

IN THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT, IN
AND FOR BROWARD COUNTY, FLORIDA

CASE NO.: CACE 15-000072

BRADLEY J. EDWARDS and PAUL G.
CASSELL,

Plaintiff(s),

vs.

ALAN M. DERSHOWITZ,

Defendant(s).

COUNTER-DEFENDANTS' MOTION TO DISMISS COUNTERCLAIM

Plaintiffs/Counterclaim-defendants Bradley J. Edwards and Paul G. Cassell, by and through their undersigned counsel, hereby move to dismiss the Counterclaim of defendant/counterclaim-plaintiff Alan M. Dershowitz.

Edwards and Cassell have filed a complaint against Dershowitz arising out of Dershowitz's international defamatory assault on Edwards and Cassell. In response, Dershowitz has filed a counterclaim alleging two counts of defamation by Edwards and Cassell: Count I, concerning statements in a pleading filed in federal court; and Count II, concerning Edwards and Cassell's alleged adoption of those statements in comments to various media sources. As a matter of law, the Court must dismiss Dershowitz's Counterclaim. With regard to Count I, the statements Edward and Cassell filed in federal court on behalf of their client are absolutely protected under the litigation privilege. With regard to Count II, the limited statements are not

defamatory and, in any event, are protected under both the fair report privilege and the litigation privilege.

BACKGROUND

The events underlying this defamation case arise from a lawsuit filed by attorneys Edwards and Cassell in 2008 in the U.S. District for the Southern District of Florida on behalf of two clients, Jane Doe No. 1 and Jane Doe No. 2. These two women alleged that they had been sexually abused by a wealthy Palm Beach financier, Jeffrey Epstein, and that the federal government had reached a secret plea arrangement with him preventing his federal prosecution for those crimes. The two victims alleged that this arrangement violated their rights under the Crime Victims Rights Act (CVRA), 18 U.S.C. § 3771. The case has moved forward through various discovery proceedings and other events, with the victims prevailing against efforts by the federal Government and Jeffrey Epstein to end the case or prevent discovery into the surrounding circumstances. *See, e.g., Does v. United States*, 817 F.Supp.2d 1337 (S.D. Fla. 2011) (allowing discovery by the victims); *Does v. United States*, 950 F.Supp.2d 1262 (S.D. Fla. 2013) (rejecting Government's motion to dismiss); *Doe No. 1 v. United States*, 749 F.3d 999 (11th Cir. 2014) (rejecting Epstein's argument that plea negotiations are barred from disclosure to the victims).

On December 30, 2014, Edwards and Cassell filed a motion on behalf of a third client – Jane Doe No. 3 – seeking joinder in the action. *See Jane Doe No. 3's Motion Pursuant to Rule 21 for Joinder in Action, Does v. United States*, No. 9:08-cv-80736-KAM (DE 279). Several days later, they filed a corrected motion, fixing the signature block on the pleading (DE 280). Jane Doe No. 3 alleged in her motion that she was the victim of sexual offenses committed by

Jeffrey Epstein, including the offense of sex trafficking. She alleged that Epstein had trafficked her to other wealthy and powerful persons, including one of the defense attorneys who had helped negotiate the plea arrangement: Alan Dershowitz.

In the days that followed, Dershowitz made numerous statements on television programs and in other media attacking Jane Doe No. 3 and her attorneys. Dershowitz called Jane Doe No. 3 “a serial liar” who “has lied through her teeth about many world leaders.” <http://www.cnn.com/2015/01/06/us/dershowitz-sex-allegation/>. Of particular relevance here, Dershowitz also repeatedly called legal counsel for Jane Doe No. 3 “two sleazy, unprofessional, disbarable lawyers.” *Id.* Dershowitz made statements to the effect that “[t]hey [Edwards and Cassell] are lying deliberately, and I will not stop until they’re disbarred.” *Boston Globe* – January 4, 2015.

On January 6, 2015, Edwards and Cassell filed this action, alleging that Dershowitz had defamed them by attacking their honesty and integrity in the course of their representation of their client. On February 10, 2015, Dershowitz filed an answer to the complaint, denying that he had defamed Edwards and Cassell. He also filed a two-count counterclaim. Count I was entitled False Allegations in Joiner Motion, and alleged that Edwards and Cassell had placed “irrelevant, defamatory and false allegations about Dershowitz” in the motion. ¶ 23. Count II was entitled- extra judicial statements, and alleged that Edwards and Cassell had defamed Dershowitz by making statements to the media such as “w[e] carefully investigate all of the allegations in our pleadings before presenting them.” ¶ 31. Count II contended that Edwards and Cassell had “created a false impression” by making such statements. ¶ 38.

ARGUMENT

Count I of counterclaim fails to state any grounds for relief, since it rests on statements made in the course of federal judicial proceedings that are immune from defamation action. Count II of the counterclaim fails to state any grounds for relief, since it rests on statements that are reasonably related to the CVRA litigation, are not defamatory and that are, in any event, protected by the fair report privilege.

I. Legal Standards for a Motion to Dismiss.

“The primary purpose of a motion to dismiss is to request the trial court to determine whether the complaint properly states a cause of action upon which relief can be granted and, if it does not, to enter an order of dismissal.” *Fox v. Professional Wrecker Operators of Florida, Inc.*, 801 So. 2d 175, 178 (Fla. 5th DCA 2001) (citing *Provence v. Palm Beach Taverns, Inc.*, 676 So. 2d 1022, 1024 (Fla. 4th DCA 1996)). Florida law is well settled that in order to withstand a motion to dismiss, the complaint must state “ultimate facts sufficient to indicate the existence of a cause of action.” *Greenwald v. Triple D Properties, Inc.*, 424 So. 2d 185 (Fla. 4th DCA 1983); *see also* Fla. Rule Civ. P. 1.110(b)(2) (“pleading which sets forth a claim for relief must state a cause of action and shall contain “a short and plain statement of the ultimate facts showing that the pleader is entitled to relief”). It is also “a fundamental principle of pleading that the complaint, to be sufficient, must allege ultimate facts as distinguished from legal conclusions which, if proved, would establish a cause of action” *Maiden v. Carter*, 234 So 2d 168, 170 (Fla. 1st DCA 1970). In other words, “[t]he question for the trial court to decide is simply whether, assuming all the allegations in the complaint to be true, the plaintiff would be entitled to

the relief requested.” *Cintron v. Osmose Wood Preserving, Inc.*, 681 So. 2d 859, 860-61 (Fla. 5th DCA 1996).

II. Count I Must Be Dismissed Because It Rests on Statements Edwards and Cassell Made in the Course of Representing a Client During a Judicial Proceeding Which Are Absolutely Immune from Suit.

Florida’s litigation privilege extends to attorneys absolute privilege from civil liability for statements made in judicial proceedings. *See Levin, Middlebrooks, Moves & Mitchell, P.A. v. U.S. Fire Ins. Co.*, 639 So.2d 606, 608 (Fla. 1994). As the Florida Supreme Court has explained, “Traditionally, defamatory statements made in the course of judicial proceedings are absolutely privileged, no matter how false or malicious the statements may be, so long as the statements are relevant to the subject of inquiry.” *Id.* at 607-08. The litigation privilege “arises immediately upon the doing of any act required or permitted by law in the due course of the judicial proceedings or as necessarily preliminary thereto.” *Fridovich v. Fridovich*, 598 So. 2d 65 (Fla. 1992). The common law has long recognized such a privilege for attorneys. *See Burns v. Reed*, 500 U.S. 478, 489-90 (1991) (“lawyers were absolutely immune from damages liability at common law for making false or defamatory statements in judicial proceedings (at least so long as the statements were related to the proceedings)”); *Restatement (Second) of Torts* § 586 (1977) (“An attorney at law is absolutely privileged to publish defamatory matter concerning another in communications . . . during the course and as a part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding.”).

That the litigation privilege protects Edwards and Cassell against suit here is apparent from the face of Dershowitz’s Counterclaim. Count I is styled “False Allegations *in the Joinder*

Motion” (emphasis added). If the litigation privilege means anything, it must mean that attorneys are free to make allegation on behalf of their clients in a legal pleading – i.e., in the federal court joinder motion. Florida law has long recognized that attorneys must have immunity for statements they make in the course of judicial proceedings in order for a “free adversarial atmosphere to flourish, which atmosphere is so essential to our system of justice.” *Sussman v. Damian*, 355 So.2d 809, 811 (Fla. 3rd DCA 1977).¹ Thus, “[i]n fulfilling their obligations to their client and to the court, it is essential that lawyers, subject only to control by the trial court and the bar, should be free to act on their own best judgment in prosecuting or defending a lawsuit without fear of later having to defend a civil action for defamation for something said or written during the litigation. A contrary rule might very well deter counsel from saying or writing anything controversial for fear of antagonizing someone involved in the case and thus courting a lawsuit, a result which would seriously hamper the cause of justice.” *Id.*; see also David Elder, *Defamation: A Lawyer's Guide* § 2:5 (2014) (absolute immunity for attorney statements “is justified by the public policy which necessitates free and unencumbered exchange of statements in judicial proceedings in order to assist courts in the truth-seeking process. Any

¹ While Florida courts recognize broad immunity for attorneys pursuing the legitimate interests of their clients, see, e.g., *Wolfe v. Foreman*, 128 So.3d 67 (3rd DCA 2013) (dismissing malicious prosecution claim against attorneys), different considerations apply when a client deliberately presents false claims to an attorney. Such misconduct directly implicates the client in the long-standing tort of malicious prosecution. See *Restatement (Second) of Torts* § 587, cmt. (a) (noting tort of malicious prosecution for “the wrongful *initiation* of the proceedings”).

other rule would unduly stifle participants and clog the courts with a multiplicity of suits emanating from prior litigation.”).²

At various points in the counterclaim, Dershowitz advances the argument that the allegations in the joinder motion are somehow “irrelevant” to the federal proceeding. But Jane Doe No. 3 has asserted in her currently-pending federal court pleadings nine different ways in which the allegations against Dershowitz are directly relevant to the case. See Plaintiff’s Resp. to Motion for Limited Intervention by Alan M. Dershowitz, *Jane Does v. United States*, No. 9:08-cv-80736-KAM, DE 291 at 17-26 & n.17 (Jan. 21, 2015). Indeed, in her pleading, Jane Doe No. 3 notes that Dershowitz himself has claimed in the media that he was “targeted” by Jane Doe No. 3 because “that could help [her] blow up the [plea] agreement.” *Id.* at 23. The Court can take judicial notice that rescission of the plea agreement – or, as Dershowitz colorfully puts it, “blowing up” that agreement – is the goal of the federal lawsuit. His identity as an attorney who helped negotiate that agreement is thus highly relevant to the federal case – and was appropriately included in the pleadings.

² In his Counterclaim, Dershowitz also complains about the styling of the signature block by attorney Cassell on the December 30, 2014 pleading, arguing that he did not drop a footnote explaining that the University of Utah was not institutionally endorsing the pleading. But whether or not Cassell styled his signature block correctly did not defame Dershowitz. In any event, Cassell added that standard disclaimer to his signature block on January 2, 2015, so the omission is at most a minor inaccuracy and not actionable. See *Florida Standard Jury Instructions—Civil Cases (No. 00-1)*, 795 So.2d 51, 57 (Fla.2001) (instructing juries to “disregard any minor inaccuracies that do not affect the substance of the statement.”). In addition, the missing footnote was merely a single instance of a mistake, which is not actionable. See *Craig v. Moore*, 4 Media L. Rep. (BNA) 1402, (Fla. Cir. Ct. Duval Cnty. 1978) (copy attached as Exhibit 1).

Dershowitz's claims of "irrelevancy" also misstate the applicable test for what materials are protected by the litigation privilege. The proper test is "not technical legal relevancy but instead a general frame of reference and relationship to the subject matter of the action," *Flugge v. Wagner*, 532 N.W.2d 419, 422 (S.D. 1995). The appropriate inquiry is thus not whether the allegations were relevant to the case, but only whether they were "pertinent": "Only those statements that are so palpably irrelevant to the subject matter of the controversy that no reasonable man can doubt their irrelevancy and impropriety are not covered by the [litigation] privilege." *Miller v. Reinert*, 839 N.E.2d 731, 735 (Ind. Ct. App. 2005). The statements in question are clearly pertinent to the federal action.

Finally, at various points in the Counterclaim, Dershowitz alleges that Edwards and Cassell somehow defamed him by alerting the media to the case³ or providing copies of their December 30 pleading to the media. But this sweeping argument is not the law, as otherwise every law firm website containing recently-filed pleadings would become actionable. *Cf. Cargill Inc. v. Progressive Dairy Solutions, Inc.*, No. CVF-07-0349-LJO-SMS, 2008 WL 2235354, at *6 (E.D. Cal. May 29, 2008) (no defamation action for posting filed complaint on company website). Courts have recognized that "mere delivery of pleadings in pending litigation to members of the news media does not amount to a publication outside of the judicial proceedings, resulting in the waiver of the absolute privilege. The harm resulting to a defamed party from delivery of pleadings in a lawsuit to the news media could demonstratively be no greater than if the news media found the pleadings on their own. Likewise, we conclude that advising the

³ Edwards and Cassell deny that they alerted the media to their filing.

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media that a lawsuit has been filed, including a basic description of the allegations, has no practical effect different from providing the pleadings to the media.” *Dallas Indep. Sch. Dist. v. Finlan*, 27 S.W.3d 220, 239 (Tex. App. 2000) (internal citation omitted); *accord Designing Health, Inc. v. Erasmus*, 2001 U.S. Dist. LEXIS 25952, 12-13, 2001 WL 36134085 (C.D.Cal.2001) (letter and news release to publications announcing suit for misappropriation of trade secrets and other claims were protected by the litigation privilege “because they simply informed the recipients of the pendency of the litigation and the claims asserted”).

All these well-settled principles lead inexorably to the conclusion that Dershowitz has no viable cause of action for statements made in and statements directly concerning the judicial pleadings. Indeed, Dershowitz himself has admitted this very conclusion! In an op-ed in the *Wall Street Journal*, Dershowitz discussed his options for challenging the allegations against him: “Well, at least you can sue for defamation the two lawyers and the woman who made the false charges. No, you can’t your lawyer tells you. They leveled the accusation in a court document, which protects them against the defamation lawsuit as a result of the so-called litigation privilege.” Alan M. Dershowitz, A Nightmare of False Accusation that Could Happen to You, *Wall St. J.*, Jan. 14, 2015 (<http://www.wsj.com/articles/alan-m-dershowitz-a-nightmare-of-false-accusation-that-could-happen-to-you-1421280860>). The Court should simply apply the litigation privilege that Dershowitz himself has acknowledged is applicable here and dismiss Counts I and II of Dershowitz’s Counterclaim based on that privilege.

III. Count II Must Be Dismissed Because It Involves Statements That Are Not Defamatory and are Protected Under the Fair Report Privilege.

Perhaps recognizing that the allegations about the judicial pleadings will not be actionable, Dershowitz moves on to lodge a second count – Count II – which involves statements made by Edwards and Cassell to the media. But here Dershowitz faces a seemingly insurmountable problem: Edwards and Cassell have refused to comment publicly about Jane Doe No. 3's allegations against Dershowitz, preferring instead to simply litigate the matter in court. As a result, Dershowitz is forced rely on the attenuated claim that in making statements that they were not going to comment publicly, Edwards and Cassell somehow “created a false impression” (¶ 38) or “implied” (39) allegations about him. This claim, too, is without merit, because the limited statements they made are not defamatory as a matter of law. And, in any event, any “impression” Edwards and Cassell created was simply a fair report of a judicial filing. The Court should accordingly also dismiss Count II.

A. Edwards and Cassell's Out of Court Statements Do Not Make Allegations Against Dershowitz and are Thus Not Defamatory as a Matter of Law.

At the heart of Count II is the following statement that Edwards and Cassell provided to various media *refusing to comment on the particulars involving Dershowitz*. Edwards and Cassell provided this statement in response to inquiries from media who had heard Dershowitz attack them and called for comment. Edwards and Cassell expressly refused comment on “specific claims” because they did not want to “litgate[] in the press”:

Out of respect for the court's desire to keep this case from being litigated in the press, we are not going to respond at this time to specific claims of indignation by anyone. As you may know, we are litigating a very important

case, not only for our clients but crime victims in general. We have been informed of Mr. Dershowitz's threats based on the factual allegations we have made in our recent filing. *We carefully investigate all of the allegations in our pleadings before presenting them. We have also tried to depose Mr. Dershowitz on these subjects, although he has avoided those deposition requests.* Nevertheless, we would be pleased to consider any sworn testimony and documentary evidence Mr. Dershowitz would like to provide which he contends would refute any of our allegations.

The point of the pleading was only to join two of our clients in the case that is currently being litigated, and while we expected an agreement from the Government on that point, we did not get it. That disagreement compelled us to file our motion. We intend only to litigate the relevant issues in Court and not to play into any sideshow. We feel that is in our clients' best interest and consequently that is what we are doing.

We have every intention of addressing all of the relevant issues in the course of proper legal proceedings. Toward that end we have issued an invitation (a copy of which is attached below) to Alan Dershowitz to provide sworn testimony and any evidence he may choose to make available regarding the facts in our recent pleading that relate to him. The invitation has been extended by Jack Scarola, who is familiar with the issues. We would obviously welcome the same cooperation from Prince Andrew should he choose to avail himself of the same opportunity.

Paul Cassell and Brad Edwards, co-counsel for Jane Doe #3.

Counterclaim, ¶ 31 (first emphasis in bold added; emphasis in italics in original).⁴

⁴ The accompanying invitation that was sent to Dershowitz by Scarola read as follows:

Dear Mr. Dershowitz:

Statements attributed to you in the public media express a willingness, indeed a strong desire, to submit to questioning under oath regarding your alleged knowledge of Jeffrey Epstein's extensive abuse of underage females as well as your alleged personal participation in those activities. As I am sure you will recall, our efforts to arrange such a deposition previously were unsuccessful, so we welcome your change of heart. Perhaps a convenient time would be in connection with your scheduled appearance in Miami on January 19. I assume a subpoena will not be necessary since the deposition will be taken pursuant to your

The first element of a defamation claim is a false and defamatory statement concerning another. *Thomas v. Jacksonville Television, Inc.*, 699 So. 2d 800, 803 (Fla. 1st DCA 1997). As a matter of law, the statement Dershowitz complains about does not amount to defamation. Indeed, the opening sentence makes clear that “to keep this case from being litigated in the press, we are not going to respond at this time to specific claims of indignation from anyone.” Thus, the passage is not addressing the kinds of “specific claims” that Dershowitz is concerned about.

The two specific sentences that Dershowitz highlights are not defamatory and do not concern him. First, the statement “[w]e carefully investigate all of the allegations in our pleadings before presenting them” is simply a description of Edwards and Cassell’s approach to lawyering; it does not specifically apply to Dershowitz – much less defame him. Second, the statement “[w]e have also tried to depose Mr. Dershowitz on these subjects, although he has

request, but please let us know promptly if that assumption is inaccurate. Also, note that the deposition will be video recorded.

Kindly bring with you all documentary and electronic evidence which you believe tends to refute the factual allegations made concerning you in the recent CVRA proceeding as well as passport pages reflecting your travels during the past ten years and copies of all photographs taken while you were a traveling companion or house guest of Jeffrey Epstein’s.

Thank you for your anticipated cooperation.

Sincerely, Jack Scarola

avoided those deposition requests” is a description of the course of litigation that is not defamatory.⁵

Whether the statements in questions are defamatory must also be considered by looking at the context of the statements as a whole. Immediately following the two sentences Dershowitz challenges, Edwards and Cassell specifically stated that they “would be pleased to consider any sworn testimony and documentary evidence Mr. Dershowitz would like to provide which he contends would refute any of our allegations.” This sentence reinforces the fact that Edwards and Cassell were not making specific *substantive* claims in the press release about whether or not sexual abuse had or had not occurred, but rather were making *procedural* representations about how they were handling the case and what types of evidence they were prepared to examine. As lawyers with obligations to continue to monitor their legal allegations for falsity, Edwards and Cassell also made clear that they would review any counter evidence from Dershowitz. The Court can take judicial notice of the fact – and should consider – that in the two months since that invitation, Dershowitz has not provided any such evidence to Edwards and Cassell. Indeed, he has refused to even comply with mandatory discovery requests for this information. **See Plaintiffs’ contemporaneously filed Motion to Compel.**

Dershowitz also relies on Edwards and Cassell’s statement that “[w]e have requested an opportunity to meet with the U.S. Attorney’s Office for the Southern District of Florida so that

⁵ The description of events is also true, as correspondence with Dershowitz amply demonstrates. Indeed, Dershowitz remarkably quotes in his complaint from correspondence by Jack Scarola attempting to take his deposition. Counterclaim, ¶ 36. Dershowitz, however, does not explain how accurately quoting from correspondence can somehow be defamatory.

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we can seek their assistance in presenting evidence (including evidence possessed by the government) that will help Jane Doe #3 respond to these unfair attacks.” Counterclaim, ¶ 34. Stating that attorneys have requested to meet with prosecutors to gather evidence on behalf of their client is not defamation.

Equally meritless is Dershowitz’s argument that Cassell defamed him by “suggesting specific questions [a BBC reporter should] . . . ask Dershowitz in interviews.” Counterclaim, ¶ 30. Dershowitz fails to set out any specific question, which is itself grounds for dismissal. *See Lipsig v. Ramlawi*, 760 So. 2d 170, 184 (Fla. 3rd DCA 2000) (“[t]he general rule in Florida is that allegedly defamatory words should be set out in the complaint for the purpose of fixing the character of the alleged libelous publication as being libel as per se.” (internal quotation omitted)). But more fundamentally, suggesting a question for a reporter to ask is simply not defamation. That the ultimate recipient of a question from the media may prefer “not [to] answer the questions . . . is not sufficient to support his defamation claim. Indeed, . . . it is the paradigm of a properly functioning press.” *Abbas v. Foreign Policy Grp., LLC*, 975 F. Supp. 2d 1, 16-17 (D.D.C. 2013); *see also Phantom Touring, Inc. v. Affiliated Publ'ns*, 953 F.2d 724, 730 (1st Cir.1992) (holding that statements in a series of articles published in the *Boston Globe*, including a rhetorical question regarding whether plaintiff was “trying to score off the success of Andrew Lloyd Webber’s ‘Phantom’” were not defamatory because they “reasonably could be understood only as [the author’s] personal conclusion about the information presented, not as a statement of fact”). As one appellate court explained, “inquiry itself, however embarrassing or unpleasant to

its subject, is not accusation.” *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1094 (4th Cir. 1993).

Whether statements can be reasonably interpreted as defaming a plaintiff is a question of law for the court. *Art. of Living Foundation v. Does*, 2011 WL 2441898 (N.D. Cal. 2011). As a matter of law, the narrow media statements that Dershowitz highlights simply do not defame him.

B. Any Impression Edwards and Cassell Created Was Simply a “Fair Report” of a Filed Judicial Document.

The Court must also dismiss Count II because any “impression” created by Edwards and Cassell was simply a description of the pleadings that had been filed in court. Absolute privilege attaches to a fair report of judicial proceeding. Count II must be dismissed for this reason as well.

The fair report privilege provides that a publication of defamatory matter concerning another in a report of an official proceeding is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported. *See Restatement (Second) of Torts* § 611 (1977). As Florida case law recognizes, the privilege extends to the publication of even the otherwise defamatory contents of official documents, as long as the account is reasonably accurate and fair. *See, e.g., Rasmussen v. Collier Cnty. Pub. Co.*, 946 So. 2d 567, 571 (Fla. 2d DCA 2006). The privilege is most commonly exercised by newspapers and others who are in the business of reporting news to the public. It is not, however, limited to the media, but extends more broadly to any person who makes an oral, written or printed report to pass on the information that is

available to the general public. *See Restatement (Second) of Torts* § 611, cmt. c (1977). The privilege also applies even in situations where the person republishing the information knows them to be false. *Restatement (Second) of Torts* § 611 cmt. a (1967).⁶

The fair report privilege applies to judicial proceedings. *See, e.g., Harper v. Walters*, 822 F. Supp. 817, 824, (D.D.C. 1993), *aff'd*, 74 F.3d 1296 (D.C. Cir.), *cert. denied*, 519 U.S. 809 (1996). Dershowitz's counterclaim alleges that that Edwards and Cassell somehow created a "false impression" by referencing those judicial pleadings. But Edwards and Cassell are certainly entitled to fairly report on those pleadings, particularly where they did nothing more than respond to inquiries from the media. All Edwards and Cassell reported was that they had properly filed pleadings in the federal case. Such a limited statement is not actionable under the fair report privilege, and thus the counterclaim must be dismissed on this ground as well.

CONCLUSION

The Court should dismiss both Counts of Dershowitz's Counterclaim for failure to state a claim on which relief can be granted.

⁶ In light of this breadth of the privilege, the Court can dismiss the complaint as a matter of law, even though Dershowitz has alleged actual malice by Edwards and Cassell. To be clear, Edwards and Cassell deny any such malice.

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I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via E-Serve to all Counsel on the attached list, this 2ND day of March, 2015.



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III

In conclusion, I find the legislative history insufficient to persuade me that we should ignore the plain meaning of the words. Rather, I agree with Judge Tamm: the result of applying Exemption 8 as written is not "absurd," "unreasonable," or "plainly at variance with the policy of the legislation as a whole" * * *." *United States v. American Trucking Ass'ns, Inc.*, *supra*, 310 U.S. at 543. Yet I do not think that our and Congress' result sits entirely comfortably with the broad thrust of the FOIA, or that congressional alterations could not improve enforcement of the Truth in Lending Act. Indeed, the matter is, I believe, in serious need of legislative attention. First, a central proposition underlying Exemption 8 — that certain information must be kept from the public for fear that it will be misunderstood and lead to overreaction — is somewhat inconsistent with the philosophy behind the FOIA.²¹ Second, the mere fact that there is a long-standing tradition of confidentiality for bank records — a tradition occasionally referred to with some reverence in testimony before the Senate subcommittee²² — strikes me as irrelevant. It may be time for a reexamination. Third, the Comptroller's argument that confidentiality is necessary to maintain the smooth functioning of the examination process and the cooperation of bank officials seems to me to be of very limited force. Not only does the Comptroller have a considerable arsenal of weapons at his disposal to compel disclosure,²³ but the costs of employing that arsenal are assessed upon the institutions he supervises.²⁴ Recalcitrance on the part of the banks would therefore lead simply to higher assessments. Further, it should go without saying that preserving good relations between regulators and those they regulate is a goal which, however desirable in moderation, can if overemphasized be flatly inconsistent with the very purposes of regulation itself. Fourth, the present practice of not disclosing the identities of banks which violate the Truth in Lending Act (and of not notifying injured bor-

²¹ See authorities cited at majority op. note 19.

²² See 1964 Senate Hearings, *supra* note 8, at 177c, 179, 191, 549.

²³ See 12 U.S.C. §481 (1976) (giving examiners power to examine all documents and to compel testimony, and setting forth sanctions for failure to cooperate).

²⁴ See 12 U.S.C. §§481-482 (1976).

rowers of violations) may be retarding achievement of substantial compliance with that Act.²⁵

I join, therefore, with appellant in feeling that further study and some change is necessary. But I join with the majority of this panel and the District Court in suggesting that it seek relief from Congress rather than the courts.

CRAIG v. MOORE

Florida Circuit Court
Duval County

GUY R. CRAIG, v. ALLEN MOORE, JOSEPH J. MCCLUSKEY, General Manager of Radio Station WAPE-690; WAPE-690, a radio station licensed to do business in the State of Florida, and S.I.S. RADIO, INC., No. 78-3204-CA, August 30, 1978

REGULATION OF MEDIA CONTENT

Defamation — Defamatory content
(§11.05)Defamation — Standard of liability —
Public official/figure plaintiffs —
Knowledge of falsity (§11.3011)Defamation — Standard of liability —
Public official/figure plaintiffs —
Reckless disregard (§11.3012)

Radio station's broadcast labeling mayor who was running for re-election as "deceptive individual" who "often misleads, if not blatantly lies" to station's reporters is, in mayor's Florida libel action against station, constitutionally protected statement of editorial opinion concerning mayor's fitness for office.

²⁵ This question was slated for further study by the House Committee on Government Operations in its 1977 report. See note 14 *supra*. In the instant case appellant has submitted affidavits suggesting that a policy of disclosure can be an important way of furthering Truth in Lending Act enforcement. See Affidavit of John E. Quinn, Superintendent of the Bureau of Consumer Protection for the State of Maine, February 15, 1977, JA 63a; Affidavit of Lawrence Connell, Jr., Bank Commissioner for the State of Connecticut, March 9, 1977, JA 67a.

Libel action against radio station. On defendants' motion for summary judgment.

Granted.

David U. Tumin and William M. Tomlinson, Jacksonville, Fla., for plaintiff.

Harold B. Wahl and George D. Gabel, Jr., Jacksonville, for defendant.

Full Text of Opinion

Oakley, J.:

This cause came on to be heard on defendants' motion for summary judgment in this libel suit, supported by the pleadings, the depositions of plaintiff and defendants, and various affidavits.

Paragraph 7(A) of the Complaint alleges:

"(A) On or about September 28, 1977, at the peak of a political campaign where in the plaintiff was running for reelection as Mayor of the City of Jacksonville Beach, Florida, the defendant, Allen Moore, as News Director/Commentator of Radio Station WAPE-690, broadcast at 6:00 a.m. a news story about 'beach cleanliness,' concluding therein as follows:

'Well, what else can we expect from Mayor Guy Craig? This deceptive individual who quite often misleads, if not blatantly lies to reporters from this radio station. What often* (sic) could you expect from him? Can you believe people elected him to begin with? Can you believe people will probably reelect him'
*else"

It is clear that at a time of a political election when plaintiff was seeking reelection as mayor, the defendants expressed their opinions or ideas as to the fitness of the plaintiff for public office and why he should not be reelected.

When the mayor's deposition was taken, both he and his counsel conceded, as they necessarily must have done, that the language sued on was an editorial commentary. It was clearly an expression of opinion, as the mayor conceded at pages 27 and 40.

There has been no showing that this expression of opinion was a calculated falsehood. See *Curtis v. Butts* (1967) 388 U.S. 130, at 153, [1 Med.L.Rptr. 1568] where the court said that the burden was on the plaintiff to prove "in effect, a calculated falsehood". There is no evidence of any kind, let alone evidence of convincing clarity [as required by *New York Times v. Sullivan* (1964) 376 U.S. 254, [1 Med.L.Rptr. 1527] and succeeding cases] that defend-

ants made this statement knowing it to be false or having serious doubts as to its truth with intent to harm through falsehood. On the other hand, there is no dispute but that the defendant Moore, as News Director of the station, had reports from his reporters, and others, that the mayor could not be relied upon and that they could not trust his statements; that the publication was merely an honest expression and opinion based upon the experiences with the mayor.

As stated in *Gertz v. Welch* (1974) 418 U.S. 323 [1 Med.L.Rptr. 1633] at 344 and 345:

"An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case. And society's interest in the officers of government is not strictly limited to the formal discharge of official duties. As the court pointed out in *Garrison v. Louisiana*, 379 U.S. at 77, 13 L.Ed 2d, 125, 85 S.Ct. 209, the public's interest extends to 'anything which might touch on an official's fitness for office. . .'. Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character."

* * *

". . . the communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them. No such assumption is justified with respect to a private individual. He has not accepted public office or assumed an 'influential role in ordering society'. *Curtis Publishing Co. v. Butts*, supra, at 164, 18 L.Ed. 2d 1094 (Warren, C.J., concurring in the result.)" (Italics here and elsewhere added unless otherwise indicated.)

Further it is stated at pages 339 and 340:

"Under the First Amendment *there is no such thing as a false idea*. However pernicious an opinion may seem, we depend for its correction not on the consciences of judges and juries but on the competition of other ideas."

For plaintiff to recover for libel he must show "by proof of convincing clarity that the publication was false and that the defendants either knew it was false or had se-

rious doubts (reckless disregard) as to its truth". See *New York Times*, supra, at 286; *St. Amant v. Thompson* (1968) 390 U.S. at 731 [1 Med.L.Rptr. 1586]; and *Beckley v. Hanks* (1967) 389 U.S. at 83 [1 Med.L.Rptr. 1585].

The burden is on the plaintiff to prove in effect "a calculated falsehood". *Curtis*, supra, at 153.

Defendant is not required to have even "a reasonable belief" in the truth of the publication. *Garrison v. Louisiana* (1964) 379 U.S. 64 at 78 and 79.

A case strikingly similar to this one is that of *Palm Beach Newspapers v. Early* (Fla. D.C.A.4, 1976) 334 So.2d 50, cert. den., 354 So.2d 351, where the trial jury gave a million dollar verdict to the plaintiff county school superintendent after the newspaper had run several hundred articles, which was reversed completely on appeal. As stated on page 51 of the Opinion:

"... Both papers, through their respective editorial and news staffs, embarked upon a concerted campaign admittedly designed to bring about the removal of Mr. Early from his elected position. In pursuance of this objective, the defendants published over a period of approximately fourteen months several hundred news articles and editorials, all of which were generally hostile to or critical of Early and many of which were of a defamatory nature."

See further on page 52:

"Plaintiff/appellee complained that the defendants characterized his tenure in office as unsuccessful, and stated that he was unfit to hold the office of Superintendent of Public Instruction because of his ineptness, incompetence and indecisiveness. All of these charges were clearly matters of opinion, not statements of fact, and were proper subject of comment on a public official's fitness for office."

We quote further on pages 53 and 54:

"Most of the articles and cartoons would fall in the category of what the courts have chosen to call 'rhetorical hyperbole' or 'the conventional give and take in our economic and political controversies.' In this category were statements to the effect that public confidence in the school system was eroding, that the public was clamoring for new leadership in the school system, that plaintiff enjoyed TV and news exposure, that plaintiff had not, prior to his election, held an administrative position in the school system higher than acting principal, and

such cartoons as depicted the school buildings falling down or crumbling under plaintiff's leadership, as typical examples.

We do not here attempt to discuss or classify more than a smattering of the several hundred derogatory articles and cartoons which defendants published of and concerning plaintiff. Suffice it to say that while most of the articles and cartoons can fairly be described as slanted, mean, vicious, and substantially below the level of objectivity that one would expect of responsible journalism, there is no evidence called to our attention which clearly and convincingly demonstrates that a single one of the articles was a false statement of fact made with actual malice as defined in the *New York Times* case. We thus conclude that the defendants' motion for a directed verdict at the close of the evidence should have been granted by the trial court. The judgment is therefore reversed and the cause remanded with directions to enter a judgment in favor of the defendants."

The *Early* decision was not only upheld by the Florida Supreme Court when it denied certiorari, but is supported by the decisions of the United States Supreme Court. In *Greenbelt v. Bresler* (1970) 398 U.S. 6 [1 Med.L.Rptr. 1589], at 11, 14 and 15, charges of "blackmail" were held insufficient; in *Old Dominion Letter Carriers v. Austin* (1974) 418 U.S. 264, the charge of being a "traitor" was held insufficient; in *Curtis v. Birdsong* (C.A.5 1966) 364 F.2d 344, at 348, the charge of being a "bastard" was held insufficient; and in *Time v. Johnston* (C.A.4 1971) 448 F.2d 378, at 384, the charge of being "destroyed" was held insufficient; the courts in all those cases holding the charges were merely "rhetorical hyperbole" and the "conventional give and take in our economic and political controversies". See also *Bennett v. Transamerican Press* (U.S.D.C. Iowa 1969) 298 F.Supp. 1013, where a charge against a legislator that he was a "liar" was held to be merely the expression of the opinion of the writer, and not libelous under the *New York Times* standard.

In addition to the *Bennett* case where the court held that the word "liar" was not actionable, the Illinois court has likewise held the word "liar" would be non-actionable in an appropriate context such as here. See *Wade v. Sterling Gazette Co.* (Third District, 1965) 56 Ill.App.2d 101.

Other cases have held non-actionable the words "lousy agent", *Valentine v. North American Co.* (Ill. Third District, 1973) 16 Ill.App.3d 227; "scab" and "traitor", *Old*

Dominion Letter Carriers v. Austin (1974) 418 U.S. 264; "dishonorable and deluded", *Delis v. Sepsis*, (Ill.App., 1972) 9 Ill.App.3d 317; "fixes parking tickets", (Ill.App., 1967), *Kansler v. Chicago American Publishing Co.*, 82 Ill.App.2d 86; "nut", "mishuginer" and "screwball", *Skolnick v. Nudelman*, (Ill.App., 1968), 95 Ill.App.2d 293, 237 N.E. 2d 804; "completely loses his cool, turns purple * * * Prussian dictator", (Ill.App., 1973) *Von Solbrig v. Licata*, 15 Ill.App.3d 1025, 305 N.E. 2d 252; and "asshole", *McGuire v. Jankiewicz*, (Ill.App., 1972), 8 App.3d 319, 290 N.E.2d 675.

The courts have held that these expressions "may be characterized as extreme, bitter, and may hold up plaintiffs to execration, yet are not libelous per se".

In *Cohen v. New York Times* (1912), 153 App.Div. 242, 138 N.Y.S. 2d 206, someone, friend or foe, inserted an advertisement in the New York Times that Cohen had died on May 6. Cohen sued the newspaper. His complaint was dismissed, the Court saying at page 246:

"Such publication may be unpleasant; it may annoy or irk the subject thereof, it may subject him to joke or jest or banter from those who knew him, even to the extent of affecting his feelings but this is not enough".

Forty years later a similar joke was played on John Cardiff. The announcement went a step further and stated that the plaintiff was lying "in state at 566 4th Avenue" which was the address of his saloon. Still the Court held there was no libel, *Cardiff v. Brooklyn Eagle Inc.*, (1947), 190 Misc. 730, 733, 75 N.Y.S. 222, holding:

"At its worst the publication might cause some amusement to the plaintiff's friend. But it is difficult to see where his reputation would be impaired in the slightest degree and the law of defamation is concerned only with injuries thereto."

In *Kimmerle v. New York Evening Journal, Inc.*, (1933) 262 N.Y. 99, the plaintiff was described as being courted by a murderer who had left "a dirty, blood-stained record behind" him in Chicago and who was later hung. In dismissing the complaint, the Court of Appeals said (262 N.Y. at 103):

"Embarrassment and discomfort no doubt came to her from the publication, as they would to any decent woman under like circumstances. Her own reaction, however, has no bearing on her reputation . . . We are unable to find anything in this article which could ap-

preciably injure the plaintiff's reputation".

Nor is it libelous to charge an individual with a single mistake or of acting foolishly on a single occasion.

This principle is well illustrated by *Twiggar v. Ossining Printing & Publishing Co.* (1914), 161 App.Div. 718, 146 N.Y.S. 429, where the article said that the plaintiff, a dentist, had removed the root of a tooth so unskillfully that three other teeth were exposed, and a cavity in the roof of the patient's mouth and a disease of the gums and jaws set in. The Court held that infallibility is not a human trait and even the most skillful may make a mistake on a single occasion, so that the assertion of a single act of negligence was not libelous.

See also *Battersby v. Collier*, (1898) 34 App.Div. 347, 54 N.Y.S. 363; *Arnold Bernhard & Co., Inc. v. Finance Publishing Corp.*, (1968), 32 A.D.2d 516, 298 N.Y.S.2d 740; *Hirschhorn v. Group Health Ins.*, (1958), 13 Misc. 2d 338, 175 N.Y.S.2d 775; *Cowan v. Time Inc.*, (1963) 41 Misc.2d 198, 245 N.Y.S. 2d 723.

One of the strongest cases is the decision of the United States Court of Appeals for the 2nd Circuit in *Hotchner v. Castillo-Puche* (1977), 551 Fed.2d 910 [2 Med.L.Rptr. 1545]. There, the author described the plaintiff "as a manipulator, a 'toady', a 'hypocrite' and 'exploiter' of Hemingway's reputation, who was never 'open and above board'." The author also said about plaintiff, "I don't really trust him."

The lower Court entered up judgment for the plaintiff which was reversed by the Court of Appeals, and the United States Supreme Court denied certiorari at

U.S. . . the key point of the opinion is found at page 913;

"A writer cannot be sued for simply expressing his opinion of another person, however unreasonable the opinion or vituperous the expressing of it may be. See *Gertz v. Robert Welch*, 418 U.S. at 339-40; *Buckley v. Littell*, 539 Fed.2d 882 at 893."

The *Hotchner* case is squarely in point here. The defendants merely express their opinion of Mayor Craig and there can be no recovery "however unreasonable the opinion or vituperous the expressing of it may be."

See also *Edwards v. National Audubon Society*, et seq. USCA 2 [2 Med.L.Rptr. 1849] (1977) 556 Fed. 2d 113, cert. den. U.S. . . ; and *Rinaldi v. Holt*, (N.Y. 1977) 42 N.Y. 2d, 396, 2 Med.L.Rptr.

2169. There, New York's highest Court upheld Summary Judgment against the plaintiff public official and said at 2 Med.L.Rptr. 2173;

"The expression of opinion, even in the form of pejorative rhetoric, relating to fitness for judicial office or to performance while in judicial office, is safeguarded. (Cf., *Old Dominion Branch No. 496, Assn. of Letter Carriers v. Austin*, 418 U.S. 264, 283-284.) Erroneous opinions are inevitably made in free debate but even the erroneous opinion must be protected so that debate on public issues may remain robust and unfettered and concerned individuals may have the necessary freedom to speak their conscience. (See *New York Times Co. v. Sullivan*, 376 US 254, 271-272, supra.) Plaintiff may not recover from defendants for simply expressing their opinion of his judicial performance, no matter how unreasonable, extreme or erroneous these opinions might be. (See *Hotchner v. Castillo-Puche*, 551 F.2d 910, 912.)

The publisher had accused the plaintiff, Judge Rinaldi, of being incompetent, stated that he should be removed from office, and that he was probably corrupt. Nonetheless, the Court held defendants had the right to have and express their opinion.

What is expressed in an editorial opinion like that here is a matter which is beyond the reach of libel law. The plaintiff who claims he has been libeled by another's published opinion of him, if he is a public official, cannot, consistent with the First Amendment, sue the publisher for having expressed his opinion. Such an action constitutes an "impermissible intrusion into the function of editors," *Miami Herald Publishing Co. v. Tornillo*, (1974), 418 U.S. 241 [1 Med.L.Rptr. 1898], 258. In *Tornillo*, the Supreme Court invalidated a Florida statute granting a political candidate equal space for reply in newspapers which were editorially critical of him, saying:

"The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and the treatment of public issues and public officials - whether fair or unfair - constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with the First Amendment guarantees of a free press as they have evolved to this time." 418 U.S. at 258.

Cf. *Columbia Broadcasting System, Inc. v. Democratic National Committee*, (1973)412 U.S. 94 [1 Med.L.Rptr. 1855] (broadcaster has right to refuse paid editorial advertisements; where the Court said: "For better or worse, editing is what editors are for; and editing is selection and choice of material." 412 U.S. at 124.)

Beyond their specific holdings, *Tornillo* and *CBS* serve as a reminder that any "intrusion into the function of editors" cannot be permitted under the First Amendment; to forget that reminder is to run the risk that "uninhibited, robust and wide-open" debate, *New York Times v. Sullivan*, (1964) 376 U.S. 254, 271, will be lost, and that the expression of personal opinions and views which is fundamental to vigorous debate will be stifled.

The editorial in question here is an expression of opinion for which the plaintiff cannot constitutionally recover in a libel action. Accordingly, the defendants' Motion for Summary Judgment must be sustained.

The burden is on plaintiff to prove his case by "clear and convincing" evidence. *Gertz v. Robert Welch, Inc.*, (1974) [1 Med.L.Rptr. 1633] 418 U.S. 323, 342; *Beckley Newspapers Corp. v. Hanks*, (1967) [1 Med.L.Rptr. 1585], 389 U.S. 81, 83; *New York Times v. Sullivan*, (1964) [1 Med.L.Rptr. 1527] 376 U.S. 254, 285-286. Accordingly, the plaintiff must show, when challenged by the Motion for Summary Judgment filed by the defendants, that the evidence he will introduce at trial will establish constitutional malice with the convincing clarity required of him. *Fadell v. Minneapolis Star & Tribune Co., Inc.* (U.S.C.A. 7 1977) 557 F.2d 107 [2 Med.L.Rptr. 2198], cert. den. (1977) U.S. 98 S. Ct. 508, aff'g (N.D. Ind. 1976) 425 F.Supp. 1075 [2 Med.L.Rptr. 1961]; *Carson v. Allied News Co.*, (U.S.C.A. 7 1976) 529 F.2d 206; *Bon Air Hotel, Inc. v. Time, Inc.*, (U.S.C.A. 5 1970) 426 F.2d 858; *Wasserman v. Time, Inc.* (U.S.C.A.D.C. 1970) 424 F.2d 920 (Wright, J., concurring); *United Medical Laboratories v. Columbia Broadcasting System* (U.S.C.A. 9 1968) 404 F.2d 706; *Washington Post Co. v. Keogh* (U.S.D.C. 1966) 365 F.2d 965; *Hutchinson v. Proxmire*, (W.D. Wis. 1977) 431 F.Supp. 1311; affirmed (U.S.C.A. 7 1978) -F.2d-, 4 Med. L. Rptr. 1016 (involving Senator Proxmire's "opinion" of plaintiff Hutchinson); *Wolston v. Reader's Digest Assn., Inc.*, (D.C.D.C. 1977) [2 Med.L.Rptr. 1289]; 429 F.Supp. 167; *Oliver v. Village Voice, Inc.*, (S.D.N.Y. 1976) 417 F.Supp. 235; *Raganov v. Time, Inc.*, (M.D. Fla. 1969) 302 F.Supp.

1005; *Bandelin v. Pietsch*, (1977) 98 Idaho 337, 563 P.2d 396 [2 Med.L.Rptr. 1600]; *Johnson v. Capital City Press*, (La. 1977) 346 So.2d 280 [2 Med.L.Rptr. 2255]; *Adams v. Frontier Broadcasting Co.*, (Wyo. 1976) 555 P.2d 556 [2 Med.L.Rptr. 1166]; *O'Brien v. Tribune Publishing Co.*, (1972) 7 Wash.App. 107, 499 P.2d 24.

The court in *Bandelin v. Pietsch*, supra, said as follows in upholding Summary Judgment:

"When a defendant's communications are constitutionally privileged [under *New York Times*], a plaintiff cannot prevail at trial unless he establishes malice with convincing clarity. This is the standard against which the court must examine the evidence on motion for summary judgment because this is the standard that determines materiality of disputed questions of fact. Unless there is evidence which if believed by a jury would establish malice clearly and convincingly, a defendant is entitled to summary judgment. Disputed issues of fact that if resolved in favor of the plaintiff would still fall short of establishing malice with convincing clarity are not material." 563 P.2d at 399.

The plaintiff cannot resist the defendants' Motion for Summary Judgment merely by arguing that there is an issue for the jury as to malice, unless he makes some specific showing from which malice may definitely be inferred. *Thompson v. Evening Star Newspaper Co.*, (1968) 129 U.S. App.D.C. 299, 394 F.2d 774; *Johnson v. Capital City Press*, (La. 1977) 346 So.2d 820. It is not enough for the plaintiff to allege that a defamatory falsehood has been published, or that the defendant acted carelessly; absent proof with "convincing clarity", summary judgment must be granted to the defendants. *Fadell v. Minneapolis Star & Tribune Co., Inc.* (U.S.C.A. 7 1977) 557 F.2d 107 [2 Med.L.Rptr. 2198], cert. den. (1977) U.S. 98 S.Ct 508, aff'g (N.D. Ind. 1976) 425 F.Supp. 1075 [2 Med.L.Rptr. 1961].

To require the defendants to incur the further expense of a trial in this matter, where on this record there is no proof, let alone clear and convincing proof, of constitutional malice on their part, would be wholly contrary to the command of the *New York Times v. Sullivan* principle. In *Fadell v. Minneapolis Star and Tribune Co., Inc.*, supra, the district court stated:

"It is in order to prevent the 'chilling effect' of such burdens on the press, and to facilitate free debate on issues of pub-

lic concern that the courts have more and more taken the position that the First Amendment issues which arise out of libel suits should be disposed of on summary judgment where a public official plaintiff has failed to establish 'actual malice' . . .

"In *Washington Post Co. v. Keogh*, [supra], the court stated: . . .

"In the First Amendment area, summary procedures are even more essential. For the stake here, if harassment succeeds, is free debate. One of the purposes of the [*New York Times v. Sullivan*] principle, in addition to protecting persons from being cast in damages in libel suits filed by public officials, is to prevent persons from being discouraged in the full and free exercise of their First Amendment rights with respect to the conduct of their government. The threat of being put to the defense of a lawsuit brought by a public official may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself especially to the advocates of unpopular causes."

See also *Guitar v. Westinghouse Electric Corp.*, supra, 396 F.Supp. at 1053 ("Summary judgment is the rule, and not the exception, in defamation cases" (emphasis in original); *Grant v. Esquire, Inc.*, 367 F.Supp. 876, 881 (S.D.N.Y. 1973) (public figure plaintiff must "make a far more persuasive showing than required of an ordinary litigant in order to defeat a defense motion for summary judgment.")

In *Jenoff v. Hearst* (U.S.D.C. Md. 1978) F.S. 4 Med.L.Rptr. 1023 at 1028, as late as June 27, 1978, the court held, citing authorities:

"Of course, where the actual malice standard of *New York Times v. Sullivan* is applicable, the granting of summary judgment is the rule, rather than the exception because of the difficulty encountered by a plaintiff in showing the existence of actual malice. *Anderson v. Stanco Sports Library*, 542 F.2d 638, 640 (4th Cir. 1976); *Time, Inc. v. Johnston*, 448 F.378 (4th Cir. 1971) at 383-84."

There are discussed hereinafter the Florida cases, including many from Duval County, upholding the right of the media defendant to summary judgment in situations like that here.

Of interest is the decision of the United States Court of Appeals for the Second Circuit in *Lando v. Herbert* (1977) 568 F.2d 974 [3 Med.L.Rptr. 1241], which went so far as to prevent pretrial discovery or dis-

closure of the editorial process of the press in deciding what to publish.

Plaintiff contends that he is entitled to recover in an individual capacity even if he cannot recover as mayor. Unfortunately for plaintiff, this contention has been squarely rejected in both *Gertz*, supra, and *Garrison*, supra, where the court held that "the public's interest extends to anything which might touch on an official's fitness for office and that few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though those characteristics may affect the official's private character" and defendants' First Amendment protection "is not rendered inapplicable remedy because an individual's private reputation, as well as his public reputation, is harmed". See 379 U.S. at 77.

In sum, this court holds that here the news media defendants, as they had a right to do, expressed their opinion of plaintiff's fitness for office and of the way in which he handled that office and his dealings with the press and public; that there is no showing under the *New York Times* cases which permit recovery.

Under the circumstances, it is the court's duty to enter up summary judgment to avoid the expense, delay, and hazard of a trial and to protect the First Amendment rights of the news media. See *Bon Air Hotel v. Time* (C.A.5 1970) 426 F.2d 858, 863-865, pointing out why summary judgment is required. See also *Washington Post v. Keogh* (U.S.C.A. D.C. 1966) 365 F.2d 965 at 968, cert. den., 385 U.S. 1011, holding that "in the First Amendment area summary procedures are even more essential".

Bishop v. Wometco (Fla. D.C.A.3 1970) 235 So.2d 759 (cert. den. at 240 So.2d 813) upheld summary judgment and quotes many of the same authorities cited in *Bon Air*. It also calls attention to the fact that the court in *White v. Fletcher* (Fla. 1956) 90 So.2d 129, affirmed summary libel judgment (for defendant) and "anticipated the later decision in *New York Times*".

Among the other Florida cases upholding summary judgments for the news media in such situations (and where the showing for the plaintiff was more and that for the media was less, if anything, than here) are *Hill v. Lakeland Ledger* (Fla. D.C.A.2 1970) 231 So.2d 254; *Amos v. Florida Publishing Company* (Fla. C.C. Duval 1964) 23 Fla. Supp. 169; *Barrow v. Florida Publishing Company* (Fla. C.C. Duval 1965), affirmed per curiam at 178 So.2d 28, cert.

dismissed at 183 So.2d 215; *Carroll v. Florida Publishing Company* (Fla. C.C. Duval 1965) 25 Fla. Supp. 5; *West v. Florida Publishing Company* (Fla. C.C. Duval 1968) 30 Fla. Supp. 1; *LaBruzo v. Miami Herald* (Fla. C.C. Dade 1971) 36 Fla. Supp. 1; *Sullivan v. Florida Publishing Company* (Fla. C.C. Duval 1966) 26 Fla. Supp. 57; *Merritt-Chapman v. Associated Press* (Fla. C.C. Dade 1970) 33 Fla. Supp. 102; *MacGregor v. Miami Herald* (Fla. D.C.A.2 1960) 119 So.2d 85; *Walker v. Times Publishing Co.* (C.C. Pinellas 1965) 26 Fla. Supp. 90; *Menendez v. Key West Newspaper Corp.* (Fla. D.C.A.3 1974) 293 So.2d 751; and *Nelson v. Globe Communications* (C.C. Duval 1977) 45 Fla. Supp. 48 [2 Med.L.Rptr. 1219].

See also the decision of the Supreme Court of Florida in *Florida Publishing Company v. Fletcher* (1976) 340 So.2d 914 [2 Med.L.Rptr. 1088], cert. den. (5-25-77)

U.S. , where the Supreme Court of Florida reversed the District Court of Appeal and upheld summary judgment entered by the Duval County Circuit Court for the newspaper at 40 Fla. Supp. 1; and *Ocala Star-Banner v. Damron* (1971) 401 U.S. 295 [1 Med.L.Rptr. 1624], where the United States Supreme Court reversed a libel judgment for the plaintiff which the District Court of Appeal and the Florida Supreme Court had refused to set aside. Thereafter when the case came back, summary judgment was entered by the same judge who had upheld the original judgment to the plaintiff, and the First District Court of Appeal unanimously affirmed at 263 So.2d 291, stating at page 292:

"Apparently the Federal Supreme Court has ruled that a public figure is without recourse when the news media, without proof of 'express malice', of 'convincing clarity' chooses to publish defamatory falsehoods about such public figure. Thus we are compelled to affirm the (summary) judgment appealed."

As late as April 26, 1978, the Supreme Court of the United States again affirmed freedom of speech and of the press granted by the Constitution. We quote from *First National Bank of Boston v. Bellotti* (April 26, 1978), U.S. , 55 L.Ed.2d 707, at 717 [3 Med.L.Rptr. 2105], 718:

"The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment . . . Freedom of discussion, if it would fulfill its historic function in this

nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.' *Thornhill v. Alabama*, 310 U.S. 88, 101-102, 84 L.Ed. 1093, 60 S.Ct. 736 (1940)."

* * * *

"As the Court said in *Mills v. Alabama*, 384 U.S. 214, 218, 16 L.Ed.2d 484, 86 S.Ct. 1434 (1966), 'there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.'"

* * * * *

A very recent case is the decision of the United States Court of Appeals for the Third Circuit in *Pierce v. Capital Cities Communications* (April 12, 1978) 576 F.2d 495, 3 Media Law Reporter 2259, where the court under the First Amendment upheld summary judgment and where the Media Law Reporter Headnote reads:

"CA 3: Federal district court did not err in granting summary judgment for television station in libel action brought by former chairman of Delaware River Port Authority for station's broadcast of program concerning port authority, based on evidence demonstrating that broadcast's only false statement was 'honest utterance, even if inaccurate,' on evidence showing that certain other statements challenged as libelous would be construed by reasonable viewers as hyperbole, and on finding that station's failure to positively rule out possibility that plaintiff used insider information did not constitute actual malice."

In *Wolston v. Reader's Digest* (U.S.C.A. - D.C. 1978) F.2d , 3 Media Law Reporter 2334, the court upheld summary judgment for the publisher, and affirmed the trial court in holding that whether plaintiff was a public figure was a question of law for the court. We quote from page 2335:

"PUBLIC OR PRIVATE FIGURE - A QUESTION OF LAW

The District Court held that whether *Wolston* was a public figure was a question of law, to be decided by the court. *Wolston* contends that in this the court erred because 'this complex factual question . . . whether plaintiff is a public figure is properly a jury matter.' We think the District Court was right. In *Rosenblatt v. Baer*, 383 U.S. 75, 88 [1Med.L.Rptr. 1558] (1966) the Court

remarked that 'as is the case with questions of privilege generally, it is for the trial judge in the first instance to determine whether the proofs show respondent to be a 'public official'. We think the same rule should be applied when the question is whether a plaintiff is a 'public figure'. The Court observed '[s]uch a course will both lessen the possibility that a jury will use the cloak of a general verdict to punish unpopular ideas or speakers, and assure an appellate court the record and findings required for review of constitutional decisions.' 383 U.S. 88 n.15. We add that a jury of laymen is hardly qualified to apply the nice and sometimes intricate distinctions between public and private figures which have been developed in the cases following *New York Times Co. v. Sullivan*, 376 U.S. 254 [1 Med.L.Rptr.1527] (1964)."

The Court further said at page 2339:

"We reject the argument that *Barron* was reckless because he failed to make inquiry to verify the statements in the F.B.I. report. *Failure to investigate does not itself establish bad faith or recklessness.* *New York Times Co. v. Sullivan*, 376 U.S. 254, 287-88 [1 Med.L.Rptr. 1527] (1964); *St. Amant v. Thompson*, 390 U.S. 727, 733 [1 Med.L.Rptr. 1586] (1968)." (underlining added.)

Construing the case here most strongly against the defendants there is no basis on which a jury could find proof of convincing clarity of calculated falsehood. The decisions of the United States Supreme Court and of the Florida courts make it clear that summary judgment is the remedy in a situation of this kind.

IT IS ORDERED that the plaintiff *Craig* take nothing by his suit; that each of the defendants go hence without delay, and that each of the defendants have and recover its or his costs from the plaintiff, such costs to be hereafter taxed by the court.

DONE AND ORDERED at Jacksonville, Duval County, Florida, this 30th day of August, 1978.