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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 37

CURTIS PUBLISHING COMPANY,
Petitioner,

versus

WALLACE BUTTS,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT

Respondent accepts petitioner's recital of "Opinions Below" and "Jurisdiction."[1]

QUESTIONS PRESENTED

Respondent construes the questions presented to be as follows:

[1]Respondent will sometimes be referred to as Wallace Butts or Butts. Petitioner will sometimes be referred to as Curtis Publishing Company or Curtis.

I. Under the facts of this case, did petitioner waive the right to challenge the verdict and judgment on any of the constitutional grounds now asserted by its decision not to assert any such grounds at or before the long and expensive trial?

II. Assuming that *Times v. Sullivan* does apply and the constitutional defenses were not waived, did the undisputed evidence show conclusively that actual malice was proved?

III. Under the facts of this case, did the amount of punitive damages constitute an abridgement of freedom of the press or the taking of property without due process of law?

ADDITIONAL STATUTES INVOLVED

Additional statutory provisions involved are set forth in Appendix A.

COUNTERSTATEMENT

The questions to be decided must be determined upon the facts of this specific case. Petitioner's "Statement" is deficient in many respects.

Petitioner's Statement Fails To Set Out the Facts As to Waiver, The First Question Presented

Petitioner's "Statement" fails to set out the background against which it made its decision as to the

strategy it would employ in the trial court in defending this case. That background is vital in determining the question of waiver involved in the first question presented. In considering the facts, the trial strategy chosen by petitioner should be kept in mind, to-wit, that it would defend this case squarely and solely on a plea of justification (truth) under which it would obtain the right to open and conclude the jury argument and that no other defense would be relied on. Only when that strategy failed did petitioner seek after the trial a constitutional ground of defense and turn hopefully to *New York Times v. Sullivan,* 376 U.S. 254 (1964), as a means of escape.

In the early part of 1963 Paul Bryant, coach of the University of Alabama, filed suit against Curtis Publishing Company and Furman Bisher (Sports Editor of the *Atlanta Journal)* in the United States District Court for the Northern District of Alabama (Civil Action 63-2-W), claiming damages for libel in an article about him written by Furman Bisher and published by Curtis in its *Saturday Evening Post.*

On February 26, 1963, Curtis filed a motion to dismiss Bryant's action on various grounds, including the following (App. B, Exh. A):

> "(f) To subject this defendant to liability in the circumstances complained of would abridge the freedom of speech and of press in violation of the First Amendment to the Constitution of the United States, made applicable to the States by the Fourteenth Amendment to the Constitution of the United States.

> "(h) To subject this defendant to liability in the circumstances complained of would be repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States.
>
> "(i) The magazine article complained of is not libelous as a matter of law in that it is fair comment concerning a personality who is famous throughout the United States and abroad."

Curtis Publishing Company was represented in that action in Alabama by its general counsel, Pepper, Hamilton & Scheetz of Philadelphia, Pennsylvania, and by T. Eric Embry of Beddow, Embry & Beddow Birmingham, Alabama.

The suit at bar brought by Wallace Butts against Curtis Publishing Company for libel published against him in *Saturday Evening Post* was filed March 25, 1963 (R. 14), almost exactly one month after Curtis had filed its constitutional defenses in the Bryant action. Curtis filed its answer to the Butts suit on April 10, 1963, and asserted no constitutional defenses whatsoever and chose to rely solely on the defense that the charges in the article complained of were true. (R. 20)

In the early part of April 1963 Coach Paul Bryant filed a second action in the United States District Court in Alabama against Curtis for libel, this one

growing out of the charges against him in the Butts-Bryant article which forms the basis for the action here. To the second Bryant action Curtis filed on April 30, 1963, its motion to dismiss on the same constitutional grounds it had filed in the first Bryant action. (App. B, Exh. B)

The constitutional defenses to the second Bryant action were filed on behalf of Curtis by its same general counsel, Pepper, Hamilton & Scheetz, and T. Eric Embry of Beddow, Embry & Beddow.

In addition to being counsel for Curtis in the Bryant cases, T. Eric Embry and the firm of Beddow, Embry & Beddow, along with Herbert Wechsler of New York City, were also counsel for the New York Times Company in the *Times v. Sullivan* case in the Alabama state courts (see 144 So.2d 25) long before it reached this Court. The firm of Beddow, Embry & Beddow and Mr. Wechsler presented the petition for writ of certiorari to this Court in the *Times* case (on Nov. 21, 1962) and saw the writ granted on January 7, 1963, several months prior to the trial of the Butts case.

Mr. Roderick Beddow, Jr., of Curtis' Birmingham counsel, was the individual who first brought the Butts-Bryant story to the attention of Curtis. (R. 368) Mr. Philip H. Strubing of the Philadelphia firm which is general counsel for Curtis apparently received the information from Beddow, for he first brought it to the attention of *Post* editors Thomas and Kahn. (R. 720)

In an affidavit executed in the instant case by Philip H. Strubing (R. 1340) he stated he is a member of the

Philadelphia firm of Pepper, Hamilton & Scheetz, general counsel for Curtis, and that he participated actively with Mr. T. Eric Embry of the Birmingham law firm of Beddow, Embry & Beddow in the preparation of the case of *Bryant v. Curtis* in the United States District Court for the Northern District of Alabama and that he participated actively with Mr. Welborn B. Cody and other attorneys in the Atlanta law firm of Kilpatrick, Cody, Rogers, McClatchey & Regenstein, in the preparation of this (the Wallace Butts) case for trial. He further stated in said affidavit that Mr. T. Eric Embry and Mr. Roderick Beddow, Jr. attended the trial of the instant case in Atlanta, "but only as spectators."

Editorial Philosophy of Petitioner At The Time It Published The Butts-Bryant Article

Petitioner publishes several magazines, including *Saturday Evening Post;* its advertising revenue fell from $106 million in 1960 to $86 million in 1961 and to about $66 million in 1962, a loss of $40 million in two years, an alarming rate of $20 million a year. (R. 707-08) Clay Blair, Jr., Editor-in-Chief of the *Post*, testified that, since the entire advertising rate schedule was based on how large the *Post's* circulation was, he, as Editor-in-Chief, decided to "change the image" of the magazine (R. 711) so as to attract more readers and thereby improve the critical advertising revenue picture. Using the language of Mr. Blair himself, this "change" in "image" was to be founded upon a policy of "sophisticated muckraking" (R. 710, 712-714) — of conducting "the expose in the mass magazines" (R. 714) calculated to "provoke people, make them mad." (R. 715) When asked if he had been facetious when he

boasted on a previous occasion that he would change the image of the *Post* from that which everyone had learned to admire and respect to that of a "sophisticated muckraker," Mr. Blair testified that he was "not being facetious," that he "meant it then" and "mean[s] it now." (R. 710-711)

Shortly after the "image" of the *Saturday Evening Post* was changed and it had embarked on its course of "sophisticated muckraking," petitioner, acting through Mr. Blair and his associate editors, purchased from one George Burnett, known by them to be a bad check artist then on probation (R. 689-92, 771-72), the Butts-Bryant story for which petitioner paid approximately $10,000.00 (R. 1041-46), and published the article here in question in its March 23, 1963, issue.

When asked how the Butts-Bryant story fitted his new image for the *Post*, Blair stated it was "a step in the right direction" and added, "we have gone 25 per cent toward the goal of the magazine that I envision." (R. 711)

On January 15, 1963, Mr. Blair had issued a memorandum to the staff of the *Post* congratulating them on the type of magazine being put out. The memorandum stated in part:

> "Your work has not gone unnoticed. We have many press clips commenting on the new vitality of the Post. Joe Culligan [President, Curtis Publishing Company] has been extremely flattering in his comments, as have the other directors of the Curtis Publishing Company. The final yardstick: we have about

> six lawsuits pending, meaning that we are hitting them where it hurts, with solid, meaningful journalism." (R. 1040)

When questioned under oath about this memorandum and comments concerning it which had been published in *Time Magazine* on March 29, 1963, Mr. Blair stated that by his use of the statement "we are hitting them where it hurts," he meant, " 'Them' is the general phrase to refer to the whole United States of America." (R. 708-09) He stated that the lawsuits referred to in that memorandum were all libel suits. (R. 710)

The Butts-Bryant Article

Pursuant to its new "image" and its proclaimed new policy of "sophisticated muckraking," Curtis purchased the Butts-Bryant story from George Burnett on about February 21, 1963, for exclusive use in its *Saturday Evening Post*. The availability of the story had been brought to the attention of Curtis by Roderick Beddow, Jr., its Birmingham counsel then handling the defense of Curtis in the first libel action which had been filed by Coach Bryant several weeks earlier. (R. 368) The information had been relayed by attorney Philip H. Strubing to Davis Thomas and Roger Kahn, two of the *Post* editors (R. 720). On February 18 Thomas and Kahn engaged one Frank Graham, Jr., a freelance sports writer who apparently knew little about football, to write the story. (R. 362, 366-67) They instructed him to go to Atlanta and meet Curtis' counsel, Roderick Beddow of Birmingham, at the Heart of Atlanta Motel. They explained to him that Beddow was a Curtis lawyer handling the Bryant libel suit then pending against it in Birmingham. (R. 367)

Graham arrived in Atlanta on February 20 and met attorney Beddow at the designated motel, together with the latter's private investigator from Birmingham. (R. 368) Attorney Beddow arranged for Graham to meet George Burnett, the man who was supposed to have the Butts-Bryant story. (R. 368-69) Graham met Burnett the next day, February 21, in attorney Pierre Howard's office in Atlanta where it was agreed between Graham and Burnett's lawyer, Pierre Howart, that Curtis would pay Burnett $2,000.00 for an affidavit about the story and an additional $3,000.00 if the story appeared in print "and was a Post exclusive." (R. 369-71) The following day (February 22) Graham obtained an affidavit from George Burnett concerning the story, although Burnett told him "he couldn't remember anything definite about it . . . without his notes." (R. 390) Mr. Beddow and his private investigator then returned to Birmingham. (R. 375) Mr. Graham remained in Atlanta until Saturday morning when he returned to New York to write the Butts-Bryant article for the *Post*. (R. 379)

The article as written by Graham was published in the March 23, 1963, issue of the *Post*. It was entitled in bold black letters, "THE STORY OF A COLLEGE FOOTBALL FIX," with a sub-title reading, "A Shocking Report of How Wally Butts and Bear Bryant Rigged A Game Last Fall."

Superimposed on the first page of the article was an editorial written by "The Editors" of the *Post* which stated as follows:

> *"Not since the Chicago White Sox threw the 1919 World Series has there been a sports*

story as shocking as this one. This is the story of one fixed game of college football.

"Before the University of Georgia played the University of Alabama last September 22, Wally Butts, athletic director of Georgia, gave Paul (Bear) Bryant, head coach of Alabama, Georgia's plays, defensive patterns, all the significant secrets Georgia's football team possessed.

"The corrupt here were not professional ballplayers gone wrong, as in the 1919 Black Sox scandal. The corrupt were not disreputable gamblers, as in the scandals continually afflicting college basketball. The corrupt were two men — Butts and Bryant — employed to educate and to guide young men.

"How prevalent is the fixing of college football games? How often do teachers sell out their pupils? We don't know — yet. For now we can only be appalled. —THE EDITORS" (R. 1071) (Emphasis in original)

The body of the article as published included, in part, the following charges against respondent:

(a) He was charged with being a "rigger" and "fixer" and with having "fixed" and "rigged" the 1962 Georgia-Alabama football game. (R. 1072)

(b) It is slyly insinuated that he rigged and fixed the game with Coach Bryant as a *gam-*

bling device in order to restore his financial resources. (R. 1072, cols. 2, 3)

(d) He is charged with having betrayed the Georgia players by his alleged deception, "fixing" and "rigging," foulness and corruption, so that their moves were "analyzed and forecast like those of rats in a maze" and they "took a frightful physical beating." (R. 1072, col. 3)

(e) In the closing paragraph of the article, the term "fixer" is defined as one who never leaves open a *"chance"*: "When a fixer works against you, that's the way he likes it." (R. 1074)

Curtis' Utter Disregard Of
Whether The Article Was True or False

1. Before coming to Atlanta to buy the story from George Burnett, Frank Graham was informed that one John Carmichael was present with Burnett when the alleged telephone conversation was intercepted and that he may have overheard it. (R. 378-79) Graham was also aware that Burnett had been convicted of writing bad checks and was at that time on probation. (R. 689-92) *Post* Managing Editor Davis Thomas knew this also, and testified they knew there were possibly other instances of bad-check-writing by Burnett. Thomas acknowledged that he considered the act of writing bad checks essentially as "a lie." (R. 771-72) In spite of knowing this about George Burnett and that John Carmichael was present when the alleged telephone conversation was supposed to have been over-

heard by Burnett, Graham, with Thomas' approval, made no effort to contact or interview John Carmichael to verify Burnett's story. (R. 378-79, 771-72) Had Graham contacted John Carmichael he would have learned from him at the outset that Burnett's whole story was a fabrication. (See R. 636-44)

2. Before publishing the story in its March 23rd issue, petitioner was informed unequivocally by telegram and again by letter, each dated March 11, 1963, of the "absolute falsity of the charges" it was *preparing* to make in the proposed article. (R. 777-78) Said telegram and letter were ignored and went unanswered. No additional investigation was made. The story appeared as prepared.

3. Although the article states that Burnett "recorded *all* that he heard" in his notes (R. 1072, col. 1) (emphasis added), before publishing the story no representative of the Post even saw or read the notes which Burnett alleges he made during the course of the intercepted conversation (R. 772-73), preferring to rely upon the memory of one person as to the details of an alleged conversation he oveheard over *five months* previous and who told author Graham he was talking to him only from memory (R. 154) and "couldn't remember anything definite about it . . . without his notes." (R. 390). The notes contained no information that could possibly have been equated to a "fix." According to Coach Griffith, University of Georgia head football coach, a witness for petitioner, a "good number of those notes were inaccurate and didn't apply to anything that the University of Georgia had." (R. 281)[2]

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[2]In fact, Georgia had no "80-8 pop" play, as asserted in the ar-

The most the notes showed was a reference to two formations (and not "plays" (R. 1071) as the *Post* wrote) which had been used by Georgia throughout the *previous* football season and which therefore would have been nothing new to Alabama or anyone else. (R. 237-39) Petitioner's witness, Georgia head coach Griffith, testified there "wasn't anything secret about those formations." (R. 239) As a matter of fact, one of the two formations used by Georgia in the game did surprise Alabama to such an extent that it was executed quite successfully four out of five times it was used. (R. 333)

4. Before publishing the story no effort was made by petitioner to view the game film although the Sports Editor of the *Post*, Roger Kahn, considered that to be necessary (R. 736), and Furman Bisher thought "it would have been a very good idea." (R. 779)[3]

5. No effort was made by petitioner to interview any member of the Alabama football team to see if any changes had been made in the team's offensive or defensive plans after the alleged telephone conversation, or for any other purpose. (R. 779)

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ticle, or "29-0 series," as asserted in the notes. (R. 226, 279, 467, 569) Neither did Georgia have any play where the "on-side guard pulls on sweep." (R. 470)

[3]Bisher, Sports Editor of the *Atlanta Journal*, was hired by Curtis for some undetermined function in connection with the story. (See R. 1043) The intimation in petitioner's brief (p. 31) that it relied on Bisher's failure to make any corrections in the article written by Graham is grossly misleading. Graham testified that he did not *ask* Bisher to make any corrections or suggestions, and in fact had sent the story to Bisher "for his files whenever the story was to be written in Atlanta, for the newspapers" (R. 384) — which it never was.

6. Neither author Graham nor any of the editors of the *Post* made any effort prior to publication to contact either Wallace Butts or Coach Paul Bryant for the purpose of verifying or negating any of the "facts" which they subsequently published in the article, or for any other purpose. (R. 677)

7. Curtis' Editor-in-Chief, Clay Blair, before publication brushed aside the tearful plea of Jean Butts Jones, a daughter of Wallace Butts, that the article not be published, that it was not true. (R. 717-18)

8. Curtis published the article knowing full well in in advance that it *would* "ruin Coach Butts' career" and *would* be "the death of Wally Butts in his chosen profession" (R. 693-94), and knowing all the time (at least one month before the issue of March 23) that he was hopeful "for [a] job with [the] pros." (R. 662) (The story itself stated: " 'I still think I'm able to coach a little,' Butts told a reporter that day [February 23], 'and I feel I can help a pro team.' The chances are Wally Butts will never help any football team again." (R. 1974, col. 2)) The testimony on this point was unequivocal:

> (a) Frank Graham, the author of the article, testified by deposition as follows:
>
> "Q. Now, in the third from last paragraph in the article you say: "The chances are that Wally Butts will never help any football team again.' Is that your language?"
> "A. That is mine."
> "Q. Is that your opinion?"
> "A. That is my opinion."

"Q. You felt, and the Post felt, or *Curtis Publishing Company felt, that when this article was published that was the death of Wally Butts in his chosen profession?*"

"A. I would say that it would be very difficult for him ---

"Q. That is your opinion?"

"A. *That is my opinion.*"

"Q. The next to the last sentence of that same paragraph you say: 'But careers will be ruined, that is sure.' Is that your language?"

"A. That is my language."

"Q. Whose career were you referring to?"

"A. To Wally Butts."

"Q. *You knew* and the *Curtis Publishing Company* knew that *when that article was published it would ruin Coach Butts' career?*"

"A. *Yes, we did.*" (R. 693-94) (Emphasis added)

(b) Charles Davis Thomas, Managing Editor of the *Post* testified by deposition as follows:

"Q. Let me point out to you the statement in this story which says, and I read from Page 83 at the bottom of the second column: 'But careers will be ruined, that is sure.' So that you knew what was involved in this story before it was published? You knew that the *careers of two men would be ruined as a result of the publication* of the story, didn't you?"

"A. *Yes.*"

(R. 770) (Emphasis added)

The Trial

The article appeared in the March 23, 1963, issue of *Saturday Evening Post* and on March 25 Wallace Butts filed suit against Curtis. (R. 14-19)

To the plaintiff's complaint, Curtis answered (R. 19-21) with three defenses: first, specific admissions or denials of the allegations of the complaint; second, that the statements in the article complained of were true; third, that the complaint failed to state a claim upon which relief could be granted.

At pretrial hearings counsel for Curtis insisted that its second defense was a valid plea of justification and that it therefore had the burden of proof in the case and was entitled to have the opening and concluding arguments.[4] The trial court so ruled, and that order was followed in the trial of the case which began on August 5, 1963. The verdict was rendered two weeks later on August 20, 1963.

In its presentation of evidence, petitioner at no time put up as a witness the author of its article or any of its editors who had made additions to the article af-

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[4]Pretrial Conf., June 3, 1963. Page 8: "MR. CODY: Whether it's justification or the truth whatever distinction you make between the pleas, the defendant has the burden on that anyway." "MR. CODY: *I will concede that that puts the burden on me.*" Page 10: "THE COURT: No. I was just — I didn't know that question was to come up. I just thought it was already a plea of justification."
"MR. CODY: I don't think there is any difference between a plea of truth and of justification. I think one means the other. The cases so hold."
"MR. CODY: Your Honor, I interpret this as a plea of justification. I think the court in its pretrial order can say that." (Emphasis added)

ter it was submitted by the author or otherwise worked on the story, although petitioner had present in the courtroom during the trial its Editor-in-Chief, Clay Blair, its Executive Editor, Don A. Schanche, and its Managing Editor, Davis Thomas. (225 F. Supp. at 919) Neither did petitioner put up as a witness Furman Bisher, Sports Editor of the *Atlanta Journal*, who was available in Atlanta and to whom petitioner had paid $1,000.00 for his connection with the article. Neither did petitioner put up as a witness Milton Flack or attorney Pierre Howard, both of whom were available in Atlanta and to whom petitioner had paid sums of money for their connections with the article.

Petitioner, although pleading truth as a defense, neither produced Mr. Graham as a witness at the trial nor gave any reason for his absence. Therefore respondent was denied open confrontation in court with the very writer of the article as to the truth of what he had written and the sources from which he had obtained it. Respondent had to resort at the trial to the use of a deposition he had previously taken of Mr. Graham in New York, where Graham resides, in order to bring to the jury any testimony by the author of the article. The same was true as to petitioner's Sports Editor, Roger Kahn, who handled the editing of the article after it was written.

As its principal witnesses petitioner put up George Burnett and head coach Johnny Griffith of the University of Georgia. George Burnett was known by the petitioner to have a record of conviction for writing bad checks and to be on probation at the time he claimed to have listened in on the conversation. (R. 689-92) He testified concerning what he claimed to have

heard while listening in on a telephone conversation between respondent and Coach Bryant on September 13, 1962.[5] (R. 128-38) Burnett is quoted in the article as stating that all he heard is contained in the notes he claims he made. (R. 1072, col. 1) As will be hereinafter shown, Burnett testified that he had not told the author of the article many things quoted in the article as having been said by him.

Petitioner's other principal witness, head coach Johnny Griffith of the University of Georgia, stated that *if* information concerning two formations had been given to the University of Alabama it would, "to some extent, limit the preparation that was necessary on the part of Alabama," that is, "it would eliminate them making preparation and spending time on the practice field to prepare against any of the possibilities of formations that we had shown to try to stop." (R. 228) As will be shown later, Coach Griffith further testified that he had not given Furman Bisher or anyone else various statements attributed to him in the story.

Assistant Coaches Frank Inman and Leroy Pearce of the University of Georgia, witnesses for petitioner, were questioned at length as to technicalities about football. Coach Inman testified that certain information in the Burnett notes in his opinion could have been helpful. (R. 288)

Both of the principals charged in the article with having "fixed" and "rigged" the game, namely, Wallace Butts, and Coach Paul Bryant, testified at the

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[5]The story asserts that this call was made on September 14, 1962. There is no evidence to support this.

trial. They both stated they had no independent recollection of any specific telephone conversation they had had throughout the many years they have known each other, but stated that throughout those years they had discussed football in general by telephone many times. (R. 424-27, 485-86) They both emphatically denied the charges made against them in the article published by the petitioner and stated that there was never any conversation between them having as its purpose or effect the "fixing" or "rigging" of any football game. (R. 426-30, 487, 514, 601)

Coach Bryant testified in effect that the notes claimed to have been made by Burnett meant absolutely nothing, stating, "those notes, as far as I am concerned, would not help me one iota. As a matter of fact, all it would do is get me confused." (R. 428) Coach Bryant stated, on the other hand, that the only thing that would be useful to a coach would be his opponent's "game plan." This would include the "field position" tendencies of the team: "what this team is going to do over here on the hash mark, because they will be on the hash mark sixty-seven per cent of the time"; "both offensively and defensively . . . , what they are going to do on first down, because it is a guessing game on first down"; "what they are going to do" on the "five to seven plays in this area here between the 20's, five to seven plays that [are] going to determine the game"; and, more broadly, what the team will do or tend to do in a given down-yardage situation, such as third down and long yardage, third down and medium yardage, etc. (R. 428-29) "[T]he kind of stuff we have been talking about [the Burnett notes] is not the game plan." (R. 428)

Coach Bryant testified that he frequently talked with various football coaches all over the country, often discussing football. In fact on the very day the call in question is alleged to have taken place, he talked by phone with Coach Darrell Royal of Texas for 37 minutes. (R. 424)

When asked whether he and Wallace Butts "threw," "fixed" or "rigged" the outcome of the Georgia-Alabama game as charged by the *Saturday Evening Post,* Coach Bryant replied, "absolutely not, and if we did we ought to go to jail, and anybody that had anything to do with this ought to go to jail, because we didn't. Taking their money is not good enough." (R. 430) Coach Bryant also testified that during September of 1962 he undoubtedly had reasons to talk with Coach Butts by telephone and in person about such matters as game schedules, problems involving game tickets, matters relating to team work-outs and other matters concerning football in general; he testified that he had talked with Coach Butts several times during that period about enforcement policies of certain rules because of Coach Butts' connection with the rule-making body of college football. (R. 424-27, 485-86) Coach Bryant stated that he knew he had talked with Coach Butts about football in general,

> "because that is my business; that is my hobby; and I just talk to him in general about football. I know I have talked to him about our football. I know I have talked to him about his football, particularly his passing game, because he is the greatest passing coach this area has even known, and most

> of us, what little we know about passing, we learned it from him." (R. 426-27)

Coach Bryant stated further:

> "I have talked a whole lot with different coaches. I used to talk a lot to Coach Dodd here at Georgia Tech. I used to talk a lot with Coach Woodruff down in Florida, and I probably shouldn't say this, but Coach Woodruff is longer winded on the phone than Coach Butts is. You get him on there, and you are going to miss dinner." (R. 427)

The Alabama team was named National Champion of college football in 1962 (R. 427), as well as the previous year. (R. 442)

Respondent Butts testified that he knew he had talked by telephone at times with Coach Bryant about the enforcement policies of certain new rules, that he had talked at length with him about such matters with the hope that it would prevent serious injuries to players in football, but that he had no way of recalling any specific dates on which such conversations took place. (R. 485)

Charlie Trippi, former All-American football player at the University of Georgia, former professional player, chief offensive coach at Georgia at the time of the Georgia-Alabama game involved, and at the time of the trial a professional coach, testified that the notes claimed to have been made by Burnett were baseless, did not indicate "any tendencies," and that if he had received them as a coach the first thing he

would have done would have been to tear them up. (R. 546-47) He stated that as offensive coach for the University of Georgia in the 1962 Georgia-Alabama game[6] he saw nothing indicating that Alabama knew anything about what Georgia was going to do in that game and that the only thing he saw was "that Alabama blocked, tackled and ran harder than we did." (R. 549) He further stated that based upon his experience as a college football player and coach, as well as a professional football player and coach, the outcome of a college football game "definitely" cannot be "pre-arranged, fixed or rigged without the participation of the players, or some of the players, themselves." (R. 549-50). Trippi further testified:

> "I have studied these notes, and I believe I expressed my opinion of these notes when they first were announced; and I still contend there's nothing in here to substantiate anything of value in football planning." (R. 550)

He even stated:

> *"We give more information to the press every week to promote the game than is being expressed in these notes right here."* (R. 550) (Emphasis added)

Leroy Jordan, All-American linebacker and captain of the University of Alabama in the 1962 Georgia-Alabama game and at the time of the trial a member of the Dallas Cowboys professional football team (R.

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[6]As such Trippi called ninety percent of the plays used by Georgia in that game from the press box. (R. 545) Georgia's defense coach, Gregory, called all of Georgia's defensive formations from the side line. (R. 465)

534, 536), testified as a witness for respondent. He stated that in his opinion an opposing coach's knowledge of the formations that were going to be employed by a team would be of no value to the coach, because it is "*when* he is going to run a play" that is important, e.g., the "tendencies of a team on third down," and this information is established from "scouting reports and films." (R. 538-39) With reference to the Burnett notes which were examined by Leroy Jordan during his testimony, he stated that there was nothing contained therein which the University of Alabama specialized in defensively in preparation for its game with the University of Georgia. (R. 540-41) He was asked whether in his opinion as a football player "the outcome of a football game can be rigged or fixed without participation of the football players themselves in it." He stated, "No, sir. It couldn't be done." (R. 541) He testified further that in his opinion there is no "way that two coaches could rig or fix the outcome of a football game without the players' knowledge." (R. 541)

Jimmy Sharp, who played on the first team for Alabama in the game, testified that he heard no player on Alabama's team call out any such thing as "you can't run '80-8 pop' on us" during the game, as was asserted in the article. (R. 442) He also testified that no fundamental changes were made in the Alabama defensive plans between the alleged telephone call and the game (R. 441) and in fact that during the game the players on the Alabama team were greatly surprised by a formation (one of the two mentioned in Burnett's notes) used by the University of Georgia. (R. 438) In speaking of this formation which was used successfully against them in that game four

of five times, Sharp stated, "we hadn't anticipated it, and we could not make the necessary adjustments." (R. 439) He said the first time Georgia employed this formation the Alabama defensive reaction "was just mass confusion, because we hadn't worked in practice on the [necessary] adjustment." (R. 439) Sharp further testified that the other formation alluded to in the Burnett notes had been anticipated by Alabama because it was utilized 109 times (out of a total of 113 plays run) in Georgia's spring game in 1962. (R. 440)

Charles Pell, who played first team tackle on the Alabama team in the game, testified that from September 1 until the game against Georgia on September 22 there were no significant changes made in the defenses that Alabama prepared to use in the game, although sometime prior to that and as a result of a scouting report the Alabama coaching staff had devised a special defense for the formation Georgia had used 109 times in its 1962 spring game. (R. 447) He also testified that during that period between September 1 and September 22 the University of Alabama did not concentrate on any particular two formations or any particular three formations (R. 451); he stated further that in his opinion for Alabama to have known Georgia's formations and plays in advance would be of no advantage without also knowing "almost a thousand other things," some of which the witness described in detail. (R. 452-53) Pell also testified that in his opinion as a football player a football game cannot be rigged or fixed without the individual players knowing about it and participating in it. (R. 454)

Robert Williamson (R. 554), Mickey Babb (R. 560) and Brigham Woodward (R. 573), varsity players for

the University of Georgia in the 1962 Georgia-Alabama game, testified at the trial. Woodward testified that Georgia players in that game did not take a "frightful physical beating" as claimed in the article. (R. 575) Williamson, who played right guard on the first team for Georgia in the game, testified that there was "not a thing" done or said by the Alabama players during the game which indicated that they knew what Georgia was going to do. (R. 556) He further corroborated Woodward by saying that the statement in the article that the Georgia players took a frightful physical beating in that game was not true. (R. 556-57) Mickey Babb, right end on the Georgia team, corroborated Woodward and Williamson's testimony that the Georgia players did not take a frightful physical beating (R. 563) and stated that as a player in that game he did not feel that their moves were being analyzed by the Alabama team. (R. 563) He specifically denied having told Furman Bisher, as claimed in the article, that the Alabama players had taunted them by yelling out "you can't run eighty-eight pop on us." (R. 564)

William C. Hartman, Jr., former Assistant Coach of the University of Georgia and former professional football player with the Washington Redskins and at the time of the trial a businessman, testified. (R. 737) In addition to detailed testimony given by him concerning football technicalities, he testified that in his opinion the information contained in the Burnett notes would not be of any assistance at all to the University of Alabama in preparing for its game with the University of Georgia, that the information concerned nothing more than basic "T" formations, and that the University of Alabama and everyone else "in the United

States" had those formations in their own offenses. (R. 745-56) He stated that the University of Alabama must have previously seen several movies of Georgia games showing the same information. (R. 746)

John Carmichael was called by respondent as a witness at the trial. (R. 616) Petitioner and its writer Frank Graham had known that Carmichael had first-hand knowledge about the alleged telephone call but they had not questioned him about it before writing and publishing the article. Carmichael testified that on the morning Burnett claims he overheard a conversation between respondent and Coach Bryant, he, Carmichael, arrived at the office which he shared with Burnett and found Burnett at Carmichael's desk (R. 618); that shortly thereafter Burnett showed him some notes scribbled on pieces of paper which Burnett claimed he had written while listening in on a long distance telephone conversation. (R. 620) Carmichael testified that on that occasion Burnett told him that the two coaches were merely talking about "football in general." (R. 622) Burnett asked him whether he thought they should bet anything on the approaching game; Carmichael responded by asking Burnett if he knew who he would bet on and if there "was anything said to lead you to believe that there would be some favorite in the game." Burnett's answer was "no." (R. 622) During his testimony John Carmichael was shown the notes which Burnett had previously testified were the notes he had made in listening in on the conversation; Carmichael was asked whether those were the same notes Burnett had shown him immediately following the alleged telephone conversation in September 1962. Carmichael's reply was "*no, sir; these*

are not the same notes that Mr. Burnett handed me." (R. 643-44) (Emphasis added)

Dr. Frank A. Rose, President of the University of Alabama, former President of Transylvania College, Lexington, Kentucky, and a former minister of a church at Danville, Kentucky, also testified (R. 917) He testified at length as to his conversation with Coach Bryant concerning the charges against Coach Bryant as related in petitioner's article and explained the contents of a letter he wrote Dr. O. C. Aderhold of the University of Georgia concerning this matter,[7] as well as his lack of knowledge of the technicalities of present day football (R. 922) which resulted in his misuse of certain terminology in this letter. (R. 924-26, 932-34) Dr. Rose also testified that Coach Bryant had told him (when Coach Bryant was asked whether what Coach Butts had told him about rule interpretations, or anything else that was said, could have affected the outcome of the game) that "he received no specific information or any specific knowledge that would affect the score or the outcome of the ball game between the University of Alabama and the University of Georgia," (R. 926) and that the same information had been given to a meeting of coaches of the Southeastern Conference by Coach Butts when he spoke to them. (R. 926-27)

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[7]Petitioner (Brief, pp. 22-23) attempts to lead the Court to believe that in investigating and writing the story it relied on Dr. Rose's March 6 letter to Dr. Aderhold. The fact is that petitioner was not aware of the letter until long after it published the article. (See R. 855-56)

In addition to those heretofore mentioned, other direct quotations used in the article were denied under oath by the parties alleged to have been quoted:

(1) Graham wrote that Burnett had told him that Georgia quarterback Larry Rakestraw placed his feet in a certain position while on offense, thereby tipping off the defensive team as to whether the Georgia play would be a run or a pass. (This, would have been vital information for an opponent (R. 266), as petitioner was aware. (R. 776)) But Burnett denied under oath that he had told Graham any such thing. (R. 175) Georgia's head coach, Johnny Griffith, who was in a better position than anyone else to know whether in fact Rakestraw did this with his feet, testified that it was not true. (R. 266)

(2) Sam Richwine, the Georgia trainer, specifically and categorically denied the quotation in the article attributed to him to the effect that Alabama knew Georgia's plays. (R. 570)

(3) In its article petitioner wrote that Georgia Coach Griffith had stated: "We knew somebody had given our plays to Alabama . . . and maybe to a couple of other teams we played too. But we had no idea that it was Wally Butts." Coach Griffith testified emphatically that he had said no such thing. (R. 268-69)

(4) The article states that "Griffith went to University officials, told them what he knew and said that he would resign if Butts was permitted to remain on his job." Coach Griffith categorically denied having done or said that. (R. 269)

(5) The article quotes Coach Griffith as saying, "You know, during the first half of the Alabama game my players kept coming to the sideline and saying, 'Coach, we been sold out.' " Coach Griffith at the trial denied that. (R. 269)

(6) The article attributes the following direct quotation to Coach Griffith: " 'I never had a chance did I?' Coach Johnny Griffith said bitterly to a friend the other day. 'I never had a chance.' " Coach Griffith denied under oath having said that to anybody. (R. 270)

Petitioner called several witnesses from the University of Georgia in an effort to impeach the testimony of respondent. Petitioner had admitted in its pleadings in this case that respondent enjoyed a national reputation (R. 19-21) in his chosen profession before the article was published, and thereafter petitioner admitted that respondent's *reputation would be ruined as the result of its article.* (R. 693-94, 770) In short, petitioner had accomplished what it set out to do.

Curtis' Post-Trial Motions

Following the two week trial and the jury's verdict of $3,060,000 for respondent on August 20, 1963 (reduced by remittur to $460,000), Curtis, having failed in its trial strategy of relying on its sole defense of proving the truth of the article, embarked upon a series of post-trial motions. It filed a motion for new trial (R. 36) and a motion for judgment notwithstanding the verdict (R. 67) on August 29, a motion for new trial based on newly discovered evidence on February 28, 1964 (R. 1090), and finally an extraordinary motion for

new trial on March 23, 1964. Certain First, Fifth, and Fourteenth Amendment claims were raised in the August 29, 1963, motion for new trial. (R. 36-38) The First Amendment claim now insisted on was raised in the March 23, 1964, extraordinary motion. (R. 1115)

To the new evidence motion respondent filed a response stating in part: (R. 1113)

> "[The] purported significance attached by defendant to this so-called 'recently discovered evidence' cannot be reconciled with defendant's action in paying Paul Bryant $300,000, tax free, to dismiss his libel suit growing out of this identical Saturday Evening Post article when *at that very time* defendant had all of this 'recently discovered evidence' in its possession."

In overruling Curtis' motions for new trial the District Court gave its appraisal of the evidence and stated in part as follows:

> "The article charged Butts with being corrupt and with betraying his players, and that the players were forced into the game like 'rats in a maze' and 'took a frightful physical beating'. The article charged, in an italicized editorial, Butts, along with Coach Bryant, with being a participant in the greatest and most shocking sports scandal since that of the Chicago White Sox in the 1919 World Series. In the same editorial Butts was relegated to a status worse than that of 'disreputable gamblers', and a corrupt person who, employed to 'educate and guide the young men',

betrays or sells out his pupils." (225 F. Supp. at 917)

"Curtis Publishing Company based its defense on certain notes taken by one George Burnett who made such notes to a telephone conversation alleged to have been overhead between Coach Bear Bryant, of the University of Alabama, and Butts, as Athletic Director of the University of Georgia, on a morning in September, a few days prior to the Alabama-Georgia game. By some mechanical defect, Burnett was connected by telephone to the conversation. These rough notes were kept by Burnett and revealed to Head Coach Johnny Griffith, of the University of Georgia, in late December, 1962, or early January, 1963. Curtis paid Burnett consideration for the story after the same was brought to its attention by Curtis' Birmingham, Alabama lawyers, who were defending Curtis in a libel suit brought by Coach Bryant because of another article in the Saturday Evening Post.

"The evidence presented showed that Frank Graham, Jr., the author of the article, and Davis Thomas, Senior Editor of the Saturday Evening Post, knew that Burnett had been convicted of 'bad check writing.' No representative of the Post looked at the notes before the article was published. According to Coach Griffith of Georgia, defendant's witness, 'a good number of Burnett's notes were incorrect and didn't even apply to anything Georgia had.' No effort was made by the Post to view the actual game film, although the

Sports Editor of the Post, one Roger Kahn, considered that necessary." (255 F. Supp. at 918)

"The article was clearly defamatory and extremely so. The Saturday Evening Post had a circulation in excess of 6 million copies per issue. It claims readers of 22 million. Butts was unquestionably one of the leading figures in the national football picture. The jury was warranted in concluding from the foregoing incidents and the persistent and continuing attitude of the officers and agents of the defendant that there was a wanton or reckless indifference of plaintiff's rights. The guilt of the defendant was so clearly established by the evidence in the case so as to have left the jury no choice but to find the defendant liable." (225 F. Supp. at 919)

The Court of Appeals Approved The District Court's Appraisal Of The Evidence

In affirming the trial court on Curtis' appeal, the Court of Appeals stated:

"This is no ordinary libel case. The publication of the article by the Post, in the face of several specific appeals that it refrain from doing so, was part and parcel of a general policy of callousness, which recognized from the start that Butts' career would be ruined. *The trial judge's appraisal of the evidence, with which we are in complete accord, was that it was sufficiently strong to justify the*

jury in concluding that what the Post did was done with reckless disregard of whether the article was false or not.

"The case was fully developed during extensive pre-trials, and in a jury trial lasting two weeks. The record itself comprises 1613 pages. We have given full consideration to the entire record, as well as to the more than 650 pages of briefs submitted by both parties, the numerous authorities cited therein, and the oral arguments of counsel. *We think that Curtis has had its day in court. It apparently thought so too until the jury verdict was returned.* This is attested by the fact that practically all of its present complaints were not even raised until after the trial.

"Believing and so finding that the trial was fair, and that the judgment of the trial court was correct and proper in all respects, it is Affirmed." (351 F. 2d at 719-20) (Emphasis added)

SUMMARY OF ARGUMENT

I.

Under the facts of this case, petitioner waived the right to challenge the verdict and judgment on any of the constitutional grounds now asserted by electing not to urge *any* constitutional grounds of defense before or during the long and expensive trial.

That Curtis knew of the constitutional defenses and

intentionally omitted them in this case as a part of its deliberate timed strategy is established by (1) the fact that its general counsel—who also appeared in this case—urged these defenses in the two companion libel suits pending against it in Alabama, (2) the fact that it pleaded the "public man" defense in the Alabama cases but omitted it in this case, although it is plainly provided for under Georgia law (Ga. Code Ann. 105-709(6)), (3) the intimate knowledge of its Alabama counsel of the proceedings in the *Times* case by virtue of their representation of the New York Times Company, and (4) its failure to object to the charge as required by Fed. R. Civ. P. 51.

Respondent suggests that the *reason* for their trial strategy is that Curtis hoped to get a favorable decision in Georgia which would discredit Bryant or realized it must establish the truth of its career-destroying charges or have its own reputation impaired or simply wanted the important right to open and conclude the arguments to the jury.

The Court of Appeals was correct in holding that Curtis obviously decided to rely solely on its plea of truth in this case for its own reasons of trial strategy and thereby waived its right to raise additional defenses on appeal. *Yakus v. U.S.*, 321 U.S. 414, 444 (1944); *U.S. v. Sorrentino*, 175 F. 2d 721 (3rd Cir. 1949), *cert. den.*, 338 U.S. 868 (1949); *Ackermann v. U.S.*, 340 U.S. 193 (1950). The limitations expressed in *Times* were not new and a like rule had existed for many years in federal and state courts in cases involving public officials.

The cases cited by petitioner are inapposite here. Petitioner is not entitled to be relieved of its deliberate

decision omitting all constitutional defenses and to subject respondent to the time and expense of a new trial. Curtis has had its day in court.

II.

Assuming the constitutional defenses were not waived, *New York Times* should not be used as a basis for reversal in view of the facts of this case.

The trial court correctly held that respondent was not a public official within the meaning of *Times,* but rather was an employee of a separate business entity. Therefore, *Times* could in no event be applicable.

The subject of the libelous article was not a "public issue" so as to justify its false treatment. One may not escape responsibility for that which he publishes by *creating* the "public issue" upon which he comments.

In this case, as distinguished from the *Times* case, there was overwhelming proof of actual malice. The evidence established that Curtis had deliberately chosen a policy of "sophisticated muckraking," of "provoking people, making them mad," and measured its success by the number of libel suits against it. It intentionally ignored warnings received well in advance of publication that the story was false and made no effort to check the truth of the information it had obtained.

It would be useless to require another trial in view of the overwhelming evidence of malice, this Court having held that if actual malice is proven, a libeller ceases to enjoy constitutional protection.

The trial court's charge in respect to malice was adequate and met the standards set out in *Times*. No objections were made by Curtis to the court's charge in respect to malice as required by Fed. R. Civ. P. 51.

Even if *Times* is held applicable, the facts fully warrant the refusal by this Court to give it retroactive application in this case.

III.

Under the facts of this case the amount of punitive damages did not constitute an abridgment of freedom of the press or the taking of property without due process of law. Curtis carelessly published the sensational article here involved, knowing it would ruin respondent. Whether it did so for the purpose of discrediting Bryant or to improve its circulation, or both, is unimportant. If for the former reason alone, it is clearly not entitled to protection. If it were done for profit, it was a "libeller for profit" and not entitled to the same protection under the Federal Constitution against punitive damages as is the responsibly and objectively informative segment of the press.

Curtis having requested the trial judge, in open court, to reduce the size of the verdict, it cannot complain of the trial judge having done so. Curtis in its desire to profit from libel deliberately sought to squeeze from respondent his "breathing space . . . to survive" and cannot now complain that the $400,000 award of punitive damages deprives it of that "breathing space." Especially is this true considering the fact that prior to any trial Curtis paid Coach Bryant $300,000 for a dismissal of his companion suit. There is no law in Georgia

or enunciation of the federal courts that requires the existence of any relationship between compensatory and punitive damages, although the ratio here of $60,000-$400,000 is entirely reasonable.

ARGUMENT

I.

UNDER THE FACTS OF THIS CASE, PETITIONER WAIVED THE RIGHT TO CHALLENGE THE VERDICT AND JUDGMENT ON ANY OF THE CONSTITUTIONAL GROUNDS NOW ASSERTED.

In *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938) *"waiver"* was defined as the "intentional relinquishment . . . of a known right or privilege." In determining whether the right is *known*, the Court expressed the need to examine the "particular facts and circumstances" of the case.

It is elementary that a litigant who claims a constitutional or other right or defense must assert that right or defense at an appropriate time in a litigation in order to rely on it on appeal. It is also elementary that any defense attorney must determine the trial strategy best suited to protect his client's interest, and circumstances may be present which require abandoning an available defense as not fitting in with his over-all plan. Such circumstances were present in this case from the beginning, and petitioner quite deliberately evolved a trial strategy which excluded any number of available defenses (including the constitutional defenses here urged) and depended entirely on the defense of truth or "justification."

That such a trial strategy, excluding constitutional defenses, *was* evolved and done so *knowingly* and intentionally within the sense of *Zerbst,* is the only reasonable conclusion which can be drawn from the following facts:

(1) There were pending against petitioner at the time two libel suits brought by Coach Bryant, one of them arising out of the same *Post* story. In both of these suits petitioner, through its general counsel who was also leading the defense of the case at bar, had specifically invoked First and Fourteenth Amendment defenses at the initial pleading stage. (App. B) No such defenses were raised in the Butts case.

(2) In both of these Bryant cases petitioner also specifically pleaded the "public man" defense. No such defense was invoked by petitioner here, even though a Georgia statute has for many years provided a privilege, conditioned on the absence of actual malice, to publications commenting "upon the acts of public men in their public capacity. . . ." Ga. Code Ann. 105-709(6) (App. A) This statutory privilege has been construed to grant a complete defense to such publications, even though the publications may have been false. See *Pearce v. Brower,* 72 Ga. 243 (1884); *Wilson v. Sullivan,* 81 Ga. 238, 7 S. E. 274 (1888); *Augusta Evening News v. Radford,* 91 Ga. 494, 17 S. E. 612 (1893).[8]

(3) Petitioner, through its counsel, was fully in-

[8]Petitioner's suggestion (Brief, p. 50 n. 12) that more recent decisions of the Georgia appellate courts require that truth be established in order to take advantage of the privilege ignores the fact that the older decisions of the Georgia Supreme Court control. See, e.g., *Cauble v. Weimer,* 101 Ga. App. 313, 113 S.E. 2d 641 (1960).

formed of the proceedings in the *Times* case from the very beginning of that litigation in the Alabama state courts, including the constitutional defenses urged, as the Court of Appeals so graphically related (351 F. 2d at 709-13).

(4) Petitioner made no objection to the court's charge on any constitutional grounds as required by Fed. R. Civ. P. 51, again demonstrating its intention not to rely on any constitutional defenses.

While Curtis asserts strongly it had no knowledge of any constitutional rights until this Court's decision in *Times* (March 9, 1964), this is refuted by its first motion for a new trial, filed August 29, 1963 immediately after the trial, in which it claims the verdict for punitive damages could not be sustained without violating the First, Fifth and Fourteenth Amendments. (R. 36-38)

It is inconceivable that Curtis and its general counsel should not have kept abreast of the law of libel. Curtis published not only the *Post,* but other magazines of large nationwide circulation. The *Post* was embarking on a new campaign to change the magazine's image through "sophisticated muckraking" which already had attracted a number of libel suits against Curtis. That it did keep abreast of the law of libel and was familiar with constitutional grounds is clear from its use of constitutional defenses in the two Bryant suits in Alabama and the constitutional grounds urged in its first motion for a new trial in this case, long before *Times.* (R. 36-38)

It is up to Curtis to explain why it chose the strategy

it did. However three questions do immediately come to mind:

(1) Was it part and parcel of its strategy to defend the suits brought by Coach Bryant in Alabama with Curtis hoping to get a favorable jury verdict in Georgia, thereby discrediting Bryant?

(2) Having made these charges which it knew would destroy Butts' career, did Curtis decide that the only defense open to it was to seek to establish the truth, this being necessary to preserve its reputation as a national magazine? Any other defense would have indicated to the public that Curtis had no confidence in the charges that it made on the one hand or, having destroyed Butts it would assume the attitude that it could not care less and defend on constitutional grounds.

(3) Was it for the purpose of obtaining the valuable right to open and conclude the arguments to the jury?

This strategy having been unsuccessful, Curtis now asks the Court to give it a second chance or as the District Court called it, "a second bite at the cake."[9] It was against this background that the Court of Appeals held these defenses to have been belatedly raised:

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[9]During the hearing on the first motion or new trial, petitioner's counsel offered a unique thesis which was characterized by the trial judge as the "two bites at the cake" theory. *Bite one* comes when the "error" is made; counsel for the aggrieved party may object and either have the error corrected or the record perfected. But if he feels that his client is sure to win the jury verdict, he will consciously fail to object. If he loses this gamble, i.e., if his client loses the jury verdict, he may nevertheless have *bite two* by convincing a federal appellate court that it should grant a new trial in the face of counsel's conscious decision not to object to the "error." Transcript of Proceedings, Hearing on First Motion for New Trial, Dec. 10, 1963, p. 17-18: ("MR. CODY: 'You never can tell how it affects — you can't tell how it affects the trial of a case until it

> "We think that Curtis has had its day in Court. *It apparently thought so too until the jury verdict was returned.*" 351 F. 2d at 720. (Emphasis added)

The Court of Appeals in the second of its two opinions, after considering the affidavits filed in support of the petition for rehearing and the questions of law involved, reached the following conclusion relative to petitioner's choice of trial strategy (351 F. 2d at 735):

> "Whatever may have been the reasons for invoking the First Amendment claim in the Alabama suits while remaining silent in Georgia, Curtis cannot sustain the proposition that it was unaware that a defendant in a libel action might assert the constitutional claim as a defense. Counsel for Butts make a persuasive suggestion that Curtis elected to defend this case on its plea of justification, rather than raise the jurisdictional, constitutional and other affirmative defenses[6] it had raised in the Alabama Bryant cases, in order to get the right to open and close the arguments."

"[6]These would include the conditional privilege recognized by § 105-709 (6) of the Georgia Code concerning published statements relating to the 'acts of public men in their public capacity.' See Note 20, 376 U.S. 254 at 280. . . ."

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is over, and the —.' THE COURT: 'Well, under that theory, you get two bites at the cake.' MR. CODY: 'That's possible; that is exactly what the courts have said.' "). It is submitted that this manipulation of the spirit of federal procedure should not be sanctioned. A successful party to a verdict should not have to be the loser in the other party's wager with the jury and courts.

The doctrine of waiver, as applicable to the facts of this case, is classically stated by this Court in *Yakus v. U.S.*, 321 U.S. 414, 444 (1944) as follows:

> "No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. [Citing cases]. Courts may for that reason refuse to consider a constitutional objection even though a like objection had previously been sustained in a case in which it was properly taken. [Citing cases]."

Eleven years later this Court reaffirmed its ruling in *Yakus* and found waiver of a constitutional right in a case involving capital punishment. *Michel v. Louisiana*, 350 U.S. 91, 99 (1955)

The waiver cases cited by petitioner are distinguishable because here petitioner deliberately chose, as a matter of strategy, to waive the constitutional grounds asserted in *Times*. Courts have long recognized that counsel may choose not to use certain defenses for strategic purposes and such choice will amount to an intentional relinquishment of a known right. *U. S. V. Sorrentino*, 175 F. 2d 721 (3rd Cir. 1949), *cert. den.*, 338 U.S. 868 (1949).

In *Ackermann v. U.S.*, 340 U.S. 193, 198 (1950), the Court held:

> "His choice was a risk, but calculated and deliberate and such as follows a free choice.

> Petitioner cannot be relieved of such a choice because hindsight seems to indicate to him that his decision . . . was probably wrong, considering the outcome of the *Keilbar* Case. *There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from.*" (Emphasis added)

It is of further interest to note that even Judge Rives, who dissented from the decision of the Court of Appeals relative to waiver, felt that the issue of waiver was a "debatable" one. (351 F. 2d at 726). Respondent respectfully submits that issue should be here decided in his favor as it was below.

Quite apart from the *specific facts* found by the Court of Appeals to constitute waiver in this case, we submit that defense counsel in *any other* libel case tried prior to *Times* would have had every reason and opportunity to include the constitutional claim in his defense if he had chosen. An analysis of *Times,* in proper historical context, shows that it made no fundamental change of law but merely gave sanction to a long-standing rule of state law and federal constitutional law as enunciated by courts and supported by scholars.

The *Times* case did not *create* the First Amendment. In that decision, this Court emphasized that the "general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions." 376 U.S. at 269.

This Court held in a libel case over fifty years ago that since the plaintiff was a "public officer [U.S. Attorney] in whose course of action connected with his

office the citizens of Porto Rico had a serious interest . . ., anything bearing on such action was a legitimate subject and comment . . . at least in the absence of express malice. . . ." *Gandia v. Pettingill*, 222 U.S. 452, 457 (1912). *Gandia* stands for the proposition that a qualified privilege has long existed under federal law in libel cases where the plaintiff is a "public official."

The identical constitutional issue now insisted on was raised twenty-six years ago in *Sweeney v. Schenectady Union Pub. Co.*, 122 F. 2d 288 (2nd Cir. 1941), aff'd by equally divided Court, 316 U.S. 642 (1942). Twenty years ago the Fifth Circuit Court of Appeals applied this specific defense in *Caldwell v. Crowell-Collier Pub. Co.*, 161 F. 2d 333, 336 (5th Cir. 1947). The argument offered by counsel for that defendant (Crowell-Collier) was that since the publication in question "related to a public officer," it was privileged. The Court of Appeals apparently accepted this contention as a sound statement of law, holding that the privilege had been avoided by an allegation in the complaint that the publisher was guilty of "malice in fact."

An indication of what was to come in *Times* is found in *Beauharnais v. Illinois*, 343 U.S. 642 (1952). In upholding a group libel statute, Mr. Justice Frankfurter, speaking for the Court, stated that he was not dealing with a statute outlawing defamation of political parties. He noted that quite different problems would be raised by such a statute because "political parties, like *public men*, are, as it were, public property." (Emphasis added) Id. at 263 n. 18.

This Court in *Times* recognized that a "like rule" has existed for many years in state courts. It stated

at page 280, "an oft-cited statement of a like rule, which has been adopted by a number of state courts, is found in the Kansas case of *Coleman v. MacLennan,* 78 Kan. 711, 98 P. 281 (1908)." In a footnote at that point in its decision this Court cited eleven decisions from ten different states[10] as well as six scholarly works. The Kansas Supreme Court has since stated that *Times* requires no change in the law of that state since the principles of *Times* have long been the law. *Kennedy v. Mid-Continent Telecasting, Inc.,* 394 P. 2d 400 (Kan. 1964).

It is obvious from *Times* itself, *Gandia, Sweeney, Caldwell, Coleman,* the Georgia statute and cases, and the decisions from ten different states cited in the footnote at page 280 of this Court's decision in *Times,* as well as the six scholarly works there cited, that the defenses there discussed have long been recognized as being available to a defendant in a libel suit.

The decisions cited by petitioner for the proposition that this Court may apply any fundamental change in the law pending appeal are inapposite here. Those cases involve the effect of an intervening treaty in *U.S. v. The Schooner Peggy,* 1 Cranch 103 (1801); applicability of state law under the rules of decision statute in *Vandenbark v. Owen-Illinois Glass Co.,* 311 U.S. 538 (1941); enactment of the Eighteenth Amendment repealing prohibition in *U.S. v. Chambers,* 291 U.S. 217 (1934); enactment of a statute in *U.S. v. Alabama,* 362 U.S. 602 (1960); enactment of the Civil Rights Act of 1964 in *Hamm v. Rock Hill,* 379 U.S. 306 (1964). We are

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[10] A complete assemblage of authorities, it is submitted, would have included the Georgia statute and decisions on the "public man" defense.

not here concerned with such a change in the law; *Times v. Sullivan* merely gave renewed constitutional sanction to a long recognized legal principle.

In addition, we submit that it is one thing to say that a change in the law may be taken advantage of by a litigant into whose chosen theory of the case the change fits without disrupting the premises of the litigation, but an entirely different thing to allow a litigant to try his case on one studied theory and then on appeal abandon this theory (or theories) and attempt to get a second chance at the jury on a quite different theory made available (or simply discovered by counsel) in the interim. There must be an end to litigation, and none of the cases cited by petitioner proposes that a litigant be allowed to proceed through pleading and the trial as many times as he chooses or as there may be innovations—real or supposed—in the body of all law. We cannot imagine this Court encouraging any such notion of piecemeal, hindsight litigation, yet it is precisely this that is being urged by petitioner and upon which its entire case stands.

We submit that petitioner should not now be relieved of its deliberate decision not to invoke any constitutional defenses.

II.

ASSUMING THE CONSTITUTIONAL DEFENSES WERE NOT WAIVED, NEW YORK TIMES V. SULLIVAN SHOULD NOT BE USED AS A BASIS FOR REVERSAL IN VIEW OF THE FACTS OF THIS CASE.

In Georgia, civil libel is a false and malicious defamation in print which exposes the victim to public

hatred, contempt or ridicule and which tends to injure him in his reputation. (Ga. Code Ann. § 105-701. See App. A) In finding for respondent in this case, the jury found the charges against him in petitioner's magazine article to be false. That these charges injured respondent's reputation and exposed him to public hatred, contempt and ridicule is beyond doubt.

Since this case was tried before a jury in August 1963, ending in a verdict and judgment in favor of respondent, this Court has handed down several decisions interpreting the constitutional right of free speech and free press in the area of libel and, in one instance, the right-of-privacy. These are *New York Times Company v. Sullivan* (March 9, 1964); *Garrison v. Louisiana,* 379 U.S. 64 (November 23, 1964); *Rosenblatt v. Baer,* 383 U.S. 75 (February 21, 1966); and *Time, Inc. v. Hill,* No. 22, October Term 1966 (January 9, 1967).

In these cases (the first three of which petitioner relies upon) the Court has discussed the question of limitations imposed by the free speech guarantees of the First Amendment at some length, *viz.,* fifteen opinions covering approximately 145 pages. We submit that there is a wide divergence between the factual situations in those cases and the one now under consideration.

The opinions of the Court in those cases emphasize the necessity for freedom of discussion where public issues are involved, saying that the press must have "breathing space" in order to survive and that the First Amendment embodies "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that

it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." 376 U.S. at 270.

In *Times* the plaintiff claimed to have been libeled in an advertisement appearing in a Sunday edition of the paper published by that company. A judgment was recovered in favor of the plaintiff. This Court reversed that judgment, holding that a state's power to award damages for libel in actions brought by public officials against critics of their official conduct is limited by the First Amendment and that factual error or content defamatory of an official's reputation, or both, are insufficient to support an award of damages for false statements unless actual malice, that is, knowledge that the statements were false or made in reckless disregard of their truth or falsity, is proved. The Court went on to hold that the case was not submitted to the jury under these restrictions and therefore the verdict and judgment offended the First Amendment.

The facts in the *Times* case more resemble those in the *Rosenblatt* case than those in the one under review. In both cases the plaintiffs had considerable difficulty in proving that the publications *referred* to them at all, for they were not named. Neither publication was a conscious destruction of the plaintiff's career, acknowledged to be "his death in his chosen profession," as in this case. The plaintiff in *Times* was the Commissioner of Public Affairs of Montgomery, Alabama, elected by the people and very properly classified as a public official, whereas the plaintiff in this case was an athletic director.

The *Garrison* case involved a conviction for criminal

defamation, under Louisiana statutes, of a district attorney who criticized the judicial conduct of eight judges of the criminal district court. The Court held that the restrictions on state power as to civil libel statutes set out in *Times* also limit state power to impose criminal sanctions for criticism of the official conduct of these public officials.

In *Garrison* the Court commented on the use of calculated falsehood (and this is quoted by Mr. Justice Brennan in *Time, Inc. v. Hill*) as follows:

> "The use of the calculated falsehood . . . would put a different cast on the constitutional question. Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published . . . should enjoy a like immunity. . . . For the use of the known lie as a tool is at once at odds with premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . .' Chaplinsky v. New Hampshire, 315 U.S. 568, 572. Hence, the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection." 379 U.S. at 75.

One important factor involved in the *Garrison* case was that the Louisiana statute authorized recovery where the remarks were true but uttered with actual malice. This was held unconstitutional, and this point is not present in the instant case.

The *Rosenblatt* case involved charges made against a former supervisor of a county recreation area which —he claimed—referred to him and constituted libel. The Court reversed the verdict and judgment and sent the case back for retrial, directing the trial court first to determine whether plaintiff Baer was a public official within the meaning of *Times,* and if it found that he was, to charge the jury in terms of the actual malice of *Times.*

In *Rosenblatt* there had been no finding by the trial court of whether Baer was such a public official. But in the case at bar, at the instance of petitioner's third motion for new trial (R. 1115), the trial court specifically found that respondent Butts was *not* a public official. 242 F. Supp. at 393-95. This is a compelling difference between the present case and *Rosenblatt.* In addition, unlike *Rosenblatt,* no *existing* "public issue" was being commented on in the libelous publication here, since there was at that time no suggestion about any corrupt dealings between Butts and Bryant. We submit that a publisher should not be allowed to escape liability by *creating* a public issue through the use of untrue statements and then to comment on that issue with impunity. Petitioner had itself created the issue here, and it is only logical to conclude that its purpose (aside from using a sensational story to sell more copies of its magazine) was to thwart Coach Bryant in his effort to obtain redress against petitioner for prior

articles. The charges made by petitioner cannot properly be described as a debate of a governmental operation or an attack on a public official entitled to special protection by our Constitution.

Time, Inc. v. Hill did not involve libel but an action under the New York right-of-privacy statute. The Court held that the limitations set out in *Times* are applicable to certain cases arising under the New York statute even where the plaintiff is not a public official. It expressly disclaimed that its ruling should be taken as applying to libel cases, such as the one at bar.

This brings us to the specific questions here involved.

1. Was respondent a public official within the concept of *Times*?

2. If *Times* applies, does not the undisputed evidence show that actual malice was proved?

3. If the facts of the case fall within the purview of *Times*, was the jury charge insufficient in the light of that decision?

4. Under the facts of this case, should *Times* be applied retroactively to it?

1.

Was Respondent A Public Official Within The Concept Of The Times Case?

Petitioner argues that respondent must be regarded as a "public official" under the criteria laid down in

Rosenblatt. Petitioner recognizes that this Court did not definitely hold that the constitutional standard of proof must apply if the publication in that case involved implied dishonesty in the financial management of the Belknap County Recreation Area, but argues that the Court's disposition of that case *suggests* that this must be so. Petitioner presents a lengthy argument in an effort to sustain its contentions and then goes on to assert that, in view of the conclusion for which it argues, the respondent here *must* have been a "public official" and the constitutional privilege of necessity has application in this case.

In *Rosenblatt*, this Court sent the case back with instructions that upon retrial the trial court should first determine if Baer was a "public official" to whom the constitutional privilege applied. In this case, the trial court has considered this particular question on petitioner's third motion for a new trial (R. 1115) and determined that respondent was not such a public official. As the District Court held on this point:

> "Plaintiff Butts was Director of Athletics at the University. The Athletic Director, along with the various coaches in the Athletic Department, were employed by the separate incorporated athletic associations. However, the defendant seeks by this motion to extend the category of 'public officials' to one employed as agent by the University of Georgia Athletic Department. Even if plaintiff was a professor or instructor at the University, and not an agent of a separate governmental corporation carrying on 'a business comparable in all essentials to those usually conducted by private owners'

> he would not be a public official or officer. Under Georgia law, the position of a teacher or instructor in a State or public educational institution is not that of a public officer or official, but he is merely an employee thereof. Regents of the University System of Georgia v. Blanton, 49 Ga. App. 602(4), 176 S.E. 673; Board of Education of Doerun v. Bacon, 22 Ga. App. 62, 95 S.E. 753." 242 F. Supp. at 394.

Thus the question has already been determined and, we submit, correctly so. Respondent was employed by the Athletic Association (a separate, non-governmental entity, Ga. Code Ann. §§32-152, 32-153) to supervise the sports program of the University of Georgia. This Court described the supervision of that program as the exercise of a proprietary rather than a governmental function. It held in *Allen v. Regents of University System of Georgia*, 304 U.S. 439, 452 (1938):

> "The important fact is that the State, in order to raise funds for public purposes, has embarked in a business having the incidents of similar enterprises usually prosecuted for private gain . . .
>
> ". . . however essential a system of public education to the existence of the State, the conduct of exhibitions for admissions paid by the public is not such a function of state government as to be free from the burden of a . . . tax laid on . . . admissions . . ."

Since, therefore, respondent was not a "public official" as envisioned by *Times* (and this has been judicially determined by the trial court), this action is based

upon a purely private defamation. And, as noted in the concurring opinion of Justices Goldberg and Douglas, the *Times* holding does not apply to libel of private individuals (376 U.S. at 301-02):

> "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. . . ."

If there is no limit to the concept of public official as used in *Times*, there seems no reason to be concerned with such a question and this Court may as well hold that the constitutional privilege announced in *Times* is applicable to *all* suits for libel under state defamation laws, regardless of the status of the plaintiffs. We submit this Court has not gone so far and we cannot envision it doing so.

In an attempt to avoid the facts as to respondent's status and the holding of the trial court on this point, petitioner asks the Court to extend the *Times* rule to situations where a "public issue" is involved. Petitioner argues that college football is of such importance that anything connected with it must be classified as a "public issue", as to which the discussion and debate "should be uninhibited, robust and wide-open."

We do not deny that college football is of interest to a great many people. In fact, we would assume that in selecting the material for its magazines—as a purely commercial decision—petitioner would endeavor to select only that which it thinks would be of "public interest", either before the article is published or as

a result of it being published. But we do not believe that this Court has elevated to a position of constitutional sanctuary every subject which "sells" magazines.

The absurdity of petitioner's argument in the context of this specific publication is apparent. There was, for example, no discussion of the role of football in college life, whether good or bad, no discussion of the question of its importance or over-emphasis. The article was a plain, unadulterated attack on the integrity of two individuals, Butts and Bryant. (We have already indicated as a probable reason for petitioner's enthusiasm in publishing the story its existing legal troubles with Bryant.) We do not believe that the Constitution guarantees the right to make false accusations and then to escape responsibility by asserting that the general public is interested in college football.

At any rate, there was no "public issue", even of the kind petitioner suggests, until this story was published. Yet, while Curtis' editors charged respondent with giving to Coach Bryant "Georgia's plays, defensive patterns, all the significant secrets Georgia's football team possessed," now petitioner unabashedly concedes (Brief, p. 27):

> "There was no evidence, however, that related Alabama's strategy or performance in the game to specific information in the Burnett notes and there was some to the effect that Alabama did not take advantage in its play of points that the notes revealed."

The only "public issue" in this case was the validity of the charges made in the article itself, and that "issue" was put to rest five months later when the jury returned its verdict.

2.

The Undisputed Evidence Shows Conclusively That Actual Malice Was Proved

Even if it should be held that respondent was a "public official" or that college football is a "public issue" and that the *Times* rule should be extended so as to apply here, we submit that its application would immediately terminate when the evidence is reviewed. Petitioner argues illogically that the fact that "actual malice within *New York Times* was conclusively proven is . . . legally immaterial." (Brief, p. 42, 65). But this Court obviously disagrees when it emphatically states, as it did in *Garrison*:

> "the knowingly false statement and the false statement made with *reckless disregard* of the truth, *do not enjoy constitutional protection.*" (379 U.S. 175) (Emphasis added)

We say, therefore, that if actual malice was proven (as it was) the case should end since the article would "not enjoy constitutional protection."

We invite the Court's attention to the fact that the District Court and the Court of Appeals have reviewed the evidence and have each concluded that the article was published at least with a reckless disregard of the

truth.[11] We feel that these concurrent findings of fact by two courts below should bring this case within the "two-court" rule discussed in *Berenyi v. Immigration Service*, No. 66, October Term 1966 (January 23, 1967) that:

> "This Court . . . 'cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.' E.g., *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275. . . .
>
> "The policy underlying the 'two-court' rule is obvious. This Court possesses no empirical expertise to set against the careful and reasonable conclusions of lower courts on purely factual issues. When, as here, resolution of the disputed factual issues turns largely on an assessment of the relative credibility of witnesses whose testimonial demeanor was observed only by the trial court, the rule has particular force."

Both courts below found that the article was libelous per se under state law. This Court will not set aside

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[11] "In the trial of this case, there was ample evidence from which a jury could have concluded that there was a reckless disregard by defendant of whether the article was false or not. See the court's ruling on defendant's motion for a new trial dated January 14, 1964. *Butts v. Curtis Publishing Co.*, 225 F. Supp. 916." 242 F. Supp. at 395. "The trial judge's appraisal of the evidence, with which we are in complete accord, was that it was sufficiently strong to justify the jury in concluding that what the Post did was done with reckless disregard of whether the article was false or not." 351 F. 2d at 719-20.

the ruling of lower federal courts applying state law in diversity suits except on a plain showing of error. *Palmer v. Hoffman,* 318 U.S. 109 (1943). On the issue of truth, the jury found for the respondent. This is a traditional element of the state right, in no way changed by the *Times* decision. Since truth was properly put to the jury as an absolute defense this Court will not determine that fact, for an evidentiary basis is apparent in the record. *Lavender v. Kurn,* 327 U.S. 645 (1946); *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.,* 369 U.S. 355 (1962).

On the other hand, should the Court feel it necessary "to undertake independent examination of factual issues when constitutional claims may depend on their resolution" and review the evidence in this case, we respectfully offer the following in support of our contention that actual malice was proved:

(1) Curtis was informed of the falsity of the story eleven days prior to publication of the story as a result of the telegram, letter, and telephone call. (R. 16-17, 20, 717-18, 777-78).

(2) Although there was adequate time in which to do so, no investigation or any other action was carried out as a result of these communications. (R. 717-18, 777-78).

(3) Prior to the publication of the story, Curtis' advertising revenues had been falling drastically. (R. 707-08). In order to bolster these revenues Editor-in-Chief Blair undertook four months before publication of this story to "change the image" of the magazine. (R. 711). He initiated a policy of "sophisticated muck-

raking," of "expose in the mass magazines." (R. 712-14). The new image was intended "to provoke people, make them mad." (R. 714-15). Blair testified that he "was not being facetious," that he "meant it then [November 1962]" and "mean[s] it now [May 1963]." (R. 710-11).

(4) Only two months prior to publication of this story, Curtis' Blair wrote a memorandum to his personnel complimenting them on their work under the new editorial policy and outlining "the final yardstick: we have about six lawsuits pending, meaning that we are hitting them where it hurts, with solid, meaningful journalism." (R. 1040). Blair later testified that the "them" who were being hit was everyone in the United States and that the law suits were all libel suits. (R. 708-10).

(5) Editor Blair later considered the Butts issue as bringing the magazine "25 per cent toward the goal of the magazine that I envision." (R. 711).

(6) The *sole* source of the story was one George Burnett, a man *known* to Graham *from the beginning* as a bad-check artist. (R. 689-92). Managing Editor Thomas, who also knew of Burnett's bad-check record, considered such a person to be a liar. (R. 771-72).

(7) Neither author Graham nor anyone else with Curtis made any *attempt* to talk to John Carmichael, who was known to Graham to have been with Burnett when the latter allegedly overheard the telephone conversation. (R. 378-79, 771-72). By performing this easy task, Graham would have learned at the outset that the whole story was a fabrication. (See R. 636-

44). Managing Editor Thomas admitted that "a responsible journalist" should rely on something more than the mere word of Burnett. (R. 772).

(8) Although the story as written relied heavily on the supposed existence and contents of some notes which Burnett allegedly made of the telephone conversation, no Curtis representative ever saw or read the notes (R. 772-73), notwithstanding the fact that Burnett told Graham that he needed the notes to refresh his memory (R. 154) and that he "couldn't remember anything definite about it . . . without his notes." (R. 390). When the notes were finally analyzed, they turned out to be largely nonsensical. (See R. 281).

(9) Before publishing the story, Curtis made no effort to view the game film, although Sports Editor Kahn considered that to be necessary (R. 736) and the collaborator, Furman Bisher, thought "it would have been a very good idea." (R. 779).

(10) No effort was made to interview any member or coach of the Alabama team in order to determine whether any changes had been made in the game plans. (R. 779).

(11) The patently outrageous story was never submitted to anyone familiar with the sport of football in order to get a knowledgeable reaction.

(12) Neither principal mentioned in the story was ever contacted before publication.

(13) After such a shockingly shoddy "investigation", Curtis published the story with full knowledge that it would ruin the career of Wallace Butts and would result in "the death of Wally Butts in his chosen profession." (R. 693).

(14) Furthermore, certain direct quotations which were inserted in the article for the sole purpose of lending truth to the charges were denied under oath by the parties alleged to have been quoted.

> (a) Graham wrote that Burnett had told him that Georgia quarterback Rakestraw placed his feet in a certain position while on offense, thereby tipping off the defensive team as to whether the forthcoming Georgia play would be a run or a pass. (This, of course, would have been vital information for an opponent. (R. 266)) Petitioner was aware of the importance of this information and put it in its article to convince the readers of the truth of its indictment of Wallace Butts. (R. 776). But Burnett denied under oath that he had told Graham any such thing. (R. 175). Georgia's head coach, Johnny Griffith, a witness for petitioner, who was in a better position than anyone else to know whether in fact Rakestraw did this with his feet, testified that it was not true. (R. 266).
>
> (b) Mickey Babb, University of Georgia all-conference end, specifically denied the quotation in the article attributed to him that the Alabama team knew the Georgia formations and plays. (R. 564). Babb was quoted in

the article as saying the Alabama players knew Georgia's key play (described in the article as "eighty-eight pop") and knew when Georgia would use it. Babb testified Georgia had no "eighty-eight pop" play. (R. 564). This was confirmed by Coach Johnny Griffith. (R. 279).

(c) Sam Richwine, Georgia trainer, specifically and categorically denied the quotation in the article attributed to him to the effect that Alabama knew Georgia's plays. (R. 570).

(d) In its article petitioner wrote that Georgia Coach Griffith had stated: "We knew somebody had given our plays to Alabama . . . and maybe to a couple of other teams we played too. But we had no idea that it was Wally Butts." Coach Griffith, appearing as a witness for petitioner, testified emphatically that he had said no such thing. (R. 268-69).

(e) The article states that "Griffith went to University officials, told them what he knew and said that he would resign if Butts was permitted to remain on his job." At the trial Coach Griffith categorically denied having done or said that. (R. 269).

(f) The article quotes Coach Griffith as saying, "You know, during the first half of the Alabama game my players kept coming to the sideline and saying, 'Coach, we been sold out.' " Coach Griffith at the trial denied that. (R. 269).

> (g) The article attributes the following direct quotation to Coach Griffith: " 'I never had a chance did I?' Coach Johnny Griffith said bitterly to a friend the other day. 'I never had a chance.' " Coach Griffith denied under oath having said that to anybody. (R. 270)

(15) There was no immediate urgency to put this story on the news stands. The alleged incident occurred six months earlier. Petitioner had an exclusive on the story from Burnett. Publication could have waited until at least the minimum standards of investigation had been met. In view of the gravity of the charges, the harm and the certainty of its occurrence, the standard of recklessness required no less.

That reckless disregard of a much lesser degree than proved here is proscribed was confirmed by the Court of Appeals for the Seventh Circuit in *Pape v. Time, Inc.*, 354 F. 2d 558, 560-61 (1965), *cert. den.*, 384 U.S. 909 (1966), wherein it was stated:

> "As stated in our previous decision— . . . Time took the risk, when it reworded parts of the Commission Report, that it might go too far. . . .' We noted that Time had departed from fidelity to the Commission's Report in order to make the article more interesting and readable for its audience. . . . As we put it (318 F. 2d at page 655)—'It is our opinion that a jury could read the Time article as stating that the Report said Pape and his follow (sic) officers *did* what the Commission Report merely said the Monroe complaint *alleged they did.*'

> "We hold that a sufficient showing has been made so that a jury could find Time, Incorporated acted with reckless disregard as to whether or not the reworded statements, hereinbefore described, were true or false."

Respondent submits that since both the District Court and the Court of Appeals have held unequivocally that actual malice was proved in the instant case, nothing would be accomplished by remanding the case for further consideration in light of *Times*.

3.

If The Facts Of The Case Fall Within The Purview Of Times, Was The Jury Charge Insufficient In The Light Of That Decision?

There is no fatal difference between the definition of malice in *Times* and that charged by the trial court. The latter, in its charge relative to punitive damages, told the jury (R. 1026):

> "Where it is established that the defendant was inspired by actual malice in the publication of the defamatory matter, the jury, in its discretion, may, but is not required to, award punitive damages. As previously stated to you, actual malice encompasses the notion of ill will, spite, hatred and an intent to injure one. Malice also denotes a wanton or reckless indifference or culpable negligence with regard to the rights of others. . . . The plaintiff charges that the column was written and published both with actual malice and in utter and wanton dis-

> regard of his rights . . . Whether actual malice or wanton and reckless indifference has been established must be determined from all of the evidence in the case."

In the *Times* case the Court held that a statement is made with actual malice when it is made "with knowledge that it was false or with reckless disregard of whether it was false or not." It did *not* announie that malice can be established only by proving that the publisher knew without any doubt that the charges it planned to make were false.

Although not in the exact language of the test set forth in *Times*, certainly it cannot be said that the jury in this case did not get the message expressed in the charge. Lest the Court be concerned about the use of the term "culpable negligence" in the charge, we point out that the concept denoted thereby is one of *criminal* law, with all of the attendant requisites of conscious conduct and narrowness of meaning. The term means—at the least—reckless or wanton misconduct.[12]

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[12]See language in *Cain v. State*, 55 Ga. App. 376, 190 S.E. 371, 374 (1937) that "the words 'criminal negligence' are synonymous with the words 'culpable negligence'. . . Culpable negligence rests on the assumption that he knew the probable consequences but was intentionally, recklessly . . ., or wantonly indifferent to the results."; and see following cases where the term "culpable negligence" is regarded as connoting, *at the least*, reckless or wanton conduct: *State v. Sealy*, 253 N.C. 802, 117 S.E. 2d 793 (1961) ("intentional, wilful or wanton"); *People v. Carlson*, 26 N.Y.S. 2d 1003 (1941) ("wanton disregard"); *State v. Schriver*, 275 S.W. 2d 304 (Mo. 1955) ("reckless or wanton", "utter indifference"); *State v. Tjaden*, 69 N.W. 2d 272 (N.D. 1955) ("utter disregard"). It is universally held that "culpable negligence" is *quite* distinct from the concept of "simple negligence" as is applied in ordinary civil cases (and as was found by the Court in *Times* to be insufficient.)

In the case now before this Court, considered in its full perspective, we submit even if the exact words used by this Court in *Times* in defining actual malice had been used, the verdict would have been the same. (As the trial court said: "The guilt of the defendant was so clearly established by the evidence in the case so as to have left the jury no choice but to find the defendant liable." (R. 73)).

A cursory view of the record here will show that respondent's prime contention throughout the trial was that the story was published with no real investigation of its truth prior to publication, thereby demonstrating petitioner's utter disregard for the truth or falsity of its categorical statement of guilt. It will be seen that:

(a) Petitioner refused to interview any member of the Georgia coaching staff — the purported "victims" — to obtain their first-hand impression of the alleged "fix," "rig" and "sell-out." Yet, when questioned, petitioner's witness, Head Coach Griffith, stated that the only benefit Bryant could have obtained from the "information" was a shortening of his practice time; petitioner's witness, Pearce (first assistant coach to Griffith), when questioned, stated that he had seen nothing that related Alabama's strategy or performance in the game to the information in the Burnett notes.

(b) No one familiar with football terminology was consulted to give an interpretation of Burnett's information — this was author Graham's first football story.

(c) As "impartial" field investigators, petitioner

hired its own counsel (Beddow) and its co-defendant (Bisher) in the initial Alabama litigation with Bryant.

(d) No effort was made to review the game films which later were viewed by the jury which decided they in no way substantiated the charges.

(e) Petitioner made no effort to determine the truth of the story after being warned that it was untrue before publication.

The above enunciated failures (and many others) of petitioner showing beyond any question that the story was published without any meaningful investigation as to truth or falsity were repeatedly emphasized to the jury by respondent. *The jury's action showed that it agreed.* The fact that the trial court did not use the exact technical language of *Times* was not important and would not be important at a retrial. The jury understood the message, just as would any other twelve people who had these inexcusable failures of petitioner impressed upon them every day for over two weeks.

4.

Under The Facts Of This Case, Should Times Be Applied Retroactively To It?

Even if this Court should be of the opinion that if this case had been tried subsequently to the date of the decision in *Times* the limits expressed in that case would apply to it, the facts here involved nevertheless fully warrant this Court in holding that it will not give retroactive application to *Times* in this case.

The question of making new constitutional interpretations retroactive has been recently dealt with by this Court in *Johnson v. N. J.*, 384 U.S. 719 (1966). The Court there held that two landmark decisions[13] announcing constitutional rights of persons accused of crime should not be applied retroactively to cases tried before the decision dates, even where appeals were pending on such dates and the judgments had not become final.

In reaching its decision against retrospective application, the Court noted that it had the right to confine rules promulgated concerning constitutional claims to subsequently tried cases " 'where the exigencies of the situation require such an application.' " 384 U.S. at 726-27. Mr. Chief Justice Warren commented, "to reiterate what was said in *Linkletter* [*v. Walker*], we do not disparage a constitutional guarantee in any manner by declining to apply it retroactively." 384 U.S. at 728. The Court noted that retroactive application would seriously disrupt the administration of the criminal laws and found no persuasive reason to do so.[14]

In the instant case, a comparable situation is presented, for the case was tried before the Court's decision in *Times*. The Court noted in both *Escobedo* and

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[13] *Escobedo v. Illinois*, 378 U.S. 478 (1964), and *Miranda v. Arizona*, 384 U.S. 436 (1966).

[14] Other cases of interest on this point are *Linkletter v. Walker*, 381 U.S. 618 (1965), holding that no distinction is to be drawn between civil and criminal litigation in determining whether a case is to be applied retroactively and that the exclusionary rule in *Mapp v. Ohio*, 367 U.S. 643 (1961), should not be given retroactive effect; and *Tehan v. Shott*, 382 U.S. 406 (1966), holding that the doctrine of *Griffin v. California*, 380 U.S. 609 (1965), should not be applied retroactively.

Miranda that its decisions had been foreshadowed by earlier cases. This was equally true of its decision in *Times,* as this Court pointed out in its opinion. There are no special considerations requiring that *Times* be applied retroactively here. On the contrary, where a person's career has been intentionally destroyed by libel, there is a special consideration that he should not be denied redress as a result of constitutional interpretations made subsequent to the trial, delaying indefinitely any relief he can hope to obtain. If a person convicted of murder prior to *Escobedo* and *Miranda* (as in *Johnson*) may not obtain the benefit of the constitutional right interpreted in those decisions, then we submit petitioner is not entitled to a new trial because of the subsequent decisions.

III.

UNDER THE FACTS OF THIS CASE THE AMOUNT OF PUNITIVE DAMAGES DID NOT CONSTITUTE AN ABRIDGEMENT OF FREEDOM OF THE PRESS OR THE TAKING OF PROPERTY WITHOUT DUE PROCESS OF LAW

Petitioner's third Question Presented (Brief p. 2), to which this section of its brief relates, is specifically framed in terms of *"the circumstances"* of this case. Applying petitioner's premise of examining this question "in the circumstances" of this case, respondent shows:

First: As stated by the Court of Appeals in its decision:

> "This is no ordinary libel case. A publication of the article by the *Post* . . . was part and parcel of a general policy of callousness, which recognized from the start that Butts' career would be ruined." (351 F. 2d at p. 719)

Petitioner concedes "*arguendo*" (p. 72) "that an award of damages imposed as a deterrent to the defendant and to others and 'to protect the community' (R. 1026) is not per se invalid in a civil case."

Examined "*in the circumstances*" of this case ("petitioner's general policy of callousness") and in light of petitioner's above quoted concession, the judgment for punitive damages ($400,000) is not invalid on any constitutional basis.

Was not the judgment imposed as a valid deterrent to petitioner, deterring it from a repetition of the offense and warning others not to commit a like offense, neither of which purposes petitioner claims to be invalid. The judgment was in no sense to be used as an attempt to regulate publication or to infringe protected freedom of the press.

Was not this judgment for punitive damages also imposed "to protect the community," a purpose which petitioner concedes is not invalid? Is not the community in which this case was tried—and, indeed, the national community—entitled to such protection as hopefully could be obtained by the assessment of the judgment?

Petitioner argues that the verdict here was grossly excessive and "was designed to put defendant out of

business." That, respondent says, is pure melodrama and is intended by petitioner to draw the court's attention away from its own defamatory article, "The Story Of A College Football Fix," which was admittedly designed to put *respondent* out of business. Petitioner admitted (R. 693-94) it "knew when the article was published it would ruin Coach Butts' career." It was also admitted that "when the article was published that was the death of Wally Butts in his chosen profession." (R. 693-94) The article itself stated: "But careers will be ruined that is sure." By admittedly "ruining the career of Wally Butts" and admittedly "killing him in his chosen profession" did not petitioner flagrantly deprive Wally Butts of his property without due process of law in violation of the Fourteenth Amendment?

It strikes respondent that petitioner would urge this Court to substitute the laws of economics in place of ". . . the Constitution's concern for the essential values represented by 'our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life. . . ." ' That privilege, like the guarantees of the Fourth Amendment, stands as a protection of quite different constitutional values—*values reflecting the concern of our society for the right of each individual to be let alone.*" *Tehan v. Shott,* 382 U.S. 406, 416 (1966) (Emphasis added).

We recognize the constitutional provisions which guarantee freedom of the press and do not suggest that this right be circumscribed. But freedom of the press does not include a license to publish untruthful and

defamatory charges against another who has no means of retaliation except through the processes of the law, the cost of which can be prohibitive. Those who enjoy the freedom of the press must recognize that it includes a *corresponding obligation and responsibility* to print only that which is true and not that which falsely and maliciously holds individuals up to public hatred, scorn and ridicule.

The most valuable possession of the journalistic profession is unquestionably the constitutional provisions which protect its right to a free press. *The most valuable possession of an individual is his good reputation and good character.* Loss of career, health, reputation of any man in his declining years cannot be measured by a few dollars—nor in fact by many. The true injury of a libel such as this one is the inescapable legacy of shame falling upon all who follow in blood and name.

> "[A] good name is rather to be chosen than great riches. . . . A good reputation honestly earned is not only one of the most satisfying sources of a man's own contentment, but from a commercial standpoint it is one of the most productive kinds of capital he can possess. Therefore it ought to find guarantees of protection in the fundamental law along with those which guard the liberty of the press, and such is indeed the case." *Coleman v. MacLennan,* 78 Kan. 711, 721, 98 Pac. 281, 284-85 (1908); See

Clark v. Pearson, 248 F. Supp. 188, 191 (D.D.C. 1965).

As the Court so aptly said in *Tehan,* quoting *Linkletter,* "the ruptured privacy . . . cannot be restored." 382 U.S. at 416.

The courts have kept in mind that "a good reputation is one of man's choicest treasures and that its uncompensated loss through false charges should be required only where it is clear that the public good requires this sacrifice." Noel, *Defamation of Public Officers and Candidates,* 49 Colum. L. Rev. 875, 891 (1949).

The proof in this case conclusively shows that this "Story Of A College Football Fix" was an integral part of the new editorial philosophy adopted by petitioner to ameliorate the dramatic decline in its revenues. Petitioner felt that hitting people "where it hurt" and thereby inviting widely publicized libel suits would inure to its financial advantage. Historically, this type of libeller has been classified as a "libeller for profit." *Strickland v. Cox,* 101 Ga. 482, 495, 28 S.E. 655 (1897). Certainly this type of libeller is not representative of the "American press" referred to by Mr. Justice Black in *Times* as being "virile enough to publish unpopular views on public affairs and bold enough to criticize the conduct of public officials." 376 U.S. at 294

It is our position that our Constitution, laws and courts were not and are not designed for the protection of irresponsible libellers who are concerned only with the character assassination of their victims.

Second: Petitioner argues that the jury's verdict was unconstitutional and therefore could not be saved by the remittitur required by the District Court.

To that line of argument the Court of Appeals pointed out (351 F. 2d at 718):

> "Georgia prescribes that '(t)he measure of . . . punitive damages is to be fixed by the enlightened conscience of an impartial jury.' What the 'enlightened conscience' of one impartial jury might consider to be fair may not satisfy another impartial jury with an equally enlightened conscience. A wide variance in the amounts of such awards is inescapably inherent in any submission of the issue of punitive damages. . . .
>
> "The trial judge had the duty of determining whether as a matter of law (a) any allowance for punitive damages could be made, and (b) what the maximum would be. As to, (a) the trial court not only expressed the opinion that the article was extremely defamatory, and that the jury had no choice other than to find Curtis liable, but he also thought that there was 'ample evidence from which a jury could have concluded that there was reckless disregard by defendant of whether the article was false or not.' Upon determining (b) he had then to decide whether to grant a new trial or require a remittitur as to the excess. The latter is a permissible course and does not infringe upon the Seventh Amendment's guaranty of a jury trial. In making his determination as to (b), he

> pursued the correct standard of keeping the verdict 'within reasonable bounds considering the purpose to be achieved as well as the corporate defendant's wanton or reckless indifference to the plaintiff's rights.' Obviously, in deciding the matter the judge had to pick a dollar figure beyond which the law would not go. He selected the sum of $400,000 as the maximum which the law would accept to deter Curtis from repeating the trespass or to compensate the wounded feelings of Butts. Although the reduction required, and the sum remaining, were each substantial, there was ample basis for the trial court's judgment."

Petitioner argues further that the remittitur required by the District Court was "inescapably a 'fruit' of the illegal action of the jury." (Brief, p. 75) Petitioner made the same point in its brief to the Court of Appeals. This entire position is diametrically contrary to the position taken by petitioner in oral arguments before the District Court on its motion for new trial, at which time the subject of the District Court's right to order a remittitur was discussed at length by the trial judge and counsel for petitioner.

As noted in respondent's Court of Appeals brief, at the time petitioner filed its designation of parts of the record to be printed, respondent did not know that petitioner intended to argue that the District Court did not have the authority to require the remittitur and, therefore, did not designate that portion of the transcript containing statements in open court by petitioner's counsel which not only agreed that the trial judge had this authority but even told the court that it would be

his "responsibility and . . . duty . . . to write it down to the point where it does meet with your own conscience." At page 171 of respondent's brief in the Court of Appeals, he set forth direct quotations from statements made by petitioner's leading counsel at the hearing:

> "I understand Your Honor perfectly . . . [I]f in your own conscience you feel that this verdict is excessive, then in that situation you have the right and, as Judge Hutcheson said, the duty to change that verdict. . . . [I]f that verdict is excessive, you have the responsibility and the duty, to use the lawyers' expression, to write it down to the point where it does meet with your own conscience."

In view of the position taken by petitioner in open court and petitioner having obtained the reduction it was seeking from the District Court (which at the time was questioning its right to order a remittitur), the contention here made by petitioner should receive the same treatment given it by the Court of Appeals as hereinabove quoted.

Third: Petitioner argued in its petition for certiorari and argues again here that the amount of the remittitur is repugnant to the Constitution, that it impinges far too heavily and arbitrarily upon the freedom of the press to preserve the "breathing space" required by the First Amendment freedom "to survive" and that the assessment was "arbitrary and unprincipled."

If the award of $400,000 in this case "impinges" as petitioner complains, how does petitioner explain its voluntary payment of $300,000 to Coach Bryant without

even a trial in this same matter? (R. 1113) How did that payment affect petitioner's "breathing space . . . to survive"? Obviously petitioner did not consider that its $300,000 payment to Coach Bryant would "put defendant out of business" or would affect its breathing space to survive. What about the effect of petitioner's malicious libel upon respondent's breathing space to survive and its effect of putting Wally Butts out of business?

Is the Constitution to be construed and applied so as to safeguard only the breathing space to survive and the financial well-being of that portion of the public press represented by petitioner and not to safeguard and protect those same interest of an individual who is subjected to such a malicious, libelous attack?

At this point we respectfully ask the Court to refer again to the editorial written by "The Editors" of the *Post* and superimposed on the picture on the first page of the article. (R. 1071) That editorial was not written by the author of the article but was written and signed by "The Editors" of the *Post*. It expressed the venom of petitioner's editors—presumably all of them. There, the editors did not raise the question of *whether* Wallace Butts had "fixed" and "rigged" the game; the editors stated unequivocally as a *fact* that he had "fixed" and "rigged" the game. The editors said Wallace Butts was corrupt. They labeled him a "fixer" and a "rigger." They *tried* him *in absentia*. They *found him guilty* and then sentenced him for the remaining days of his life to public hate, scorn, ridicule and oblivion with, in their own words, a "ruined career."

Petitioner seeks to relate the judgment for punitive damages here to what this Court said of the $500,000

judgment rendered in the *Times* case. There is no analogy whatsoever between the scurrilous attack made against respondent in the editorial written by the editors of the *Post* and the language used in the advertisement which formed the basis of the action in the *Times* case. The advertisement in the *Times* case and the statements therein were not directed at any particular person; its attacks were directed at "the police." Here respondent is named repeatedly in the article, his picture is used and he is categorized as being "corrupt." In the *Times* case, the New York Times was acting in the capacity of an impartial public forum, a medium for the expression of ideas by "a movement whose existence and objectives are matters of the highest public interest and concern." 376 U.S. at p. 266. In the present case, Curtis published an article originating from within its own ranks pursuant to a self-advancing policy of "sophisticated muckraking" intended to "provoke people" and "make them mad" by "hitting them where it hurts," in order to increase circulation and advertising revenues. As a result of the Butts-Bryant article Curtis considered itself "25 percent" of the way to its new image as a "sophisticated muckraker." In *Times*, the court was concerned about foreclosing "an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities — who wish to exercise their freedom of speech even though they are not members of the press." 376 U.S. at p. 266.

Petitioner argues that an award of punitive damages must bear a reasonable relationship to the allowance of actual damages. It has always been the law in Georgia that nominal damages will support punitive damages and that no relationship is required. *Sikes v. Fos-*

ter, 74 Ga. App. 350, 39 S.E. 2d (1946), and reverse title, 202 Ga. 122, 42 S.E. 2d 441 (1947) In the federal courts, punitive damages need not bear any relationship to actual damages. In *Selalise v. National Utility Service, Inc.*, 120 F. 2d 938 (5th Cir., 1941) it was said:

> "In Florida, as *in the Federal courts*, the giving of punitive damages is not dependent upon, nor must it bear any relation to, the allowance of actual damages." (Emphasis added)

In *Wardman-Justice Motors v. Petrie*, 39 F. 2d 512, 516 (D.C. Cir. 1930) the court stated:

> "In many states the rule prevails that actual damages must be established as a basis for the assessment of punitive damages, but this is not the Federal rule nor the rule applied in this district."

Attention is also called to the case of *Reynolds v. Pegler*, 233 F. 2d 429 (2nd Cir. 1955), *cert. den.*, 350 U.S. 846 (1955), which upheld an award of $1.00 compensatory damages and $175,000 punitive damages, a ratio of one hundred seventy-five thousand to one.

CONCLUSION

The Court of Appeals stated in its decision rendered in this case July 16, 1965:

> "We think that Curtis has had its day in Court. It apparently thought so too until the jury verdict was returned." 351 F. 2d at 719.

For the reasons which prompted the Court of Appeals to that conclusion and for all the foregoing reasons, the judgment in this case should be affirmed, or, in the alternative, the writ should be dismissed.

WILLIAM H. SCHRODER
ALLEN E. LOCKERMAN
ROBERT S. SAMS
MILTON A. CARLTON, JR.
Attorneys for Respondent
Wallace Butts

Of Counsel:
Troutman, Sams, Schroder & Lockerman
1600 William-Oliver Building
Atlanta, Georgia 30303

APPENDIX A

STATUTORY PROVISIONS INVOLVED

FEDERAL RULES OF CIVIL PROCEDURE
RULE 51

INSTRUCTIONS TO JURY: OBJECTION. "At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

GEORGIA CODE ANNOTATED.

§ 32-152.

ATHLETIC ASSOCIATIONS OF UNIVERSITY OF GEORGIA AND GEORGIA SCHOOL OF TECHNOLOGY DECLARED TO BE CORPORATIONS. — "The Athletic Associations of the University of Georgia and the Georgia School of Technology are hereby declared to be corporations, incorporated under charter

issued by the superior court of the county in which said associations are located. (Acts 1949, p. 29.)''

§ 32-153.

ASSOCIATIONS AS NOT STATE AGENCIES: FINANCIAL OPERATION RULES AND REGULATIONS. — ''The Associations named are hereby declared not to be agencies of the State and not subject to the limitations, restrictions and laws of general application imposed on State agencies by the Constitution of Georgia and the laws enacted by the General Assembly of Georgia in compliance with the Constitution of Georgia, and the Associations are authorized under their corporate charter issued by the superior court to make such rules and regulations for the financial operations of the Associations as they deem necessary: Provided, however, that this resolution shall not apply to any tax money appropriated by the State of Georgia. (Acts 1949, p. 29.)''

§ 105-701.

LIBEL DEFINED; NECESSITY OF PUBLICATION. — ''A libel is a false and malicious defamation of another, expressed in print, or writing, or pictures, or signs, tending to injure the reputation of an individual, and exposing him to public hatred, contempt, or ridicule. The publication of the libelous matter is essential to recovery.''

§ 105-709.
PRIVILEGED COMMUNICATIONS. — "The following are deemed privileged communications: . . .

"6. Comments upon the acts of public men in their public capacity and with reference thereto."

APPENDIX B

EXHIBIT "A"

Filed: Feb. 26, 1963

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

PAUL BRYANT,
Plaintiff,
versus Civil Action No. 63-2-W

THE CURTIS PUBLISHING COMPANY,
A Corporation, and
FURMAN BISHER,
Defendants.

MOTION OF DEFENDANT,
THE CURTIS PUBLISHING COMPANY,
A Corporation, TO DISMISS

Comes the defendant, The Curtis Publishing Company, a Corporation, and moves the Court as follows:

1. To dismiss this action because the complaint fails to state a claim against this defendant upon which relief can be granted.

2. To dismiss the action inasmuch as the same is brought improperly in the Western Division of the Northern District of Alabama.

3. To dismiss this action because the complaint fails to state a claim against this defendant upon which relief can be granted in the following particulars, separately and severally:

(a) For that the magazine article complained of is not libelous as a matter of law.

(b) The magazine article complained of is not libelous per se and there is no allegation of special damages.

(c) Part of the magazine article complained of and relied upon as libelous is not of and concerning the plaintiff.

(d) Part of the magazine article complained of and relied upon as libelous is alleged out of the context of the entire magazine article which is not libelous as a matter of law.

(e) To subject this defendant to liability in the circumstances complained of would impose an unreasonable burden upon interstate commerce in violation of Article 1, Section 8 of the Constitution of the United States.

(f) To subject this defendant to liability in the circumstances complained of would abridge the freedom of speech and of press in violation of the First Amendment to the Constitution of the United States, made applicable to the States by the Fourteenth Amendment to the Constitution of the United States.

(g) To subject this defendant to liability in the circumstances complained of would be repugnant to Article 1, Section 6 of the Constitution of the State of Alabama in denying to this defendant due process of law.

(h) To subject this defendant to liability in the circumstances complained of would be repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States.

(i) The magazine article complained of is not libelous as a matter of law in that it is fair comment concerning a personality who is famous throughout the United States and abroad.

PEPPER, HAMILTON &
SCHEETZ
BEDDOW, EMBRY &
BEDDOW
BY T. ERIC EMBRY
T. Eric Embry,
Attorneys for
The Curtis Publishing
Company, A Corporation

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the above and foregoing Motion on Messrs. Pritchard, McCall and Jones, Attorneys for Plaintiffs in this cause, by mailing a copy of same to them at their office at the Frank Nelson Building, Birmingham, Alabama, United States postage prepaid.

This 26th day of February, 1963.

(Signed) T. ERIC EMBRY
Of Counsel

EXHIBIT "B"

Filed: Apr. 30, 1963

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

PAUL BRYANT,

Plaintiff,

versus Civil Action No. 63-166

THE CURTIS PUBLISHING COMPANY,
A Corporation,

Defendant.

MOTION OF DEFENDANT,
THE CURTIS PUBLISHING COMPANY,
A Corporation, TO DISMISS

Comes the defendant, The Curtis Publishing Company, a corporation, and moves the Court as follows:

1. To dismiss this action because the complaint fails to state a claim against this defendant upon which relief can be granted.

2. To dismiss this action because the complaint fails to state a claim against this defendant upon which relief can be granted in the following particulars, separately and severally:

(a) For that the magazine article complained of is not libelous as a matter of law.

(a) The magazine article complained of is not libelous per se and there is no allegation of special damages.

(c) Part of the magazine article complained of and relied upon as libelous is not of and concerning the plaintiff.

(d) Part of the magazine article complained of and relied upon as libelous is alleged out of the context of the entire magazine article which is not libelous as a matter of law.

(e) To subject this defendant to liability in the circumstances complained of would impose an unreasonable burden upon interstate commerce in violation of Article 1, Section 8 of the Constitution of the United States.

(f) To subject this defendant to liability in the circumstances complained of would abridge the freedom of speech and of press in violation of the First Amendment to the Constitution of the United States,

made applicable to the States by the Fourteenth Amendment to the Constitution of the United States.

(g) To subject this defendant to liability in the circumstances complained of would be repugnant to Article 1, Section 6 of the Constitution of the State of Alabama in denying to this defendant due process of law.

(h) To subject this defendant to liability in the circumstances complained of would be repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States.

(i) The magazine article complained of is not libelous as a matter of law in that it is fair comment concerning a personality who is famous throughout the United States and abroad.

PEPPER, HAMILTON &
SCHEETZ
BEDDOW, EMBRY &
BEDDOW
BY T. ERIC EMBRY
T. Eric Embry,
Attorneys for
The Curtis Publishing
Company, A Corporation

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the above and foregoing Motion on Messrs. Pritchard, McCall and Jones, Attorneys for Plaintiff in this cause, by mailing a copy of same to them at their office at the Frank Nelson Building, Birmingham, Alabama, United States postage prepaid.

This the 30th day of April, 1963.

(Signed) T. ERIC EMBRY
Of Counsel

CERTIFICATE OF SERVICE

I do hereby certify that I am of counsel for Respondent in the above styled case and I have this day served a copy of the within and foregoing Brief for Respondent, by mailing, in the United States Mail, a copy of same to Petitioner's attorneys of record, HERBERT WECHSLER, ESQ., 435 West 116th Street, New York, New York 10027; PHILIP H. STRUBING, ESQ., PEPPER, HAMILTON & SCHEETZ, 123 South Broad Street, Philadelphia, Pennsylvania 19109 and KILPATRICK, CODY, ROGERS, McCLATCHEY & REGENSTEIN, 1045 Hurt Building, Atlanta, Georgia 30303, in envelopes properly addressed and with sufficient pre-paid postage thereon, pursuant to Supreme Court Rule 33.

This ____ day of February, 1967.

Of Counsel for Respondent