***Case Title: Ricardo Zarattini Filho v. Diario de Pernambuco (REsp 1.369.571/PE Superior Court of Justice)***

**Case Analysis**

***Meta-Data*:**

* **Case Number**: RE Nº .1.369.571 (2011/0234963-0)
* **Date of decision**: 10-28-2016
* **Featured case**: N/A
* **Region**: Latin America and Caribbean
* **Country**: Brazil
* **Type of expression**: Journalistic / Media Outlets
* **Judicial Body**: Superior Court of Justice (STJ) .
* **Type of law**: Constitutional law; Civil law.
* **Main Themes**: Right to be forgotten; defamation/reputation; Freedom of Expression; Freedom of the Press; .
* **Outcome**: Affirmed Lower Court; Right to be forgotten affirmed;
* **Status**: On appeal
* **Tags**: Right to be forgotten; Violation of Personality Rights; Freedom of Expression; freedom of the Press; Liability of Press for Third Party Statements.

**Case Tracking**

<https://processo.stj.jus.br/processo/revista/documento/mediado/?componente=ITA&sequencial=1519492&num_registro=201102359630&data=20161028&formato=PDF>

***Analysis:***

* **Summary and Outcome**:
* **a. Summary.** In 1993, Diario de Pernambuco, a local media outlet, published an interview of a political figure of Brazilian Dictatorship who accused Ricardo Zarattini Filho of being responsible for a bomb explosion in Recife airport on July 25, 1966 (during the dictatorship regime). Zarattini, a former activist during the dictatorship, was cleared of charges in the 80’s. He filed a lawsuit for compensation for moral damages against Diario de Pernambuco in the first instance of Pernambuco State Court of Justice. The first instance had condemned the newspaper to pay damages to Zarattini. The decision was overturned by the second instance of Pernambuco State Court (TJPE). The plaintiff appealed to the Superior Court of Justice, which affirmed the lower court decision. The case is currently awaiting trial at the Federal Supreme Court. ,
* **b. Outcome.** The Superior Court of Justice overturned the decision made by Pernambuco State Court stating that the publication of the interview violated the rights of personality of Ricardo Zarattini, which held the newspaper Diário de Pernambuco liable for moral damages in the amount of R$ 50,000.00. Justice Rapporteur Paulo de Tarso Sanseverino stressed that the freedom of press and freedom of expression must be limited when the result of a publication may interfere with the principle of human dignity. He held that the facts indicated in the publication were granted amnesty by the Brazilian State (Amnesty Act). Therefore, the right to be forgotten would apply in this case. The defendant appealed to the Supreme Court, which declared the general repercussion of the issue. ,
* **Facts**:

1. **Facts giving rise to cause of action**

The local newspaper Diário de Pernambuco published an interview in which a third party, Wandekolk Wanderley, claimed that political figure (former congressman) Ricardo Zarattini was the culprit for terrorism crimes against the dictatorial military regime in Brazil, including a bombing of Guararapes Airport, which occurred in July 1966, in the city of Recife, Pernambuco. Zarattini was cleared of charges in the 80’s. He filed a lawsuit for compensation for moral damages against Diario de Pernambuco in the first instance of Pernambuco State Court of Justice. The first instance had condemned the newspaper to pay damages to Zarattini. The decision was overturned by the second instance of Pernambuco State Court (TJPE). The plaintiff appealed to the Superior Court of Justice.

1. **Cause of action or law at issue**

Ricardo Zarattini subsequently filed a suit against the news outlet claiming damages. He alleged violation of his honor and human dignity, under articles 5º, X, and 1º, III, of the Federal Constitution and unlawful conduct, on the basis of articles 186 and 927 of the Civil Code.

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1. **Procedural history**

The first instance had condemned the newspaper to pay damages to Zarattini. The defendant appealed and the decision was overturned by the second instance of Pernambuco State Court (TJPE). The plaintiff appealed to the Superior Court of Justice. After analyzing the case, the third panel of the Superior Court of Justice (“STJ”) granted a Special Appeal (Recurso Especial or REsp) which reestablished the understanding of the first instance of the lower Court that Zarattini’s personality rights were in fact violated by the unlawful publication, granting him compensation for moral damages. An Extraordinary Appeal (RE) was issued to the Federal Supreme Court, where the case is currently suspended for the analysis of Justice Roberto Barroso and awaiting trial.

* **Decision Overview**:

1. **Deciding judge & type of opinion**

The Special Appeal was analyzed by the third panel of the Superior Court of Justice, in accordance with the vote of. Justice Paulo de Tarso Sanseverino.

1. **Issue statement**

The main issue before the court was whether the newspaper publication infringed the plaintiff's human dignity, right to be forgotten and honor and should be held liable or it is protected by the right to freedom of expression. Some of the main points raised by the Justice were that the newspaper “should have made the necessary reservations in order to preserve the moral integrity of the appellant or, at least, give him space to exercise his right of reply to the accusations made by the interviewee”. Also, he stressed that the right to dignity guaranteed by the Brazilian Constitution included the right to be forgotten, which was especially true in the case due to the applicability of the Amnesty Actto all criminal activity performed by or against the military regime in Brazil.

1. **Parties’ arguments**

Ricardo Zarattini claimed his personality rights had been infringed by the false attribution of authorship of criminal activity to him (slander), which resulted in considerable moral damages. He argued that the investigations on the bomb explosion at the airpoirt and the criminal prosecution resulted in an acquittal. Zarattini added that the attack was conducted by “AP” and he was never a member of this organization. Lastly, he stated the defendant’s conduct was unlawful either by voluntary action, or through negligence and imprudence, which raises a legal basis for seeking damages, under arts. 186 and 927 of the Civil Code.

Diário de Pernambuco affirmed that the publication was merely informative and that the interviewee's statements were spontaneous, having occurred without any interference from the reporter responsible for the interview. It held that holding newspaper companies accountable for third-party allegations in publications would unduly restrict the right to freedom of press.

1. **Court’s rulings & legal grounds**

In 1997, the first instance determined the newspaper to pay R$ 700,000.00 (seven hundred thousand reais), claiming that “the newspaper did not adopt the necessary reservations in order to preserve the moral integrity of the plaintiff”. The judge cited the historical controversy over the Brazilian dictatorial regime and the general Amnesty Law (in relation to both the perpetrators and enemies of the dictatorial state) as reasons why the newspaper should have been especially cautious about the publication. He also affirmed that the thesis of the plaintiff's guilt for the attack on the airport “was not supported on material grounds”. For that reason, he considered that the public image of the plaintiff was violated, which would justify compensation.

The decision was, however, overturned at the Pernambuco State Court of Appeals (Tribunal de Justiça do Estado de Pernambuco), which considered that the right to honor and image must be compatible with the right to information and freedom of expression, in such a way that the journalistic article, “which only seeks to bring information”, can be considered abusive and cause injury to the person being reported “only when it treats the case lightly”. The publication of an interview with a third party about a “controversial” historical fact was not considered as “a defamatory matter or even harmful” to the plaintiffs.

Furthermore, they considered that “the liability of communication vehicles occurs when it publishes news that it knows to be false”. The State Court stated that the newspaper did not intend to harm the honor and morals of the plaintiff. They concluded that, when weighing the conflicting constitutional values (right to freedom of information vs. right to the inviolability of one's honor), the former should prevail, especially “given the unequivocal public interest brought upon by the case”.

In the Superior Court of Justice (STJ), Justice Rapporteur Paulo de Tarso Sanseverino stressed that freedom of press should be limited by the constitutional right to human dignity. He pointed out that it is possible for the news company to control the content of the interview and that “the facts narrated in the news article are covered by the Amnesty Act, inspired by the idea of social pacification”. He also affirmed the need to respect the right to be forgotten “as a modern principle of civil liability”. Besides arguing that “unequivocal proof of the publication's *mala fides (*bad faith) is unnecessary for liability”, the Justice also pointed out that the newspaper did not produce "fundamental proof that the interviewee effectively stated that the appellant had participated in the attack at Guararapes Airport".

Justice Sanseverino held that the newspaper “cannot neglect their commitment to the veracity of the facts or take a careless attitude when disclosing facts that may tarnish the moral integrity of third parties, especially when dealing with serious facts duly ascertained at their time”.

Lastly, the decision mentioned the Enunciation no. 531, of the VI Journey of Civil Law of the Superior Court of Justice that posited: "The protection of the dignity of the human person in the information society includes the right to be forgotten".

Diário de Pernambucos appealed to the Federal Supreme Court (STF).

Justice Alexandre de Moraes established the theme 995 of the general repercussion regarding the liability of newspapers for publication of interviews. The Supreme Court established the following thesis: “[a] newspaper company is not liable when, without issuing an opinion, it broadcasts an interview in which the interviewee attributes an illicit act to a certain person””. The issue is pending on STF.

1. **Concluding statement**

As a final decision, the STJ granted the Special Appeal, partially maintaining the lower court ruling, but reducing compensation to the amount of R$ 50,000.00 (fifty thousand reais). The Court based its decision on the right to be forgotten arising from the Amnesty Act in this specific case, and on the argument that freedom of information cannot be used as a shield for irresponsible acts.

Further developments of the case in the Federal Supreme court are still awaited.

* **Dissenting or Concurring opinions**

In the STJ, Justices Marco Aurélio Bellizze and Marco Buzzi voted with Justice Paulo de Tarso Sanseverino,while Justices Ricardo Villas Bôas Cueva and João Otávio de Noronha dissented. Justice Moura Ribeiro was absent. Justice Ricardo Villas Bôas Cueva sustained that the press should not be liable for third party statements it may publish “without reasonable motive for suspicion of falsehood”.

In the STF, Justice Marco Aurélio voted to reform the appealed decision, dismissing the claim for damages and suggesting that “[a] newspaper company is not liable when, without issuing an opinion, it broadcasts an interview in which the interviewee attributes an illicit act to a certain person”.

***Direction:***

* **Outcome**: Contracts Expression
* **Explanation for why and how it contracts or expands expression or has a mixed outcome.**
* Justices decided that the freedom of press to publish third party opinions (or fact descriptions) is dependent on media outlet’s own evaluation of (i) the probability of veracity of the account; and (ii) the probability of exposure of those involved in the account. Although this was a special case due to the applicability of Amnesty Act to the discussion over acts committed during the Brazilian dictatorial regime, such considerations had not been previously included in the law. That being so, the judicial decision determined that media outlets should be able to make complex considerations before the decision for publishing, involving the possible applicability of undetermined legal standards and critical reflection on the result of the publication on one’s personality rights. The complexity and, sometimes, indeterminacy of criteria for content publication (as imposed by this decision) would surely result in a higher level of self-censorship by the media – which has constricting effects on freedom of expression and freedom of press.

***Perspective***:

* **Related International and/or regional laws**:
* **National law or jurisprudence**:

Brazilian Federal Constitution, art. 105, item III, line "a".

Brazilian Civil Code of 1916, articles 186 and 187.

Law 6.683/1979 (Amnesty Act).

**Other national law or jurisprudence**:

Enunciation no. 531, of the VI Journey of Civil Law of the Superior Court of Justice.

REsp 1159903/PE, Reporting Justice RICARDO VILLAS BÔAS CUEVA, THIRD COLLECTION, judged on 01/12/2015, DJe 11/12/2015

REsp 1297426/RO, Reporting Justice RICARDO VILLAS BÔAS CUEVA, THIRD POD, judged on 11/03/2015, DJe 10/11/2015

REsp 1334097/RJ, Reporting Justice LUIS FELIPE SALOMÃO, FOURTH GROUP, judged on 05/28/2013, DJe 09/10/2013)

REsp 1331098/GO, Reporting Justice LUIS FELIPE SALOMÃO, FOURTH GROUP, judged on 05/09/2013, DJe 24/10/2013

AgInt in REsp 1356913/SP, Reporting Justice ANTONIO CARLOS FERREIRA, FOURTH TURMA, judged on 06/02/2016, DJe 09/06/2016

AgInt no AREsp 842.702/RS, Rel. Minister LUIS FELIPE SALOMÃO, FOURTH TURMA, judged on 06/02/2016, DJe 07/06/2016

REsp 1541079/DF, Rel. Minister MOURA RIBEIRO, THIRD THIRD GROUP, judged on 05/10/2016, DJe 05/13/2016

AgRg in AREsp 681.413/PR, Rel. Minister RAUL ARAÚJO, FOURTH TURMA, judged on 03/08/2016, DJe 17/03/2016

***Significance***:

1. **Case significance**

Although the decision is of historic importance, due to the analysis of the effects of the Brazilian Amnesty Acton the right to be forgotten, the precedent does not give out clear criteria by which to offer compensation for damages to affected parties. It also fails to rigorously define broad standards for liability of the press for published third-party statements. In the case, Justices concluded that the special condition of a plaintiff affected by the Amnesty Actmeant that the responsibility of the newspaper in reproducing a third-party statement should be held to a higher standard. However, it also suggested that a major issue with the publication was the lack of proof that it was produced by a third party. It is unclear whether cases in which the publications are known to have been produced by a third party will be differently evaluated by the Court.

1. **Precedential Effect**

Considering it is the highest appellate court in Brazil for non-constitutional questions of federal law, lower courts are expected to follow its understanding.

1. **Persuasive Effect**
2. **Related Cases**
3. **Additional Citations**

***Docs***:

* **Official Case Documents**:

Federal Supreme Court:

<https://redir.stf.jus.br/estfvisualizadorpub/jsp/consultarprocessoeletronico/ConsultarProcessoEletronico.jsf?seqobjetoincidente=5263701>

Superior Court of Justice:

[**https://processo.stj.jus.br/processo/revista/documento/mediado/?componente=ITA&sequencial=1519492&num\_registro=201102359630&data=20161028&formato=PDF**](https://processo.stj.jus.br/processo/revista/documento/mediado/?componente=ITA&sequencial=1519492&num_registro=201102359630&data=20161028&formato=PDF)

* **Amicus Briefs and Other Legal Authorities**

Federal Supreme Court:

<https://redir.stf.jus.br/estfvisualizadorpub/jsp/consultarprocessoeletronico/ConsultarProcessoEletronico.jsf?seqobjetoincidente=5263701>

* **Reports, Analysis and News Articles**

<https://wilmap.stanford.edu/entries/ricardo-zarattini-filho-v-diario-de-pernambuco>

* **Relevant Materials in Foreign Language**

<https://www.migalhas.com.br/quentes/246065/diario-de-pernambuco-indenizara-ricardo-zarattini-por-publicacao-ofensiva>

<https://www.conjur.com.br/2016-out-06/stj-condena-jornal-publicar-noticia-epoca-ditadura>