standard, and they have two arguments. Number one, that Rosenbloom and Cox Broadcasting have extended the New York Times document to report through judicial proceedings. And we would first say that we really do not read those cases as doing that. I think the Cox Broadcasting case says essentially that truth is the defense, that if you truthfully report a judicial proceeding or judicial report, then it is a defense. And I think we have shown in this case that their publication was not truthful.

The second question and perhaps one of the most relevant here is whether or not Mrs. Firestone was a public figure and therefore whether or not the standard of actual malice was applicable.

Of course, how do you determine this? And we are going to have to look to the very decisions of this Court, to the language in those decisions. I think the one that comes most to mind is Gertz because there I think it was talked about perhaps more than other decisions. Some of the language is: A public figure is one who has voluntarily placed himself in the public spotlight by reason of notoriety of their achievements or the vigor and success with which they seek the public's

attention that they become labeled as public figures. They thrust themselves to the forefront of public controversies in order to influence the resolution of those issues. They invite attention and comment. They voluntarily expose themselves to the increased risk of injury from defamation. I think that that is generally the language in Gertz.

In this case I would like to point out that although Mrs. Firestone did file a complaint in this case for separate maintenance, unconnected with divorce, she did not file for divorce. Her husband, of course, counterclaimed against her for divorce. She did not institute the divorce proceedings. Therefore, it would be our contention she was involuntarily drawn into the divorce proceeding.

We can only say that simply because the newspapers chose to write about Mrs. Firestone and to write about her divorce does not make her a public figure. She was married to a wealthy man, and we certainly admit that. He was a very wealthy man. But the woman was a housewife, and he sued for divorce. We think that up until that time--

Q She was a housewife?

MISS CARUSO: Yes, sir.

Q What did she do in the house?

MISS CARUSO: I am sorry, I do not mean to--perhaps I should not say she was a housewife in that sense. I do not think she was a public figure in her own right. She was simply



married to a very wealthy man. I do not know what chores she performed around the house, sir.

Q Miss Caruso, why did you give up your claim on reputation?

MISS CARUSO: I think that--

Q You did give it up?

MISS CARUSO: We withdrew the claim for loss of reputation.

Q And did that not change the whole lawsuit?

MISS CARUSO: I do not think so; no, sir. I do not think so. I will tell you quite frankly why that was done. This woman had just been through a very lengthy divorce suit, and as a practical matter it was not thought that she could withstand having the witnesses that were paraded through the divorce suit--and I am talking about on both sides, I am not pointing simply to her husband, but we all know from the record that there were many, many witnesses that came in and testified as to activities outside the marriage on both parties. For a number of physical and emotional reasons, it was thought that the woman should not have to go through this again and did not want to have to go through this again. So, that is why they withdrew the claim for loss to reputation.

Q That is completely out of the case?

MISS CARUSO: Yes, sir.

Q But nevertheless apparently is a basis for

recovery under Florida law.

MISS CARUSO: I think there is a basis for recovery--

Q The Supreme Court of Florida affirmed. You won, did you not?

MISS CARUSO: Yes, sir.

Q Even though it was for another kind of injury.

MISS CARUSO: I think it was--I think--

Q It was not an injury to reputation you recovered.

MISS CARUSO: No, sir. I think that under a defamation action we clearly do not have to seek each of the elements that can be sought.

Q What was it, damages for mental anguish?

MISS CARUSO: Mental anguish, humiliation.

Q How can you separate really mental anguish and impingement upon reputation?

MISS CARUSO: I am not sure that I can answer that specifically. Let me see if I can do it this way. In this trial, there was testimony, for example, just by Mrs. Firestone that she had a little son and that she lived every day with the thought that he was going to be old enough to read about this and find out about it and that that was something she lived with and feared every day of her life.

The judge in this case ruled that that had nothing to do with her reputation; that had something to do with the mental state of that woman and being extremely distressed over

that. And so I think that you can separate. And, if I may, what if a person does not have a reputation? What if you have someone who is not known by--that he is a hermit or something and no one knows this man and he does not have a reputation or standing in the community and yet someone libels him? Certainly the man for his own mental pain and anguish over what he has withstood--

Q Would you say the converse of that would be that a very thick-skinned person might suffer no mental anguish but merely have a sense of anger but have his reputation in general damaged, thus separating these two things?

MISS CARUSO: I think so. And I think that the language in Gertz, to me it says that. Gertz says if they prove actual damages, you can prove negligence or you can prove other than malice. And the Court says there, "Actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehoods include impairment of reputation and standing in the community." It goes on to say personal humiliation and mental anguish and suffering, and then it goes on to say, talk about, the jury should be correctly instructed on these elements of damages. And it is our point we would not have to pursue as an element of damage the loss of reputation, that we could pursue the other elements of injury to this woman.

Q What were the consequences under Florida law as

to--what would be admissible in evidence when she abandoned her claim for damage to reputation?

MISS CARUSO: In proof of her damages, sir?

Q By abandoning her claim for damage to reputation, did she preclude the use of certain evidence on the part of the defendant? That even if he had not been granted a divorce for adultery, he should have been?

MISS CARUSO: I think that it precluded either party putting on going to her reputation, yes, sir, and that was what we were trying to prevent because of the lengthy trial before that where all of this has been brought out.

Q Miss Caruso, what standard do you think the Supreme Court applied in this case, the New York Times standard or the Gertz standard?

MISS CARUSO: I think they applied Gertz.

Q What evidence of negligence was cited by the Supreme Court of Florida in support of liability under the Gertz standard?

MISS CARUSO: Quite frankly, I would have to relook at the decision, sir.

Q The only specific evidence that I recall was that since under Florida law alimony could not be granted an adultress that as a sort of a per se result the Supreme Court of Florida found negligence. Is that your reading of the case?

MISS CARUSO: If I may have just one second--

Q It is in appendix C of the--well, I do not want to interrupt your argument.

MISS CARUSO: That is all right. Appendix C?

Q C-10 contains the concluding paragraph of the Florida court.

[Pause]

I know that it is very difficult to pick up language unless you have been looking at it. So--

MISS CARUSO: I would submit to the Court that I think that there--I do not frankly recall the specific things pointed to in the Florida Supreme Court decision. Unfortunately we have had a number of decisions in Florida courts on this. However, I think that clearly, clearly, the evidence presented in this case supports the finding of negligence on their part.

Q The court said that if anybody had looked at the decree, it would have been plain what the grounds were, and that a careful examination of the final decree would have clearly demonstrated that the divorce had been granted on the grounds of cruelty, not adultery. That is what your Supreme Court said.

MISS CARUSO: Yes, I would agree with that, and I would also say that I think a reading of the divorce decree would not allow one to assume that it had been on adultery, and that would be negligence, yes, sir.

But also I think the important part about Time, Inc.'s



employees not even following their own standard to make sure that they are actually reporting something when the employees--

Q There is a boilerplate ahead of the paragraph that Mr. Justice White referred to. "Careful examination and consideration of the record discloses that the judgment of the trial court is correct and should have been affirmed on appeal." Does that sweep in the ground you argue, namely, the failure at the New York home office of those involved in the publication, particularly the failure to spot the word "adultery," satisfies the requirement of negligence?

MISS CARUSO: No, sir, I do not think so.

Q The Supreme Court did not say anything about that, did it?

MISS CARUSO: In this case I think the distinction is that in this case we have the woman who is responsible for running an accuracy check.

Q Yes, but your Supreme Court did not rely on that fact, did it?

MISS CARUSO: I do not think that was mentioned in there, no, sir.

Q Unless it is in this catch-all paragraph I have just read you.

MISS CARUSO: No, sir, I do not think they specifically pointed that out; no, sir.

Q I suppose the Supreme Court of Florida has

occasion on more than one appeal to simply summarily say there is sufficient evidence of negligence and we disallow that point, without going into great detail as to why they think there is sufficient evidence of negligence.

MISS CARUSO: Yes.

Q I think if they are reversing another appellate court, do they often do that that cryptically? It is one thing when you are affirming; it is something else when you are reversing.

MISS CARUSO: Yes, sometimes they do, sir; yes, sir.

Q Certainly there is nothing in the Federal Constitution that would prevent them from doing it.

MISS CARUSO: No, sir, I do not think so.

If there are no other questions, I conclude.

Q In the opinion of the Supreme Court of Florida there is a statement to the effect that the trial court found the equities to be with Mrs. Firestone.

MISS CARUSO: Mrs. Firestone?

Q That is what the Supreme Court of Florida--wait a minute. Maybe I am reading the wrong--look on page C-2 of the petition and see if I am reading the wrong opinion. Page C-2, the last full paragraph. That is not what the trial court found, is it?

MISS CARUSO: I think--

Q You think it is a misprint?

MISS CARUSO: I think perhaps it is, but we would have to check.

Q Is it possible that the Supreme Court of Florida was misinformed itself?

MISS CARUSO: No, I think that they understood, but I would have to look at--I think they understood that the question--I think that they understood that Mr. Firestone had been granted the divorce and she had been awarded adultery--

Q Awarded alimony.

MISS CARUSO: Yes, excuse me. She was awarded alimony, and I think they understood that. And I would think this is a misprint, but we would have to check that to be sure, sir.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Miss Caruso.

Do you wish to make anything further, Mr. Pickering?

REBUTTAL ARGUMENT OF JOHN H. PICKERING, ESQ.,

ON BEHALF OF THE PETITIONER

MR. PICKERING: Yes.

MR. CHIEF JUSTICE BURGER: Before you get started, let me just ask you one question that you can handle briefly. This testimony on page 200, which has been alluded to indirectly--that is, the researcher explained her function as checking every word in a story if it was a key word; and the record showed that when she--the document was in evidence. The pencil check

appeared above each of the key words in the article, the pencil check of the researcher, except the word "adultery." Do you suppose that testimony was overlooked by the jury? I am speaking now not of the Supreme Court or the Court of Appeals but by the jury in coming to its conclusions.

MR. PICKERING: No, Your Honor, because I think it was made very clear in the testimony that that absence of a check mark signified absolutely nothing. That is what Miss Nadasdy testified.

Q That was her testimony.

MR. PICKERING: That was her testimony.

Q But having already testified that her regular habit was to put a check over every word that she had checked and then the document was put before the jury and it did not have a check over "adultery." Do you think that would permit the jury to accept the documentary evidence rather than her explanation?

MR. PICKERING: That is possible, but the only issue that went to the jury, Your Honor, was truth. There was nothing about negligence or malice or anything else. Mrs. Nadasdy and the other people responsible for the article, the writer Doerner and the editor Daniels, all testified at the trial as to their complete belief in the truth of the article at the time it was published and at the time of trial. That is set forth in our brief, and I can give you the record references for that

testimony as set forth in the brief, and the researcher Nadasdy and the editor both testified, at pages 2 and 3 of our reply brief, that the absence of the check mark over that signified nothing.

Q There were several other words without a check mark.

MR. PICKERING: There were several other words, Your Honor. There was not a check mark over every one.

Q Trial, month, day, and 42.

MR. PICKERING: And if you will look at--

Q Were there two words in this litigation--

MR. PICKERING: Some of them were, yes.

Q Was there only one key word in this litigation, and that is the word "adultery"?

MR. PICKERING: There is only one key word as far as her suit is concerned. But in making an accurate statement to the general public, Mr. Chief Justice, there are a number of key words.

Let me give one more reason why any knowledge of the stringer Delaney cannot be attributed to Time. The New York Times case itself I think makes that plain because there was knowledge in the files of the New York Times itself that contradicted the advertisement. But this Court said that did not come to the attention of those responsible for the publication.

Q But there you are talking about a malice



standard. That would not necessarily carry over to a negligence standard.

MR. PICKERING: That is correct, but you can have a lack of imputation for a negligence as well. It is an easier test; I grant you that.

My opponent referred to the failure of Time to request jury instructions. Time requested jury instructions--they appear in the record at 557-558--on all of the Constitutional issues which it raised. And that included all of this.

Several questions dealt with, Why was the claim for reputation withdrawn and did not that do something? If I could for just one second respond to that, the claim for damage to reputation was withdrawn because it was quite clear Time was prepared to do in proving this; and the danger that follows from allowing a claim for a representation to be withdrawn is clear from the record in this case because Mrs. Firestone testified the thing that concerned her most about this article was that some day, as counsel for the respondent has said, some day her infant son would hear about it and understand what it meant. That appears in the record at 393, and the jury sent back a query, in the record at page 515 to the judge, asking if they could award compensatory damages to the son in trust for him.

The judge answered no without consulting with the attorneys. The verdict then came in for \$100,000 compensatory

damage. Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Pickering.

Thank you, Miss Caruso.

The case is submitted.

[Whereupon, at 2:47 o'clock p.m. the case was submitted.]

- - -