

# The Burger Court Opinion Writing Database

## *Schiavone v. Fortune*

477 U.S. 21 (1986)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University in St. Louis  
Forrest Maltzman, George Washington University



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

June 10, 1986

84-1839 - Ronald Schiavone, Genaro Liguori and  
Joseph DiCarolis v. Fortune, aka Time, Inc.

Dear John:

I join your dissent.

Regards,

A handwritten signature in black ink, appearing to be 'LSB', written in a cursive style.

Justice Stevens

Copies to the Conference

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

April 25, 1986

Schiavone v. Fortune  
No. 84-1839

Dear Harry,

I have joined your opinion in the above, but was wondering if you might nevertheless consider a suggestion. In Part III-A, you discuss the "identity-of-interest" argument made by the petitioner. Although the argument is fully disposed of in the first full paragraph on page 8, there follow two paragraphs concerning the clarity with which a plaintiff must draw its complaint. As I recall, at oral argument, John questioned whether a misdescription might be so miniscule as not to constitute a "change of parties" requiring relation back. You have (wisely in my view) chosen not to address this contention, since it is so clear that this is not such a case. As such, the final two paragraphs of Part III-A are unnecessary. Do you not think it might be better simply to delete them? It would certainly take some of the winds out of John's sails in dissent.

Sincerely,

*Bill*

Justice Blackmun



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

April 25, 1986

No. 84-1839

Schiavone, et al.  
v. Fortune, a/k/a Time, Inc

Dear Harry,

Please join me.

Sincerely,

Justice Blackmun

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FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

April 25, 1986

84-1839 - Schiavone v. Fortune

Dear Harry,

I shall await the dissent.

Sincerely yours,



Justice Blackmun

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5

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

June 5, 1986

84-1839 - Schiavone v. Fortune

Dear John,

Please join me.

Sincerely yours,



Justice Stevens

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

April 25, 1986

Re: No. 84-1839 - Schiavone v. Fortune

Dear Harry:

Please join me.

Sincerely,



T.M.

Justice Blackmun

cc: The Conference

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: **Justice Blackmun**

Circulated: APR 24 1986

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1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 84-1839

RONALD A. SCHIAVONE, GENARO LIQUORI AND  
JOSEPH A. DiCAROLIS, PETITIONER *v.* FOR-  
TUNE, AKA TIME, INCORPORATED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE THIRD CIRCUIT

[April —, 1986]

JUSTICE BLACKMUN delivered the opinion of the Court.

This case primarily concerns Rule 15(c) of the Federal Rules of Civil Procedure and its application to a less-than-precise denomination of a defendant in complaints filed in federal court near the expiration of the period of limitations. Because of an apparent conflict among the Courts of Appeals,<sup>1</sup> we granted certiorari. — U. S. — (1985).

I

The three petitioners instituted this diversity litigation on May 9, 1983, by filing their respective complaints in the United States District Court for the District of New Jersey. Each complaint alleged that the plaintiff was libeled in a cover story entitled "The Charges Against Reagan's Labor Secretary," which appeared in the May 31, 1982, issue of Fortune magazine. The caption of each complaint named "For-

<sup>1</sup> Compare, *e. g.*, *Cooper v. U. S. Postal Service*, 740 F. 2d 714, 716 (CA9 1984), cert. denied, — U. S. — (1985); *Watson v. Unipress, Inc.*, 733 F. 2d 1386, 1390 (CA10 1984); *Hughes v. United States*, 701 F. 2d 56, 58 (CA7 1982); and *Trace X Chemical, Inc. v. Gulf Oil Chemical Co.*, 724 F. 2d 68, 70-71 (CA8 1983), with *Kirk v. Cronvich*, 629 F. 2d 404, 408 (CA5 1980); *Ingram v. Kumar*, 585 F. 2d 566, 571-572 (CA2 1978), cert. denied, 440 U. S. 940 (1979); and *Ringrose v. Engelberg Huller Co.*, 692 F. 2d 403, 410 (CA6 1982) (concurring opinion).

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

April 25, 1986

Re: No. 84-1839, Schiavone v. Fortune

Dear John:

Thank you for your letter of April 24. I anticipated your dissent because your vote was that way and because your questions from the bench during oral argument were in that direction.

I think that you and those who are with you in this case will agree that it would be impossible--and surely inadvisable--in one opinion to cover every situation of careless pleading. As a result, the proposed opinion attempts to decide this case while leaving some elbowroom for others. I thought that the comments near the bottom of page 8 and at the top of page 9 pointed in this direction and were not mere proclamations. You, of course, will disagree. By all means, write as you wish, for that, I suppose, is what this Court is all about.

Sincerely,



Justice Stevens

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

April 30, 1986

Re: No. 84-1839, Schiavone v. Fortune

Dear Bill:

Thank you for your letter of April 25. Although I am not fully persuaded, I shall omit the two paragraphs and see what happens when John writes. A second draft with this change will be around shortly.

Sincerely,



Justice Brennan

STYLISTIC CHANGES  
\* p. 8

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: **Justice Blackmun**

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2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 84-1839

RONALD A. SCHIAVONE, GENARO LIQUORI AND  
JOSEPH A. DICAROLIS, PETITIONERS *v.* FOR-  
TUNE, AKA TIME, INCORPORATED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE THIRD CIRCUIT

[May —, 1986]

JUSTICE BLACKMUN delivered the opinion of the Court.

This case primarily concerns Rule 15(c) of the Federal Rules of Civil Procedure and its application to a less-than-precise denomination of a defendant in complaints filed in federal court near the expiration of the period of limitations. Because of an apparent conflict among the Courts of Appeals,<sup>1</sup> we granted certiorari. 474 U. S. — (1985).

I

The three petitioners instituted this diversity litigation on May 9, 1983, by filing their respective complaints in the United States District Court for the District of New Jersey. Each complaint alleged that the plaintiff was libeled in a cover story entitled "The Charges Against Reagan's Labor Secretary," which appeared in the May 31, 1982, issue of Fortune magazine. The caption of each complaint named "For-

<sup>1</sup> Compare, *e. g.*, *Cooper v. U. S. Postal Service*, 740 F. 2d 714, 716 (CA9 1984), cert. denied, 471 U. S. — (1985); *Watson v. Unipress, Inc.*, 733 F. 2d 1386, 1390 (CA10 1984); *Hughes v. United States*, 701 F. 2d 56, 58 (CA7 1982); and *Trace X Chemical, Inc. v. Gulf Oil Chemical Co.*, 724 F. 2d 68, 70-71 (CA8 1983), with *Kirk v. Cronvich*, 629 F. 2d 404, 408 (CA5 1980); *Ingram v. Kumar*, 585 F. 2d 566, 571-572 (CA2 1978), cert. denied, 440 U. S. 940 (1979); and *Ringrose v. Engelberg Huller Co.*, 692 F. 2d 403, 410 (CA6 1982) (concurring opinion).

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

April 28, 1986

84-1839 Schiavone v. Fortune

Dear Harry:

Please join me.

Sincerely,



Justice Blackmun

lfp/ss

cc: The Conference

V

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

April 28, 1986

Re: No. 84-1839 Schiavone v. Time, Inc.

Dear Harry,

Please join me.

Sincerely,

*wm*

Justice Blackmun

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

MEMBERS OF

JOHN PAUL STEVENS

April 24, 1986

Re: 84-1839 - Schiavone v. Fortune,  
aka Time, Incorporated

Dear Harry:

During the oral argument, counsel for Time, Incorporated acknowledged that their legal position would have been the same if the complaint had incorrectly named "Time, Inc." instead of using the correct corporate name. Your opinion does not seem to accept this formalistic view, but rather holds that "fairness to defendants" requires something "more than haphazard description of the kind evidenced by these complaints as originally drawn." Opinion at page 8.

At the end of your opinion you state that the "linchpin is notice, and notice within the limitations period." In the context of this case, that sentence would be fully consistent with the argument advanced by Time, because even a misspelling would not put a defendant on notice within the limitations period given the time sequence in this case.

As you will recall, I voted the other way at Conference and therefore expect to write in dissent. I must confess, however, that I am not sure whether I should be criticizing the majority for drawing a hyper-technical distinction between "Time, Incorporated" and "Time, Inc." or similar trivial misnomers, on the one hand, or for adopting a standard that is not explained because your opinion provides no guidance whatsoever on the degree to which a misdescription would be too haphazard to be acceptable. If the standard really is "fairness to the defendants," the opinion does not explain why this complaint gave Time, Incorporated any less notice that it was being sued than it would have

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given if it had simply misspelled the defendant's name.

In all events, I shall be writing in dissent and probably will criticize your draft both because it seems to adopt the sporting theory of litigation that Roscoe Pound criticized and also because it will invite lots of litigation concerning your "more than haphazard description" standard.

Respectfully,



Justice Blackmun

Copies to the Conference

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To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice O'Connor

From: **Justice Stevens**

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1st DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 84-1839

RONALD A. SCHIAVONE, GENARO LIQUORI AND  
JOSEPH A. DICAROLIS, PETITIONERS *v.* FOR-  
TUNE, AKA TIME, INCORPORATED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE THIRD CIRCUIT

[June —, 1986]

JUSTICE STEVENS, dissenting.

Certain principles are undisputed. If petitioners had filed their suits alleging that Fortune magazine libelled them on precisely the same date; had added the magic words “also known as Time, Incorporated” to the word “Fortune”; and had done everything else exactly the same, petitioners would be entitled to proceed with their legal actions. Because petitioners committed the “fatal” error, *ante*, at 9, of identifying the defendant by its name of publication rather than its name of incorporation, however, the Court finds that they fell through a trap door—despite the fact that the magazine publisher’s agent contemporaneously noted his understanding that the suits were directed against the magazine publisher (Time, Incorporated) fully as much as if petitioners had included the magic words.

In my view, the Court’s decision represents an aberrational—and, let us hope, isolated—return to the “sporting theory of justice” condemned by Roscoe Pound eighty years ago.<sup>1</sup> The Court’s result is supported neither by the language nor purposes of the Federal Rules, or of Rule 15(c) in particular.

<sup>1</sup>See Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 *Amer. Bar Assn. Reports* 395, 404-405 (1906).

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice O'Connor

STYLISTIC CHANGES THROUGHOUT.  
SEE PAGES: |

From: Justice Stevens

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2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 84-1839

RONALD A. SCHIAVONE, GENARO LIQUORI AND  
JOSEPH A. DICAROLIS, PETITIONERS *v.* FOR-  
TUNE, AKA TIME, INCORPORATED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE THIRD CIRCUIT

[June —, 1986]

JUSTICE STEVENS, with whom JUSTICE WHITE joins,  
dissenting.

Certain principles are undisputed. If petitioners had filed their suits alleging that Fortune magazine libeled them on precisely the same date; had added the magic words “also known as Time, Incorporated” to the word “Fortune”; and had done everything else exactly the same, petitioners would be entitled to proceed with their legal actions. Because petitioners committed the “fatal” error, *ante*, at 9, of identifying the defendant by its name of publication rather than its name of incorporation, however, the Court finds that they fell through a trap door—despite the fact that the magazine publisher’s agent contemporaneously noted his understanding that the suits were directed against the magazine publisher (Time, Incorporated) fully as much as if petitioners had included the magic words.

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<sup>1</sup>See Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 *Amer. Bar Assn. Reports* 395, 404-405 (1906).

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice O'Connor

From: Justice Stevens

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3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1839

RONALD A. SCHIAVONE, GENARO LIQUORI AND  
JOSEPH A. DiCAROLIS, PETITIONERS *v.* FOR-  
TUNE, AKA TIME, INCORPORATED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE THIRD CIRCUIT

[June —, 1986]

JUSTICE STEVENS, with whom THE CHIEF JUSTICE and  
JUSTICE WHITE join, dissenting.

Certain principles are undisputed. If petitioners had filed their suits alleging that Fortune magazine libeled them on precisely the same date; had added the magic words "also known as Time, Incorporated" to the word "Fortune"; and had done everything else exactly the same, petitioners would be entitled to proceed with their legal actions. Because petitioners committed the "fatal" error, *ante*, at 9, of identifying the defendant by its name of publication rather than its name of incorporation, however, the Court finds that they fell through a trap door—despite the fact that the magazine publisher's agent contemporaneously noted his understanding that the suits were directed against the magazine publisher (Time, Incorporated) fully as much as if petitioners had included the magic words.

In my view, the Court's decision represents an aberrational—and, let us hope, isolated—return to the "sporting theory of justice" condemned by Roscoe Pound 80 years ago.<sup>1</sup> The Court's result is supported neither by the language nor purposes of the Federal Rules, or of Rule 15(c) in particular.

<sup>1</sup> See Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 *Amer. Bar Assn. Reports* 395, 404-405 (1906).

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

June 13, 1986

Re: 84-1839 - Schiavone, et al. v.  
Fortune, aka Time

Dear Harry:

As I mentioned before Conference yesterday, I enjoyed the first line of your golden shiner opinion because it gives us a chance to laugh when we are really too busy to think about what is happening with our most pressing problems. I trust that you will accept the following criticism in the spirit in which it is offered.

In the opinion for the Court in this case, you expressed bewilderment as to how a busy lawyer could possibly misname the defendant in litigation of this asserted magnitude. See p. 7. I have the same lack of understanding as to how such a careful craftsman as the author of the Court opinion in this case could possibly have misnamed the party--you will note that your caption names "Genaro Liquori" but the caption to the papers that were actually filed name him as "Genaro Liguori."

In order to forestall the need for a post-filing amendment to the caption that would have to relate back to the time of announcement, I wonder if you might see fit to make an appropriate correction.

Respectfully,



Justice Blackmun

Copies to the Conference

P.S.--It pains me to admit it, but I find that I made the same mistake in my dissent.

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

April 24, 1986

No. 84-1839 Schiavone v. Time, Inc.

Dear Harry,

Please join me.

Sincerely,



Justice Blackmun

Copies to the Conference