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STATUTES AND AUTHORITIES CITED

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

CASE NO. 814

CURTIS PUBLISHING COMPANY,
Petitioner,

versus

WALLACE BUTTS,
Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CITATIONS TO OPINIONS BELOW

Petitioner[1] refers to the opinion of the United States Court of Appeals for the Fifth Circuit as unreported and reproduces a copy as Appendix B to its petition. This opinion is reported in 351 F. 2d 702 (5th Cir. 1965).

QUESTIONS PRESENTED

Respondent construes the questions presented to be as follows:

I. Under the facts of this case, did petitioner waive the right to challenge the verdict and judgment on any

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[1]Petitioner is hereafter sometimes referred to as "Curtis".

of the constitutional grounds asserted in *New York Times v. Sullivan,* 376 U.S. 254 (1964) 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

In respondent's Appendix A are set forth additional statutory provisions involved.

COUNTER-STATEMENT

The questions must be determined in the light of the facts of the case. The statement in the petition for certiorari is deficient in many respects.

CURTIS' STATEMENT FAILS TO SET OUT THE FACTS AS TO WAIVER

Curtis fails to set out the background against which it made its decision as to the strategy it would employ in defending the case. This is of vital importance in determining the question of waiver. In considering the facts, the choice made by Curtis should be kept in mind, to wit, that it would rest its

defense squarely and solely on a plea of justification under which it would obtain the right to open and conclude before the jury, and no other defenses would be relied on. Only when its strategy failed did Curtis seek some constitutional ground of defense, turning hopefully to *New York Times v. Sullivan* as a means of escape.

Curtis Raised The Constitutional Defenses In Two Alabama Libel Suits

One of a number of libel suits pending against Curtis when the article involved in this action was published was a suit filed in Alabama by Paul Bryant, head football coach of the University of Alabama, because of a previous article that had been published by the *Post*. A co-defendant with Curtis in that libel suit was Furman Bisher, Sports Editor of *The Atlanta Journal*, the author of the previous article. (R. 497-98). The Birmingham, Alabama law firm defending petitioner and Bisher in that libel suit steered the editors of the *Post* to one George Burnett in Atlanta from whom they bought the instant Butts-Bryant story. (R. 497-98). In that libel suit, as well as a later suit filed by Bryant because of the article here involved, Curtis raised the following constitutional defenses:

> "(f) To subject this defendant to libel in the circumstances complained of would abridge the freedom of speech and of the 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 libel in the circumstances complained of would be repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States."
>
> (See respondent's Appendix B; petitioner's Appendix B, pp. 64a-65a).

Curtis' Defensive Strategy

Two days after publication, respondent filed suit against petitioner. (R. 1925). Petitioner filed its defensive pleadings, relying solely upon its plea of justification.

No constitutional questions of any kind were raised by Curtis in its answer, notwithstanding the following remarkable situation: Petitioner, represented by the same lawyers who defended *The New York Times* in *Times v. Sullivan,* raised the First and Fourteenth Amendment defenses in the first *Bryant* suit in Alabama and again in the second *Bryant* suit in Alabama. (Exhibits A and B to "Response To Petition For Re-Hearing En Banc" as filed in the Court of Appeals, Respondent's Appendix B). Curtis' General Counsel (through Mr. Strubing) actively participated in both Alabama cases, as well as in this case. Notwithstanding, no constitutional defenses were raised in this case. As pointed out by the Court of Appeals (351 F. 2d at 734; Pet. for Cert., App. B, p. 65a):

> "If the First and Fourteenth Amendments were thought by Mr. Strubing and his law firm to be valid grounds for dismissal of the related

> *Bryant* cases in Alabama, why did they not assert them in the *Butts* case? By his own statement Mr. Strubing was an active participant in all three cases, so he certainly should have known what the rights of Curtis were."

Even though given the full opportunity during the lengthy pre-trial proceedings and during the trial, which lasted fifteen days, petitioner chose not to raise any constitutional grounds of defense, and no such objections were made to the trial court's charge as to malice as required by Fed. R. Civ. P. 51.

CURTIS' STATEMENT FAILS TO SET OUT THE FACTS WHICH ESTABLISHED MALICE

Petitioner knew and admitted it knew when the article was published that its publication would "ruin the career of Wallace Butts" and "would result in his death in his chosen profession." (R. 915-16).

Curtis' New Editorial Policy

Prior to publication of the article in question, the *Post's* Editor-in-Chief, due to a severe and continuing loss of revenues (R. 935-36), had embarked upon a new editorial policy characterized by the *Post's* Editor as "sophisticated muckraking" — of conducting an "expose type magazine," (R. 943) "of provoking people, making them mad." (R. 944). When Mr. Blair was asked in the taking of his testimony if he had not 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 "sophisti-

cated muck-raker," Mr. Blair testified that he "was not being facetious," that he "meant it then" and "mean it now." (R. 939). When asked how the article which is the subject of this suit fitted in with the "new image," the Editor-in-Chief of the *Post* testified "I would say we have gone 25 per cent toward the goal of the magazine that I envision." (R. 940). Mr. Blair testified that he had in fact changed the image of the *Post*. (R. 940). On January 15, 1963, Clay D. Blair, Jr., as Editor-in-Chief, had written a memorandum to the staff of the *Post* congratulating them on "putting out one hell of a fine magazine," stating "the final yard stick: we have about six law suits pending, meaning that we are hitting them where it hurts, . . ." (R. 1376). When questioned in this case as to what kind of law suits he was referring to in that memorandum, Mr. Blair stated "all of these are libel suits." (R. 938). When asked whom he had reference to in his use of the phrase "hitting them where it hurts," Mr. Blair testified " 'Them' is the general phrase to refer to the whole United States of America." (R. 938.)

Curtis Ignored Warnings That The Stories Were False

Eleven days before publishing the story petitioner was categorically informed by telegram and letter of the "absolute falsity of the charges" to be made in the proposed story. (R. 1023) (R. 947-48). Petitioner ignored those warnings and published the story knowing full well in advance that it would "ruin the career of Wallace Butts", "would result in his death in his chosen profession", and "that the careers of two men would be ruined as a result of the publication of the story." (R. 1014). Before publishing the article petitioner made

no effort to contact either Wallace Butts or Coach Paul Bryant of the University of Alabama for any statement to be carried in the article by either of them as to whether the charges against them were true. (R. 897). The *Post* had a readership of twenty-two million (R. 1014-15) and neither respondent nor Coach Bryant was given any opportunity whatsoever for a retort before that forum. After the article was published respondent was further denied any voice before petitioner's forum of twenty-two million readers in that petitioner ignored a prompt and urgent demand by respondent that it publish a retraction of the defamatory statements against him. (R. 22, 26).

Petitioner paid George Burnett $5,000 for the story. (R. 1380-81). This was in February, 1963. The telephone call which Burnett claimed he had listened in on between respondent and Coach Bryant was in September, 1962. Petitioner and its writer, Frank Graham, Jr., knew when they bought the story from Burnett that he had been convicted of writing bad checks and was at that time on probation (R. 911, 912, 913). They further knew there were possibly other instances of "bad-check writing" by George Burnett. (R. 1016). Davis Thomas, a Senior Editor of the *Post*, knew the criminal background of George Burnett and testified that he considered one who wrote bad checks to be the same as a "liar." (R. 1016).

As will be shown, the record is replete with evidence of Curtis' malice, all of which was artfully ignored in Curtis' Statement of the Facts.

The District Court's Summary Of The Evidence In Respect Of Malice

The facts in respect of malice were summarized by the trial judge 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 a 'disreputable gambler,' and a corrupt person who, employed to educate and guide the young men, betrays or sells out his pupils." (225 F. Supp. at 917; Pet. for Cert., App. B. p. 77a).

> "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 overheard 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.

"Inserted in the article were the following direct quotations, which were subsequently denied under oath by the parties quoted:

> (1) Graham wrote that Burnett had told him that Larry Rakestraw, Georgia quarterback, 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. Burnett later testi-

fied under oath that he had not told Graham any such thing.

(2) Mickey Babb, another Georgia football player, specifically denied the quotation in the article attributed to him pertaining to knowledge by the Alabama team of the Georgia formations and plays. Babb was quoted in the article as saying the Alabama players knew Georgia's key play (eighty-eight pop) and knew when Georgia would use it. Babb testified Georgia had no 'eighty-eight pop' play. This was confirmed by Coach Johnny Griffith.

(3) Sam Richwine, the Georgia trainer, specifically and categorically denied the quotation in the article attributed to him, which was also to the effect that Alabama knew Georgia's plays.

(4) Coach Johnny Griffith categorically denied three separate and distinct quotations in the article that were attributed to him.

(5) There were many other instances in which the individual, credited by Graham as giving Graham certain information which was included in the article, categorically denied under oath that any such information had been furnished.

"Frank Graham, Jr., author of the article, and Charles Davis Thomas, the Managing Editor of the Saturday Evening Post, testified by deposition that they both knew that after the article was published plaintiff Butts' career would be ruined. The author of the article, Frank Graham, Jr., testified by deposition at the trial. Curtis' Editor-in-Chief, Clay Blair, Jr., and its Senior Editor, Davis Thomas, were present in court but testified by deposition. Furman Bisher, of Atlanta, who was paid to assist in the preparation of the article, testified by deposition.

"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 918-19; Pet. for Cert., App. B, pp. 78a-80a).

The Circuit Court Approved The District Court's Appraisal Of The Evidence

In affirming the trial court, 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; Pet. for Cert., App. B, pp. 33a-34a).

The jury's verdict of $60,000 as general damages and $3,000,000 as punitive damages was rendered on August 20, 1963. On August 29, 1963, Curtis filed its initial motion for new trial. (R. 46). On January 22, 1964, the District Court entered judgment in the case in the amount of $460,000, representing $60,000 general damages and $400,000 punitive damages. (R. 105)

Thereafter, petitioner filed under Fed. R. Civ. P. 60(b) an additional motion for new trial on the alleged ground of recently discovered evidence, during the determination of which it developed that petitioner had paid Coach Paul Bryant $300,000 following the trial of this case rather than go to trial in his case based upon the same libelous article here involved. (R. 1456-57).

The Court of Appeals, in well reasoned opinions, rejected all of the arguments made by petitioner.

SUMMARY OF ARGUMENT

I.

Curtis, which elected not to urge any constitutional grounds of defense before or during the trial, now contends that this Court's reliance on those grounds in *New York Times* v. *Sullivan,* 376 U.S. 254 (1964), relieves it of the consequences of that election and permits it to raise those grounds for the first time on appeal. That Curtis knew of the constitutional defenses and elected not to use them in this case is established

by the fact that it urged such defenses in two companion libel suits pending against it at the same time in Alabama and that its Alabama counsel were contemporaneously representing *The New York Times* in the *Times* case. The Court of Appeals was correct in holding that, for its own reasons of trial strategy, Curtis obviously decided to rely solely on its plea of truth in this case and thereby waived its right to raise additional defenses on appeal and has no right now to complain of its choice. *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); *Ackerman* v. *U. S.*, 340 U.S. 193 (1950).

This Court's holding in *Times* v. *Sullivan* that proof of actual malice is required by a public official in a libel suit was no change in the law but merely gave confirmation to a principle which has long been the law. *Gandia* v. *Pettingill*, 222 U.S. 452, 457 (1912); *Sweeney* v. *Schenectady Union Pub. Co.*, 122 F.2d 288 (2nd Cir. 1941), aff'd by equally divided court, 316 U.S. 642 (1942); *Caldwell* v. *Crowell-Collier Pub. Co.*, 161 F.2d 333, 336 (5th Cir. 1947). Therefore, even without regard to Curtis' action in the companion cases and its knowledge of the proceedings in *Times*, the *Times* holding does not afford it an excuse for its failure to raise the constitutional defenses here urged.

Respondent was not a public official within the meaning of *Times* but an employee of a separate business entity, so *Times* could in no event be applicable. Georgia Code Sections 32-152 and 32-153; *Regents of the University System of Georgia* v. *Blanton*, 49 Ga. App. 602, 176 S.E. 673 (1934); *Board of Education of Doerun* v. *Bacon*, 22 Ga. App. 72, 95 S.E. 753 (1918);

Page v. *Regents of the University System of Georgia,* 304 U.S. 439, 452 (1938).

II.

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 went on to add, guised as statements of fact, damaging charges for which there were no basis at all.

It would be useless to require another trial in view of the overwhelming evidence of malice.

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

III.

Curtis callously published the spectacular article here involved, knowing it would ruin respondent, for the purpose of improving its circulation. As such it was a "libeller for profit" and not entitled to the same protection under the United States 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 $400,000.00 award of punitive damages deprives it of that "breathing space." There is no law in Georgia or the Federal courts that requires the existence of any relationship between compensatory and punitive damages.

ARGUMENT

I.

PETITIONER WAIVED THE RIGHT TO CHALLENGE THE VERDICT AND JUDGMENT ON ANY OF THE CONSTITUTIONAL GROUNDS ASSERTED IN *TIMES V. SULLIVAN.*

Petitioner Chose The Strategy Of Which It Now Complains

It is elementary that a litigant who claims a constitutional right must assert that right at an appropriate time in a litigation in order to rely on it on appeal.

Curtis cannot explain away its decision not to raise at the trial constitutional defenses of which it was fully aware and upon which it now relies on the ground that those defenses might have been overruled below. Nor should Curtis be heard to complain that it was under no duty to raise constitutional defenses below.

What was the situation faced by Curtis when it determined its trial strategy? At that very time there were pending against it in the Federal courts in Alabama the two libel suits brought by Bryant, in both of which it had set up the defenses of the First and Fourteenth Amendments (Pet. for Cert., App. B, pp. 64a-65a; Resp. App. B). In both Alabama suits it had also raised the "public man" defense granting the publisher a privilege conditional on the absence of actual malice in libel suits brought by public persons. (Resp., App. B). This "public man" defense, together with a number of other defenses raised in the Alabama cases, might have been raised here but Curtis elected not to do so.[2]

What was done by petitioner's counsel in this case is not difficult to understand. They merely chose the defense which they felt would be the most effective for their own use and chose not to rely on any other defenses.

The Circuit Court, in the first of its two decisions, after considering the affidavits filed in support of the petition for rehearing and the questions of law involved, reached the following conclusion relative to

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[2]The "public man" rule as set out in Section 105-709(6) of the Georgia Code (Resp. App. A) provides a privilege, conditioned on the absence of actual malice, to publications commenting "upon the acts of public men in their public capacity. . . ." The statutory privilege has been construed to grant a complete defense to publications falling within its terms, 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). Certainly a full defense would have included Georgia Code Section 105-709(6).

Curtis' choice of trial strategy (351 F. 2d at 735; Pet. for Cert. App. B, p. 67a):

> "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."

Again, the Circuit Court met Curtis' argument relative to its awareness of the constitutional defenses squarely by saying (351 F. 2d at 710; Pet. for Cert. App. B, pp. 15a-16a):

> "The *Times* case was decided by the Alabama Supreme Court on August 30, 1962. A petition for writ of certiorari presenting constitutional questions identical to those now being urged by Curtis, was filed in the United States Supreme Court on November 21, 1962, four months prior to the filing of the complaint in this case on March 25, 1963. Certiorari was granted in the *Times* case on January 7, 1963.

"[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."

The jury verdict in the instant case was returned on August 20, 1963, and the trial court's judgment thereon was entered the same day. A Birmingham, Alabama law firm, which represented the New York Times in the case brought against it by Sullivan, also, together with Curtis' General Counsel, represented Curtis in a libel suit Coach Bryant had filed against it in the United States District Court at Birmingham, Alabama. A member of this law firm had sent information to Curtis about the alleged telephone conversation between Butts and Bryant, and had talked with the author, Graham, about the matter prior to publication of the story. The same lawyer, together with another member of the firm, sat (as did the General Counsel for Curtis) at Curtis' Counsel table throughout the trial of this case.

"While it is true that the Supreme Court did not decide the *Times* case until March 9, 1964, it would be contrary to reason and common sense to assume that there had not been, at all times during the pendency of this case, full communication among Curtis' counsel, particularly concerning trial strategy. The facts more than justify our conclusion that Curtis was fully aware when this suit was instituted, and certainly no later than the beginning of trial, that the constitutional questions it now argues had been for some time, and were still being, vigorously asserted in *Times*."

Prominent among the questions which have been considered and passed on by this Court and by other

courts during the last several decades have been cases involving the right of freedom of speech. It is inconceivable that petitioner, a publisher for over two hundred years of several magazines of nationwide circulation, should not have considered raising that question in this libel suit as it had in the Alabama suits.

This Court's Decisions Relative To Waiver Support Respondent

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]."

The waiver cases cited by Curtis are distinguishable because petitioner chose here, as a matter of strategy, to intentionally 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. denied*, 338 U.S. 868 (1949).

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

> "His choice was a risk, but calculated and deliberate in 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 *Elibar* case. There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from."

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. (Pet. for Cert., App. B, p. 46a, 351 F. 2d 702, 726). Respondent respectfully submits that issue should be here decided in his favor as it was below and that this Court should decline to review this case.

This Court's Holding in Times v. Sullivan Affords Curtis No Excuse For Its Decision Not To Raise At The Trial The Constitutional Defenses Now Urged

An analysis of *Times*, upon which petitioner relies for a review by this Court, shows that it made no change of law but merely gave sanction to a long-standing rule of state law and federal constitutional law as enunciated by courts and urged by scholars.

The *Times* case did not create the First Amendment. In that decision, this Court emphasized that the "gen-

eral 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 of statement 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-two years ago in *Sweeney v. Schenectady Union Pub. Co.,* 122 F. 2d 288 (2nd Cir. 1941), aff'd by equally divided courts, 316 U.S. 642 (1942). Seventeen 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 Fifth Circuit Court of Appeals apparently dealt with 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."

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, as well as six scholarly works. The Kansas Supreme Court has stated since *Times* that *Times* requires no change in the law of that state since the principles found in *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* 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 Curtis for the proposition that this Court must apply any 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 not here concerned with a change in the law. *Times v. Sullivan* merely gave constitutional sanction to a long recognized legal principle.

Curtis' belated insistence "that *Times* came like a bolt out of the blue" (351 F.2d at 733) in granting constitutional protection in defamation cases is all the more incongruous when viewed in light of the fact that (although Curtis chose not to rely on those defenses at the trial) Curtis did raise First Amendment defenses in its initial motion for new trial, filed five months before the *Times* decision was rendered.

Respondent Was Not A "Public Official"

Respondent was employed by the Athletic Association to supervise the intercollegiate sports program of the University of Georgia. This Court described the supervision of that program as it relates to football and other activities from which revenue is derived, as the exercise of a proprietary rather than a governmental function. It held in *Page v. Regents of University System of Georgia,* 304 U.S. 439, 452 (1938):

> ". . . 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. . .
>
> "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."

The Athletic Association, respondent's employer, has, by a statute enacted in 1949, been declared to be a

corporation and not an agency of the State. Georgia Code Annotated, Section 32-152 (See Resp., App. A) provides:

> "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."

Section 32-153 of the Code provides:

> "The associations named are hereby declared, not to be agencies of the State. . ." (See Resp., App. A)

Respondent submits, therefore, that he was not a "public official" as envisioned by *Times v. Sullivan.*

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 association. 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 officer or official. Under Georgia law, the position of a teacher or instructor in a State or public education 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); *Board of Education of Doerun v. Bacon*, 22 Ga. App. 72." (Pet. for Cert., App. B, pp. 95a-96a).

II.

UNLIKE *TIMES V. SULLIVAN*, THE UNDISPUTED EVIDENCE SHOWS CONCLUSIVELY THAT ACTUAL MALICE WAS PROVED

Even if it should be held that *Times v. Sullivan* does apply, the evidence in this case fully justifies the conclusion reached by the jury and affirmed by both the District Court and the Court of Appeals that actual malice was proved and, therefore, no useful purpose could possibly be served by granting the writ. A brief resume of the evidence follows.

(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. 22, 23, 26, 947-49).

(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. 947-49, 1023).

(3) Prior to publication of the story, Curtis' adver-

tising revenues had been falling drastically. (R. 935-36). 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. 940). He initiated a policy of "sophisticated muckraking," of "exposé in the mass magazines." (R. 943). The new image was intended "to provoke people, make them mad." (R. 944). Blair testified that he "was not being facetious," that he "meant it then (November 1962)" and "mean it now (May 1963)." (R. 939).

(4) Only two months prior to publication of this story, Curtis' Blair wrote a memorandum (R. 1376) to his personnel (which found its way into another magazine's pages (R. 937)) complimenting them on their work under the new editorial policy and outlining "the final yardstick: we have about six law suits pending, meaning that we are hitting them where it hurts, with solid, meaningful journalism." (R. 1376). Blair later testified that the "them" who were being hit was everyone in the United States and the law suits were all libel suits. (R. 938).

(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. 940).

(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. 911-13). Managing Editor Thomas, who also knew of Burnett's bad check record, considered such a person to be a liar. (R. 1016).

(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. 511, 1015-16). By performing this easy task, Graham would have learned at the outset that the whole story was a fabrication. (R. 850-51). Managing Editor Thomas admitted that "a responsible journalist" should rely on something more than the mere word of Burnett. (R. 1017).

(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, notwithstanding the fact that Burnett told Graham that he needed the notes to refresh his memory (R. 212) and that he "couldn't remember anything definite about it without his notes." (R. 525). When the notes were finally analyzed, they turned out to be largely nonsensical. (R. 386-87).

(9) Before publishing the story, Curtis made no effort to view the game film, although Sports Editor Kahn considered that to be necessary (R. 970-71) and the collaborator, Furman Bisher, thought "it would have been a very good idea." (R. 1026).

(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. 1026).

(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 his death in his chosen profession." (R. 915-16).

(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 Larry Rakestraw (University of Georgia quarterback) 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. 365-66). 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. 1022). But Burnett denied under oath that he had told Graham any such thing. (R. 241). 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. 366).
>
> (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. 745). 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. 746). This was confirmed by Coach Johnny Griffith. (R. 383).

(c) Sam Richwine, Georgia trainer, specifically and categorically denied (R. 752) the quotation in the article attributed to him to the effect that Alabama knew Georgia's plays.

(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. 369).

(e) The article states that "Griffith went to University officials, told them what he knew and said 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. 369).

(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. 371).
>
> (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. 372).

Considering the above evidence, the District Court held on April 7, 1964: (Pet. for Cert. App. B p. 96a)

> "If it were conceded that plaintiff Butts was a 'public official', the case of *New York Times Company v. Sullivan* would not permit the vacating of this Court's previous judgment, as the ruling in the *Times* case does not prohibit a public official from recovering for a defamatory falsehood where he proves 'actual malice' — that is, with knowledge that it was false or *with reckless disregard of whether it was false or not.* (Emphasis supplied.) In the trial of this case, 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. See the Court's ruling on defendant's motion for a new trial dated January 14, 1964. *Butts v. Curtis Publishing Company,* 225 F. Supp. 916."

On review, the Fifth Circuit, after giving "full consideration to the entire record" held that: (351 F. 2d 702, 719, Pet. for Cert. App. B, p. 33a)

> "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."

That reckless disregard as to whether printed statements are false constitutes malice was confirmed by the Court of Appeals for the Seventh Circuit in *Pape v. Time, Inc.*, No. 15101, C.A. 7, Dec. 28, 1965, wherein it was stated:

> "As stated in our previous decision — '. . . Time took the risk when it reworded parts of the Commission's 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. Time's writers who prepared the article must have known the statements as to Pape's conduct were only allegations in a complaint in a civil suit. 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. There-

> fore, it was error for the District Court to grant defendant's motion for a summary judgment."

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

The Charge As To Malice Was Adequate

Petitioner complains that the District Court's charge on malice was insufficient in the light of *Times v. Sullivan*. When the District Court's charge is examined *in toto*, it will be found that it measures up to the standards laid down in *Times v. Sullivan*. It is particularly important to note that no exception was made by petitioner at the conclusion of the charge with reference to the instructions on malice, as required by Fed. R. Civ. P. 51. (Resp. App. A).

The definition of malice as given in the trial court's charge to the jury in this case was in effect the same as the definition of malice given in *Times*. The trial court charged (R. 1356-57):

> ". . . 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 without 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 disregard of his rights. . . .

"Actual malice involves the state of one's mind, and your determination must be made from all the surrounding facts and circumstances.

"Further [whether] actual malice or wanton and reckless indifference has been established must be determined from all of the evidence in the case."

III.

THE JUDGMENT FOR PUNITIVE DAMAGES VIOLATED NO CONSTITUTIONAL RIGHTS OF PETITIONER

In Point III of its reasons for granting the writ, petitioner presents three arguments: *First,* the punitive damages awarded by the jury "contravened the First Amendment and entailed a deprivation of due process" (p. 17); *Second,* the jury verdict was not "saved by the remittitur required by the district court" (p. 19); and *Third,* the remittitur itself "is repugnant to the Constitution."

FIRST: Under this argument petitioner, after conceding *arguendo* that "a punitive award in libel cases, imposed as a deterrent to the defendant and to others and 'to protect the community', is not *per se* an unconstitutional method of regulating publications. . .," makes the astonishingly shortsighted statement that "the verdict was designed to put defendant out of business. . . ." (p. 18). It was less than two years ago that this same petitioner published "The Story Of A College Football Fix" which it stated at the time would

put Wallace Butts "out of business." Petitioner's editor boasted to his staff that the *Post* had six law suits (all libel) pending, "meaning we are hitting them where it hurts." 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,* No. 52, decided by this Court January 19, 1966.

Respondent recognizes and will be the first to defend the constitutional provisions which guarantee freedom of the press and would never suggest that these rights 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 to many 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 holds individuals up to public hatred, scorn and ridicule by publishing untrue, malicious and defamatory charges about them.

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 repu-*

tation and good character. Loss of career, health, reputation of any man in his declining years cannot be measured by a few dollars, nor by many. This is the true injury of a libel such as this one: it becomes an inescapably legacy of shame to all who follow in the line of blood. As the Court so aptly said in *Tehan v. Shott, supra,* citing *Linkletter v. Walker,* 381 U.S. 618:

> "the ruptured privacy. . . . cannot be restored."

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. As stated before, petitioner felt that hitting famous 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." Certainly this type of libeller is not representative of the "American press" referred to by Mr. Justice Black in *Times v. Sullivan* 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). A "libeller for profit" has been characterized by the Georgia Supreme Court as follows:

> "A newspaper is a great power. There will doubtless appear no greater factor in the progress and development of our common country. Some men owe to the press the respect they exhibit for religion and morality; they fear its lash. The newspaper should discriminate; upon its lofty pedestal it should com-

mand respect for its high-toned thought, its justice, its conservatism and its moderation. The press should be free; it should not be deterred from its legitimate work. It leads thought; it moulds public opinion; it thinks for the people. Some men have illustrated this great calling; they have appreciated its duties and obligations; they have lent an ear to the right; their endeavors have kept time to the needs and necessities of the great millions who exemplify the virtue, religion and morality of this country.

"*The man that sits in this high place, athirst for greed and gain; whose opinions depend upon the amount of money he gets in his wallet; who attacks private character when he is paid to do so, is an usurper and a public enemy.* As well might Judas Iscariot exhibit the price of his perfidy as an excuse for his crime, as for a libeller to set up that he published the libel complained of for money. If this plaintiff is guilty of the acts published against him, these defendants had a right to publish them, and they did a public service in doing so. On the contrary, if he is not guilty, and *if it is an effort to defame and degrade him, the law should not withhold its vindication.*" *Cox v. Strickland,* 101 Ga. 482, 495, 28 S.E. 655 (1897) (Emphasis added).

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

victims. The more prominent the victim, the more sensational the libel, and the greater the profit will be.

SECOND: Petitioner argues here that the remittitur required by the District Court was unconstitutional as being "inescapably a 'fruit' of the illegal action of the jury." Let respondent state here and now that when petitioner first made this point in its brief on appeal to the Fifth Circuit, he was shocked and surprised. During the oral arguments before the District Court on petitioner's motion for new trial, the subject of the District Court's right to order a remittitur was discussed at length between the trial judge and counsel for petitioner. In his Fifth Circuit brief, respondent pointed out that "at the time (Curtis) filed its designation of parts of the Record to be printed (Butts) did not know that appellant intended to argue that the district court 'did not have the authority to "require" the remittitur' " and, therefore, respondent had not designated 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 Fifth Circuit, he set forth direct quotations from statements made by petitioner's attorneys at the hearing:

> "I understand Your Honor perfectly. . . . if 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. . . . If the verdict is ex-

> cessive, 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 conscience. . . ."

In view of petitioner's position and statements made in open court, and having obtained the reduction it was seeking from the district court (which at the time was questioning its right to order a remittitur), this contention should receive the same treatment given it by the Court of Appeals.

THIRD: Petitioner argues here that the amount of the remittitur is repugnant to the Constitution and 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.' " (p. 21). 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 Paul Bryant without even a trial in this same matter? (R. 1456-57). How did that payment affect petitioner's "breathing space. . . . to survive?" Obviously petitioner did not consider its $300,000 payment to Coach Bryant would "put defendant out of business" or would affect its "breathing space to survive." Furthermore, what about the effect of petitioner's malicious libel upon respondent's "breathing space to survive" and its effect on "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 interests of that portion of the public press represented by petitioner and not to safeguard

and protect those same factors as to an individual who is subjected to such a malicious libelous attack?

At this point we respectfully refer the Court to the Editor's block written by "The Editors" of the *Post* and superimposed on the picture on the first page of the article. (R. 1407). That editorial was not written by the author of the article but was signed and admittedly written 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 referred to — the Editors stated unequivocally as a *fact* that he had "fixed" and "rigged" the game. The Editors said Wallace Butts was corrupt. They evaluated him as 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 argues further than 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. Foster*, 74 Ga. App. 350 (39 S.E. 2d 585) and reverse title, 202 Ga. 122 (42 S.E. 2d 441). 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 (C.A. 5, 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).

and 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 (C.A. 2 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." (351 F.2d 702, 719; Pet. for Cert., App. B, p. 33a).

For the reasons which prompted the Court of Appeals to that conclusion and for the foregoing reasons, the petition for writ of certiorari should be denied.

William H. Schroder
Allen E. Lockerman
Robert S. Sams
Tench C. Coxe
Milton A. Carlton, Jr.
Gerald P. Thurmond

Of Counsel:
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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.)''

§ 105-709.

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 re-

lief 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 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 Response to Petition for A Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit upon Petitioner, Curtis Publishing Company, by mailing, in the United States Mail, a copy of same to its 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 an envelope properly addressed and with sufficient prepaid postage thereon, pursuant to Supreme Court Rule 33.

This _____ day of February 1966.

Of Counsel for Respondent