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Pennsylvania and Supreme Court Libel Decisions: The “Libel Capital of the Nation” Tries to Comply

Richard E. Labunski*

I. INTRODUCTION

For more than a decade states have struggled to comply with Gertz v. Welch,¹ one of the Supreme Court’s most important and complicated libel cases. Second only to New York Times v. Sullivan² in impact on libel law, Gertz granted states substantial discretion to develop standards in several key areas. But the new standards had to be squared with the numerous rules the Supreme Court continued to impose on states. This blending of the common law of libel, nurtured for centuries in state courts, with the Supreme Court’s “nationalization” of major aspects of libel, has produced complex, inconsistent and sometimes contradictory standards.³ The resulting rules often fail to adequately protect either the first amendment or reputational interests.

Beginning with New York Times in 1964, the Supreme Court began a decade-long effort to establish the first national standards in libel. The creation of the public official and public figure categories of libel plaintiffs, and the requirement that such plaintiffs prove actual malice, demonstrated the Court’s determination to provide greater protection to the press than was available under the standard of “strict liability” that dominated state libel law.⁴

* Assistant Professor, School of Communications, University of Washington. B.A. 1975, M.A. 1977, Ph. D. 1979 (political science), University of California.

4. In developing libel laws, the states applied varying attitudes, doctrines and practices in defamation actions, and most, if not all, demonstrated a zealous interest in preventing and redressing attacks by the press upon the reputations of their citizens. Emerging from the various state doctrines was the so-called rule of “strict liability.” Until 1964, states
The Court established a minimum standard of "fault" which the states must observe;\(^5\) retained within its jurisdiction the standards that would apply in cases involving public officials and public figures;\(^6\) and allowed states to permit recovery of presumed or punitive damages only upon a showing of \textit{New York Times} actual malice.\(^7\) Yet the Court also made it clear in \textit{Gertz} that the states still had a very important role to play in determining such issues as the status of the libel plaintiff, and if a private person, the appropriate standard of liability.\(^8\)

In a number of areas, the Supreme Court either directly charged states with the responsibility of choosing an appropriate standard, or left the issues sufficiently vague that states could assume their own laws would govern. The issues which the Supreme Court seemed to have left to the states include: 1) determining the status of the plaintiff, i.e., whether a public official, public figure or private person; 2) determining what standard of liability, such as actual malice, negligence or gross negligence would need to be met by a private person plaintiff; and 3) determining what lack of care or departure from accepted journalistic standards would satisfy the were largely free to establish restrictive standards that warned publishers that they printed materials susceptible of defamatory meaning at their own peril. So limited were the privileges afforded the press, the American Law Institute’s Restatement of Torts in 1938 listed truth (Section 582); consent (Section 583); and a very narrow conditional privilege based upon a limited interpretation of the public interest (Section 598) as the only defense to the publication of defamatory material. The Restatement made it clear that the conditional privilege applied only when a substantial interest of the public was threatened. It specifically stated that the rule “does not afford a privilege to publish false defamatory statements of fact about public officers or candidates for office,” (Section 598, comment A) and “is not intended to constitute an all-inclusive category of public interests which may be protected.” (Section 598, comment B). See Lee, \textit{Strict Liability Versus Negligence: An Economic Analysis}, 1981 \textit{BRIGHAM YOUNG U. LAW REV.} 398-406.


6. 418 U.S. at 342-43.

7. \textit{Id.} at 349. The actual malice test is discussed below. Although the Supreme Court expressed concern in \textit{Gertz} and other cases about juries awarding "punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused," \textit{id.} at 350, it has never said that punitive damages could not be awarded in cases involving media defendants. Some states, such as Washington, have taken that step. In Taskett \textit{v. King Broadcasting Co.}, 86 Wash.2d 439, 546 P.2d 81 (1976), the Washington Supreme Court ruled that “under no circumstances will we allow a jury to award punitive damages.” (emphasis in original). \textit{Id.} at 447, 546 P.2d at 86. \textit{See Note, Mark v. Seattle Times: A Clarification of Libel Law in Washington State}, 18 \textit{WILLAMETTE L. J.} 695-706 (1982).

8. For a definition of a private person, \textit{see} 418 U.S. at 344-46; for standards of liability, \textit{see id.} at 347. Most states have adopted a “negligence” standard in cases involving private persons, although what constitutes negligence varies from state to state.
negligence requirement, as long as states did not impose liability without fault. 9

The Supreme Court has left largely unanswered other important questions, and only recently has settled a key area of libel law in Philadelphia Newspapers v. Hepps, 10 by holding that a private person plaintiff has the burden of proof in cases involving issues of "public concern." The Court has left unclear the extent to which federal courts may impose their own standards on states that have not yet determined the rules that will apply in cases involving private plaintiffs; whether it intended to allow states to choose a lesser standard of level of proof, i.e., "preponderance of evidence" as opposed to "convincing clarity," in cases where the actual malice test applies; 11 and jurisdictional issues relating to which state's laws will govern in cases involving news organizations whose newspaper or broadcast is circulated in more than one state. 12

Additionally, the Supreme Court has not yet defined the extent to which states will be allowed autonomy to interpret federal constitutional rights. In this era of "decentralization," when the Burger Court was determined to grant greater autonomy to the states to interpret both their own and the federal constitutions, it remains unclear how far the states may go. State reaction to their increased independence has varied. Some have relied directly on their own state constitutions to balance fundamental rights, while

9. Washington uses a "reasonable care" standard which the state supreme court defined in Taskett: "We hold that a private individual . . . may recover actual damages . . . on a showing that in publishing the statement, the defendant knew or, in the exercise of reasonable care, should have known that the statement was false, or would create a false impression in some material respect." (emphasis omitted). 86 Wash.2d at 445, 546 P.2d at 85. In St. Amant v. Thompson, 390 U.S. 727 (1968), where the plaintiff was a public official, the Supreme Court tried to identify press conduct that would entitle the plaintiff to recover for injury to reputation:

Reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.

390 U.S. at 731.

Justice Harlan, writing a plurality opinion in Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), suggested that public figures, as opposed to public officials, could recover for harm to reputation if they could demonstrate irresponsible conduct on the part of the defendant: "[A] 'public figure' . . . may also recover . . . on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." Id. at 155.


11. See 418 U.S. at 342. See also 376 U.S. at 285-86.

others have more boldly applied federal constitutional provisions knowing that the Supreme Court is willing to tolerate state experimentation to a greater extent than in the past.\footnote{In Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980), the Supreme Court indicated that it would allow states greater autonomy to rely on their own constitutions in deciding issues with federal constitutional implications. The California Supreme Court had interpreted its constitution as granting access to private shopping centers for the purpose of distributing literature and collecting signatures. In writing the Court's opinion, Justice Rehnquist noted that even though the Supreme Court in previous cases held that the federal constitution would not force a privately-owned shopping center to provide such access, the Court would allow such a finding if based on a state constitution. \textit{Pruneyard} suggested that states would enjoy more freedom to interpret their own constitutions even when faced with challenges based on federal constitutional rights. \textit{See also} \textit{Pear}, \textit{State Courts Move Beyond U.S. Bench in Rights Rulings}, N.Y. Times, May 4, 1986, at 1.}

The responsibility and discretion granted to the states in \textit{Gertz}, and the fact that vital first amendment issues are involved, make all the more important an examination of the development of state libel law in the post-\textit{Gertz} era. While a number of states could have served as a case study on compliance with \textit{Gertz}, Pennsylvania's experience is in some respects typical, while in other respects unusual, and it provides evidence that the Supreme Court has failed to provide sufficient guidance in cases prior and subsequent to \textit{Gertz}.

\section*{II. Pennsylvania as a Case Study}

For reasons that should please neither news organizations nor those seeking to vindicate their reputations, Pennsylvania has become, in the words of one observer, the "libel capital of the nation."\footnote{Garneau, "Libel 'Epidemic,'" \textit{EDITOR AND PUBLISHER}, Nov. 9, 1985, at 14.} Libel suits are filed in the state at such a frenzied pace that during the 46-day newspaper strike in 1985, for example, eight libel suits were filed against Philadelphia's two daily newspapers. A survey by Pennsylvania Associated Press Managing Editors found that of 64 responses received from mailings to 107 daily and 154 weekly newspapers, 25 said they had been sued a total of 95 times in the last five years, 34 times by public officials.\footnote{\textit{Id.}}

The proclivity of Pennsylvanians to file libel suits is certainly related to the Philadelphia \textit{Inquirer}'s aggressive reporting style. It is a paper that has produced many award-winning investigative pieces in recent years. Yet, the willingness of even public officials to sue in Pennsylvania "at the drop of a hat," in the words of \textit{Inquirer} editor Eugene Roberts,\footnote{\textit{Id. See Bezanson, Libel Law and the Press: Setting the Record Straight, 71 IOWA} (1979).} is also due to court decisions that...
are often unsympathetic to the first amendment claims of journalists.

Pennsylvania's actions in the post-Gertz era also attracted the Supreme Court's attention in the Hepps case decided in the spring of 1986, which assigned the burden of proof to plaintiffs in cases involving private persons, an issue of much importance to both plaintiffs and defendants in libel suits.

III. THE BURDEN OF PROOF

Between Gertz and Hepps, states were given few, if any, clear instructions on the issue of burden of proof. It seems remarkable that after the many libel cases decided by the Supreme Court between 1974 and 1986, such a fundamental issue would remain unresolved. Pennsylvania's struggle with the issue clearly demonstrated that Gertz sometimes spawned contradictory and inconsistent decisions in lower courts. Pennsylvania's experience in developing a burden of proof standard was probably shared by many states.

Gertz appeared to make constitutionally suspect Pennsylvania's historic requirement that the defendant in a libel case prove that the defamatory statements were true. The Supreme Court had expressed the concern in a number of opinions that if media organizations were forced to defend the accuracy of every statement, the effect would be so inhibiting that journalists would not be able to function.17 However, it was not until Gertz and the formal adoption of the fault requirement that the Court strongly suggested that an appropriate accommodation of the competing interests requires that the burden be shifted to the plaintiff.18

Yet, in the years following Gertz, it became clear that there was

17. Some of the Supreme Court's most eloquent language on the history and role of the first amendment is found in New York Times, 376 U.S. at 269-77.
18. The Court said:

We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual. This approach provides a more equitable boundary between the competing concerns involved here. It recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, yet shields the press and broadcast media from the rigors of strict liability for defamation.

418 U.S. at 347-48. Presumably, the publication or broadcast of a truthful statement can never constitute fault. Therefore, because all libel plaintiffs, as of Gertz, have to prove some level of fault on the part of the media defendant, the plaintiff would also have the burden of proving falsity.
still much confusion over the issue of burden of proof as Pennsylvania's federal and state courts reached different conclusions. An examination of pre- and post-Gertz Pennsylvania libel cases suggests that state courts at first accepted the shift in the burden of proof indicated in Gertz, but later rejected that interpretation in favor of one more restrictive of the first amendment. The Pennsylvania Supreme Court, which eventually resolved the issue in favor of the plaintiff, had to decide what combination of state and national standards would apply.

In Corabi v. Curtis Publishing Co., 19 decided three years before Gertz, the Pennsylvania Supreme Court discussed the comprehensive libel law passed by the legislature in 1953. 20 Among its provisions was the verbatim adoption of the Restatement of Torts which specifically stated that the defendant had the responsibility of proving the truthfulness of his statements. The Restatement provided in part:

In an action for defamation, the defendant has the burden of proving, when the issue is properly raised: a) The truth of the defamatory communication; b) The privileged character of the occasion on which it was published; [and] c) The character of the subject matter of defamatory comment as of public concern. 21

The state supreme court, in interpreting the Act, discussed the relationship between truth and falsity:

[A]lthough ordinarily in order to be actionable words must be false, falsity is not an element of a cause of action for libel in Pennsylvania. Rather the opposite of falsity, truth, is a complete and absolute defense to a civil action for libel . . . . And the burden of proving the same rests upon the defendant . . . . Moreover, it is manifestly the fair thing to place upon the defendant the burden of proving truth. 22

The court expressed concern that it would be unfair to force a libel plaintiff to "prove a negative," namely, that the defamatory statement was false, and held that because the media defendant is more likely to know whether or not the statements are true, it is "preferable to place the burden of proof upon the party . . . who presumably has peculiar means of knowledge of the particular fact in issue." 23 The court gave an example:

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20, PA. STAT. ANN. tit. 12, § 1584a (Purdon 1970).
21, 441 Pa. at 450 n.6, 273 A.2d at 909 n.6, citing Restatement of Torts § 613 (1938).
22, Id. at 449-50, 273 A.2d at 908. (footnotes omitted.) (emphasis in original.).
23, Id. at 450, 273 A.2d at 908.
If the written communication accuses plaintiff of being a murderess, a burglar or a prostitute, the defendant knows precisely what particular event he is referring to and the source of his information, whereas the plaintiff, not knowing these facts, would experience great difficulty in refuting these general charges by showing their falsity.\(^4\)

Corabi was, of course, decided before the Supreme Court formally adopted the fault requirement. After Gertz, Pennsylvania’s state and federal courts began to recognize that the new fault standard had to be incorporated into Pennsylvania law. In Steaks Unlimited v. Deaner,\(^25\) a 1980 case decided by the Third Circuit, the court noted that the Corabi holding seemed to have been negated by Gertz. The court stated that “Pennsylvania’s placement of the burden of proving the truth of the communication on the defendant . . . would appear to be contrary to the constitutional limitations on state libel law enunciated by the Supreme Court.”\(^26\)

But the court declined to make a definitive ruling, apparently preferring that a Pennsylvania court put a formal end to the defendant’s burden of proof:

Inasmuch as the district court concluded that there exists a genuine issue of fact regarding the truth of some of the broadcast material . . . and because the defendants have not challenged the decision on this appeal, we have no occasion to review either the correctness of the district judge’s decision or the constitutionality of Pennsylvania’s placement of the burden of proof.\(^27\)

Two years later, the Pennsylvania Superior Court did find the right occasion in Dunlap v. Philadelphia Newspapers\(^28\):

\(^24\) Id. at 450-51, 273 A.2d at 908-09. Justice White, dissenting in Gertz, made a similar argument. He claimed that the adoption of the fault requirement and the subsequent shifting of the burden of proof to the plaintiff was an intolerable infringement on the right of states to adopt standards to protect the reputations of private persons:

The Court, in a few printed pages, has federalized major aspects of libel law by declaring unconstitutional in important respects the prevailing defamation law in all or most of the 50 states. That result is accomplished by requiring the plaintiff in each and every defamation action to prove not only the defendant’s culpability beyond his act of publishing defamatory material but also actual damage to reputation resulting from the publication. . . . I assume these sweeping changes will be popular with the press, but this is not the road to salvation for a court of law. As I see it, there are wholly insufficient grounds for scuttling the libel laws of the States in such wholesale fashion, to say nothing of deprecating the reputation interest of ordinary citizens and rendering them powerless to protect themselves.

418 U.S. at 370.

25. 623 F.2d 264 (3d Cir. 1980).

26. Id. at 274 n.49.

27. Id. at 275.

The practice in Pennsylvania has been to place the burden of proving truth on the defendant, but the continued validity of this practice has been questioned. The common law rule has been that the defendant has the burden of proving truth as an affirmative defense. However, as noted by the Third Circuit, the constitutionality of placing the burden of proving truth on the defendant has been called into question by *Gertz*. Because the reason for placing the burden of proving truth on the defendant is that falsity is presumed, it has been urged that the common law rule does precisely what *Gertz* forbids: it hold a defendant strictly liable in a case where truth cannot be proved.

The court then made the decision to bring Pennsylvania law into conformity with *Gertz*. The *Dunlap* court stated that "[g]iven this state of the law, we have a choice. We might follow *Corabi v. Curtis Publishing Co.*, and hold that appellant as defendant has the burden of proving truth. But we do not think we should do that . . . we are persuaded that the plaintiff should have the burden of proving falsity." Thus, eight years after *Gertz*, both Pennsylvania courts and the Third Circuit Court of Appeals accepted the notion that *Gertz* required the plaintiff to prove falsity. This made the Pennsylvania Supreme Court's *Hepps* decision all the more disturbing to those concerned about the first amendment rights of media defendants.

On December 14, 1984, the state's highest court announced in *Hepps v. Philadelphia Newspapers* that *Gertz* had not disturbed the state's long-held requirement that the defendant prove truthfulness in libel suits, thus rejecting the Pennsylvania Superior Court's *Dunlap* and the Third Circuit's *Steaks Unlimited* decisions.

Maurice Hepps was the principal stockholder of a company that franchised a chain of stores selling beer, soft drinks and snacks. In a series of articles, the Philadelphia *Inquirer* claimed that Hepps had links to organized crime and that he used some of those links to influence various governmental activities. For the purpose of the

29. *Id.* at 484-85, 448 A.2d at 11-12.
30. *Id.* at 485-86, 448 A.2d at 12-13.
suit, he was considered a private person.\(^{32}\)

The Pennsylvania Supreme Court began with an underlying premise that goes to the heart of its *Gertz* interpretation, that is, the principle that "any man accused of wrong-doing is presumed innocent until proven guilty." Based on that premise, the court held that "in actions for defamation, the general character or reputation of the plaintiff is presumed to be good."\(^{33}\) The court then moved to the next step. It held that "[s]ince the gravamen of defamation is that the words uttered or written tend to harm the reputation, a consequence of the rule presuming the good reputation of the plaintiff was presumption of the falsity of the defamatory words."\(^{34}\)

The court in *Hepps* recognized that the Supreme Court in *Gertz* had expressed special concern about the ability of private individuals to defend themselves when defamed by news organizations and said that such individuals were more deserving of recovery for such harm. While it also recognized compelling first amendment interests, the Pennsylvania Supreme Court pointed to cases as early as 1939 when it held in *Summit Hotel v. National Broadcasting Co.*\(^{35}\) that liability for defamation cannot be imposed without fault, and that was interpreted to mean "negligence or willful misconduct."\(^{36}\) Thus, because mere falsity is not enough for a private plaintiff to recover, the Pennsylvania Supreme Court held that requiring the defendant to prove truthfulness sufficiently protected first amendment interests.\(^{37}\)

The Pennsylvania Supreme Court also asserted that because it was Pennsylvania law under consideration in *Rosenbloom v. Metromedia,*\(^{38}\) decided three years before *Gertz* in 1971, the United States Supreme Court had approved the state's placement of burden of proof on the defendant and had recognized that the state did not apply a "liability-without fault standard."\(^{39}\)

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\(^{32}\) The Pennsylvania Supreme Court accepted, without addressing the issue, the trial judge's determination that Hepps was a private figure.

\(^{33}\) 506 Pa. at 311, 485 A.2d at 378.

\(^{34}\) *Id.*

\(^{35}\) 336 Pa. 182, 8 A.2d 302 (1939).

\(^{36}\) *Id.*

\(^{37}\) 506 Pa. at 326, 485 A.2d at 386. The court wrote that:

\(\text{[a]s we understand the thrust of the } Gertz \text{ reasoning, it would not offend the principles articulated therein to place the burden of proving truth upon a defendant as long as the recovery is dependent upon the plaintiff's ability to establish the defendant's willful or negligent conduct in publishing the defamatory matter.}\)

\(^{38}\) *Id.*

\(^{39}\) 403 U.S. 29 (1971).

\(^{39}\) 506 Pa. at 326, 485 A.2d at 386.
involved a libel plaintiff who was clearly a private person, but who became involved in a matter of public interest, namely the distribution of allegedly obscene materials. A plurality opinion of the Supreme Court held that even private persons caught up in matters of public concern must prove actual malice. This holding was substantially modified in Gertz. The Pennsylvania Supreme Court apparently assumed that because the United States Supreme Court in Rosenbloom did not invalidate the state's "fault" standard, it was tantamount to approving it.

The state court also pointed to Pennsylvania's strong shield law protecting the right of news people to keep sources confidential even in libel suits, as evidence that the plaintiff, denied access to such information, is "restricted in his ability to prove the falsity of the defamatory statement." It would be most unfair, the court reasoned, to require the proof of falsity while at the same time denying access to information that may be necessary to such proof: "The defendant, who does possess that information is therefore in a better position to prove the truth of the defamatory statement."

The Pennsylvania Supreme Court's holding in Hepps provided not only a crabbed view of the first amendment rights of media defendants, it demonstrated the ad hoc nature of state compliance with United States Supreme Court libel decisions. The Pennsylvania Supreme Court had interpreted the state's libel statute in Corabi to mean that falsity is not an element of a cause of action for libel; yet, it must have recognized that the fault standard established in Gertz had fundamentally changed the libel laws in all 50 states. Because the publishing or broadcast of a truthful statement can never constitute fault, and fault must be proved by libel plaintiffs whether public officials, public figures or private persons, the burden of proof must, therefore, fall on the plaintiff. The Pennsylv-

40. 403 U.S. at 52.
41. While the Supreme Court in Gertz did not directly overrule Rosenbloom, it substantially curtailed Rosenbloom's strong endorsement of first amendment rights by creating the category of "private person" libel plaintiffs and holding that states may allow a lesser standard than actual malice for such plaintiffs. 418 U.S. at 332-34, 346.
42. 506 Pa. at 328, 485 A.2d at 387. The Pennsylvania Shield Law, 42 Pa.C.S. § 5942(a), provides that: (a) General rule.—No person engaged on, connected with, or employed by any newspaper of general circulation or any press association or any radio or television station, or any magazine of general circulation, for the purpose of gathering, procuring, compiling, editing or publishing news, shall be required to disclose the source of any information procured or obtained by such person, in any legal proceeding, trial or investigation before any government unit. (emphasis in original).
43. 506 Pa. at 328, 485 A.2d at 387.
Pennsylvania's rejection of the Gertz burden of proof standard meant that neither plaintiff nor defendant would know with any certainty in advance of trial what evidence would be required to win his or her case. It was left to the United States Supreme Court to help Pennsylvania understand what it meant in Gertz, and in the process, to provide in national standards more expansive first amendment protection than would be available under many state laws.

When the Supreme Court handed down Hepps, it was widely applauded as a departure from the Court's more recent cases favoring reputational interests. In a 5-4 decision, with Justice O'Connor writing the majority opinion, the Court held that private person libel plaintiffs must prove the falsity of the defamatory statements if the issues involved are of "public concern."

The trial judge in Hepps had concluded that Pennsylvania law required the plaintiff to prove the falsity of the statements; in ruling for the defendants, the jury held he had failed to do so. The Pennsylvania Supreme Court had overturned the judge's interpretation of state law and remanded the case for a new trial.

Justice O'Connor reiterated that Gertz had supplanted much state libel law, and held that when speech is of "public concern but the plaintiff is a private figure, as in Gertz, the Constitution still supplants the standards of the common law." She added that "[w]e believe that the common law's rule on falsity—that the defendant must bear the burden of proving truth—must similarly fall here to a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages."

Justice O'Connor recognized that in some libel cases, a jury will be unable to determine definitively whether the statements were true or false. In those cases, the burden of proof is dispositive. The dilemma, Justice O'Connor noted, is that the allocation of the burden of proof will determine liability for some speech that is true and some that is false, "but all of such speech is unknowably true.

45. 106 S.Ct. at 1563.
46. Id.
or false." 47 In a case where the court cannot determine how much of the speech is true and how much is false, "we believe that the Constitution requires us to tip [the scales] in favor of protecting true speech." She concluded that "[t]o ensure that true speech on matters of public concern is not deterred, we hold that the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern." 48

Justice O'Connor recognized that Hepps' burden was "weightier" because Inquirer reporters invoked the state's shield law allowing them to refuse to divulge the names of sources. She argued, however, that because the trial judge did not give any instructions to the jury on the issue of whether it could draw a negative inference from the refusal to name sources, the issue was not before the Supreme Court. She also asserted that because a jury is more likely to rule in favor of a libel plaintiff who demonstrates the falsity of the defamatory statements, the Hepps case added only "marginally" to the burdens a plaintiff must already bear as a result of earlier defamation cases. 49

In a dissent punctuated by language uncharacteristically harsh for him, Justice Stevens argued that the majority view undermined precious reputational interests:

[D]eliberate, malicious character assassination is not protected by the First Amendment to the United States Constitution. That Amendment does require the target of a defamatory statement to prove that his assailant was at fault. . . . I simply do not understand, however, why a character assassin should be given an absolute license to defame by means of statements that can be neither verified nor disproven. 50

The Supreme Court's Hepps ruling seems to have settled one key area of libel law. Yet, many areas remain where the Court has either provided conflicting or vague instructions, or has been frustratingly silent on a key issue. Perhaps no issue is more important than that of determining the status of the plaintiff. The decision on whether the plaintiff must sue as a public figure or a private person will strongly influence the outcome of the trial and subsequent appeals. 51 By creating the public figure/private person test,

47. 106 S.Ct. at 1564. (emphasis in original).
48. Id.
49. Id. at 1565.
50. Id. at 1568-69. Justice Stevens' dissent was joined by Chief Justice Burger, Justice White and Justice Rehnquist.
51. For two seminal studies, see Franklin, Winners and Losers and Why: A Study of
the Court has placed upon the states the very substantial burden of interpreting its pronouncements on what actions a plaintiff must take, and the nature of the controversy, before being designated a public figure or a private person.\(^5\) Once a plaintiff is held to be a private person, states must decide what standard to apply. In Pennsylvania, courts have found making these decisions to be rather difficult.

IV. PRIVATE PERSONS AND PENNSYLVANIA LAW: WHAT STANDARD OF LIABILITY?

The Supreme Court specifically ruled in *Gertz* that the states are entitled to substantial latitude in determining the appropriate standard for cases involving private individuals, and they may impose liability on a "less demanding showing than that required by *New York Times.*"\(^3\) The actual malice test, first defined in *New York Times,* applies to all cases involving public officials and public figures.\(^4\)

While the Supreme Court retained the actual malice test for public officials and public figures, it allowed states to choose for themselves a standard for private persons. The Court, in fact, suggested that the states have the discretion to adopt a standard more favorable to first amendment interests than mere "negligence" or some other minimum level of fault.\(^5\) But, according to a survey

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53. 418 U.S. at 348. See Naughton, *Gertz and the Public Figure Doctrine Revisited,* 54 TUL. L. REV. 1053-93 (1980).

54. 376 U.S. at 279-80. The Court stated that:

The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

Id.

55. 418 U.S. at 347. The suggestion is derived from the very words used by Justice Powell in formally adopting the fault standard: "... so long as they do not impose liability without fault, States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." Id. (emphasis added). In establishing the fault standard in *Gertz,* the Court would most likely have suggested an appropriate standard of liability if, in fact, it did not want to leave such a decision to the states. In a long footnote to the passage cited above, Justice Powell took issue with Justice White's dissenting view that the fault standard drastically "scuttle[s]" the libel laws of all fifty states. In retreating from the extension of the actual malice test in *Rosenbloom* to private individuals involved in matters of public interest, Powell suggested that the standard announced in *Gertz* actually gave the states greater autonomy: "[O]ne
done by the Libel Defense Resource Center in New York, few have chosen to provide such additional protection to media defendants in libel suits. Of those which have chosen one standard of liability over another, the great majority have chosen "negligence" to be the standard in cases involving private defamation plaintiffs. State activity in this area vitally affects the rules under which libel battles will be fought; a "negligence" standard would normally provide a plaintiff a much greater chance of success than would be available under the New York Times actual malice test.

In its libel decisions from 1974 to 1979, the Supreme Court made it clear that it intended for more and more plaintiffs to be classified as private persons. The Court had become concerned that previous libel cases, requiring not only public officials and public figures, but sometimes private persons as well, to prove actual malice, had unfairly favored media defendants. The Court balanced such inequities by limiting public figure status to those who have "thrust themselves to the forefront" of controversies to play some role in resolving them. Thus, with more libel plaintiffs enjoying private figure status, what states do in the post-Gertz era with regard to the burdens on private persons will determine to a large extent in whose favor first amendment and reputational interests are to be balanced.

Pennsylvania's efforts to determine a standard for private persons provide much insight into how states arrive at this important

might have viewed today's [Gertz] decision allowing recovery under any standard save strict liability as a more generous accommodation of the state interest in comprehensive reputational injury to private individuals than the law presently affords." 418 U.S. at 347-48 n.10.

56. The Libel Defense Resource Center found in a survey conducted in 1984 that twenty-five states had adopted a negligence standard for private person plaintiffs. 13 LDRC Bulletin at 9 (March 31, 1985). New York has developed a standard for private persons that is a compromise between mere negligence and actual malice. In Chapadeau v. Utica Observer-Dispatch, 38 N.Y.2d 196, 379 N.Y.S.2d 61, 341 N.E.2d 569 (1975), New York's highest court identified "gross negligence" or "gross irresponsibility" as the correct standard in cases involving private person plaintiffs involved in matters of public interest: "[W]here the content of the article is arguably within the sphere of legitimate public concern, . . . the party defamed . . . must establish, by a preponderance of evidence, that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties." 38 N.Y.2d at 199, 341 N.E.2d at 571.

57. See, e.g., 6 LDRC Bulletin at 35-43 (March 15, 1983).

58. See Gertz v. Welch; Time, Inc. v. Firestone; Hutchinson v. Proxmire; and Wolston v. Reader's Digest.


60. 418 U.S. at 345 (to be discussed infra).
decision. In Pennsylvania, the verdict now seems to be in: the state supreme court asserted in Hepps that the standard for private persons is negligence. However, in the decade between Gertz and Hepps, Pennsylvania had the opportunity to grant greater first amendment protection than that offered by mere negligence. That it chose not to do so may be partially related to the way the decision was made, and it shows the sometimes strained relationship between state and federal courts.

In 1971, six months after the United States Supreme Court’s splintered decision in Rosenbloom, the Pennsylvania Supreme Court adopted the Rosenbloom plurality opinion in Matus v. Triangle Publications. The Pennsylvania court correctly interpreted the plurality opinion as holding that private persons involved in matters of “public or general” concern would be required to meet the same actual malice standard as do public officials and public figures. This “public interest” test focused on the status of the controversy, namely, whether the issue was one of public importance, rather than on the status or actions of the plaintiff. This test was embraced by only a plurality in Rosenbloom and enjoyed only brief favor in the Supreme Court. Still, the impact of Rosenbloom was felt in the states even after Gertz.

In rejecting the Rosenbloom public interest test, the Supreme Court in Gertz held that states may require a lesser standard than malice for private persons. Yet, after Rosenbloom, but prior to Hepps, Pennsylvania courts continued to apply the public interest test in Rosenbloom that required private persons involved in issues of public importance to prove actual malice. The state’s failure to adjust its standards in the post-Gertz era created problems for not only state courts, but federal courts trying to identify and apply state law. In a 1982 case, Marcone v. Penthouse, the United States District Court for the Eastern District of Pennsylvania

61. To be discussed infra.
63. See supra note 39 and accompanying text.
64. Writing for a plurality in Rosenbloom that included Chief Justice Burger and Justice Blackmun, Justice Brennan discussed the relationship between the issue and the plaintiff: "If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not 'voluntarily' choose to be become involved. The public's primary interest is in the event. . . . We honor the commitment to robust debate on public issues, which is embodied in the First Amendment, by extending constitutional protection to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous." 403 U.S. at 43-44 (footnotes omitted).
noted the confusion caused by the failure to adjust state standards to Supreme Court rulings:

The Pennsylvania Supreme Court has yet to reconsider the *Matus* decision in light of *Gertz*, causing our Third Circuit to describe Pennsylvania's standard of liability for suits brought by private figure plaintiffs as "unsettled." Penthouse argues that the *Matus* decision is still good law and that application to the public interest or concern test of *Matus* to the facts of the instant case mandates that Mr. Marcone prove that the allegedly defamatory communications were published by Penthouse with knowledge of their falsity or reckless disregard for the truth.66

The absence of state court action put federal courts in the difficult position of trying to guess what Pennsylvania courts would decide on this issue. Eventually, federal judges, unable to determine state law on the question of whether a private person must prove actual malice or some lesser standard, decided to assume for themselves the responsibility of updating Pennsylvania law.

Judge Broderick, who wrote the decision in *Marcone*, acknowledged that in trying to determine the appropriate standard for private persons, he was influenced by the opinion of one of his brethren four years earlier in *Mathis v. Philadelphia Newspapers*.67 In that case, Judge Luongo, of the same federal district court, recognized the discretion granted to the states in the wake of *Gertz*. He said that "a state may, consistent with the Constitution, permit a private individual to recover damages in a defamation action 'upon a showing of mere negligence.' The issue here is whether Pennsylvania has chosen to do so."68

The defendants in *Mathis* had argued that the Pennsylvania Supreme Court, in adopting the *Rosenbloom* plurality opinion in *Matus*, had embraced the *Rosenbloom* actual malice standard with "enthusiasm."69 But Judge Luongo disagreed, claiming that he "discerned no enthusiasm at all for the *Rosenbloom* standard in *Matus*." Quoting from the Pennsylvania Supreme Court in the *Matus* case, he saw a court reluctantly agreeing to change state law to satisfy the United States Supreme Court:

On the . . . question of extending the reach of *New York Times* to matters of public or general concern, there was no disagreement among the five members of the Supreme Court who wrote or joined in opinions in support of the judgment affirming the Court of Appeals. We therefore accept this

66. *Id.* at 360.
68. *Id.* at 411 (emphasis in original).
69. *Id.* at 411-12.
modification of the law of defamation in Pennsylvania, and with it the corollary that in such cases the reasonable care standard must give way to the more stringent standard of [actual malice]. Specifically, we adopt as binding on us the holding of the plurality opinion in Rosenbloom. . . .

Where in that statement Judge Luongo found a lack of enthusiasm on the part of the Pennsylvania Supreme Court is difficult to determine. He not only rejected the contention of the defendants that the Matus ruling was still in effect in Pennsylvania, but he proceeded, even in the absence of state court action, to all but commit Pennsylvania to the negligence standard in cases involving private persons:

When the Supreme Court of Pennsylvania is ultimately faced with the question of whether a "private figure" plaintiff may recover for defamation based on a showing of negligence, it will have to resolve that question by drawing on the policies that traditionally have shaped the Pennsylvania law of libel and slander. Although the common-law rule of strict liability is no longer viable in light of New York Times v. Sullivan, I see no reason to believe that the Supreme Court of Pennsylvania, which is now free to abandon the Rosenbloom "actual malice" standard in "private figure" cases, will choose to retain that standard. Nor have defendants pointed to any aspects of Pennsylvania law that would support such a prediction. Accordingly, I conclude that the Matus decision is no longer good law, and that a "private figure" defamation plaintiff may recover under Pennsylvania law based upon a showing of negligence.71

Judge Luongo's opinion became a strong precedent that influenced later cases. Judge Broderick, in refusing to accept the argument of Penthouse in the Marcone case, denied the magazine's motion for summary judgment, citing Mathis as authority.72

Perhaps it was only natural that the federal courts, in hearing cases pursuant to their diversity jurisdiction, would fill the void

70. 445 Pa. at 395, 286 A.2d at 363. Interestingly, the court in Matus held that the issue in that case was not a matter of public interest. A radio talk show host had criticized on the air Raymond Matus, for charging his wife what was, in the host's view, too much money to shovel the driveway. The court held that the talk show host's calling Matus by name and his statement that "people like this, taking advantage of a woman at home alone . . . shouldn't be in business," did not relate to Matus' involvement in an event of public or general concern as interpreted by the Supreme Court in Rosenbloom. Id. at 395-96, 286 A.2d at 365.

71. 455 F. Supp. at 412.
72. 533 F. Supp. at 361. In pertinent part, the court stated that:
[W]e endorse Judge Luongo's decision in Mathis concluding, as we do now, that the Supreme Court of Pennsylvania, in light of Gertz, will retreat from the position taken in Matus. Accordingly, we must reject Penthouse's argument that it is entitled to summary judgment on the ground that Mr. Marcone cannot prove malice.

Id.
left by the failure of Pennsylvania courts to determine in the post-
Gertz era the appropriate standard of liability. But the Supreme
Court had said in Gertz that as long as states require some level of
fault, they may adopt a lesser standard than actual malice for pri-
vate persons; it certainly did not say that it was mandatory.

The Pennsylvania courts decided in the wake of Rosenbloom to
require private persons involved in public issues to meet the actual
malice test. It seemed remarkable, therefore, that federal judges
sitting in the Pennsylvania districts would largely on their own ini-
tiative commit the state to a negligence standard. The Pennsylva-
nia Supreme Court had not overruled Matus; therefore, federal
courts should have considered adopting a standard more protective
of the first amendment, as suggested by the state courts in the
wake of Rosenbloom, while waiting for the state's highest court to
adjust the standards. That the Pennsylvania Supreme Court event-
tually adopted the federal court's standard, one that was more re-
strictive of the first amendment, does not vindicate the usurpation
of state discretion by over-anxious federal judges. 73

When the Pennsylvania Supreme Court finally got around to de-
ciding the issue in Hepps, it did so almost offhandedly, as if it had
long been settled:

It would appear that long before the First Amendment considera-
tions were raised, the common law of this jurisdiction had determined that the law of
libel should require negligence or willful misconduct. . . . If a private figure
plaintiff is to maintain any cause of action at all, he must minimally estab-
lish the negligence on the part of the publisher. 74

Although the United States Supreme Court in Hepps has not al-
lowed Pennsylvania the discretion to determine the burden of
proof in private person cases, the Court seems committed to the
public figure/private person test and thus is not likely to reverse
state court rulings that mere negligence provides the right balance
between first amendment and reputational interests in private per-
son cases. While the issue appears settled in Pennsylvania, many
states still have not found the occasion for determining the stan-

73. The Supreme Court did intend to give appeals courts substantial latitude in libel
cases and took the unusual step of saying that appeals courts may conduct an independent
review of the evidence because of the fundamental first amendment interests involved. Bose
Corporation v. Consumers Union, 104 S. Ct. 1949 (1984). An appeals court is normally lim-
ited to a review of court procedure and does not independently gather and reassess evi-
dence. For a discussion of how the Third Circuit Court of Appeals compares with other
circuits in libel cases, see 13 LDRC Bulletin at 16-18 (March 31, 1985).

74. 504 Pa. at 323, 485 A.2d at 384.
standard for private person plaintiffs, and there is a possibility that of those that have yet to make the decision, some may provide more protection to the media than is available under a mere negligence standard.\textsuperscript{75}

V. THE "PUBLIC FIGURE/PRIVATE PERSON" TEST IN PENNSYLVANIA

The Supreme Court attempted in its opinions from \textit{Gertz} in 1974 to \textit{Wolston v. Readers Digest}\textsuperscript{78} in 1979 to provide guidance for lower courts as they decide who is a public figure and who is a private person. Yet, the Supreme Court has been unable to enunciate clear standards, except to suggest that states further narrow the categories of individuals considered to be public figures.

In \textit{Gertz}, Justice Powell defined a public figure as an individual who had actively sought notoriety:

\begin{quote}
Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare. For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular controversies in order to influence the resolution of issues involved. In either event, they invite attention and comment.\textsuperscript{77}
\end{quote}

The Court further "clarified" the definition of a public figure in the \textit{Firestone} case two years later, rejecting the notion that those involved in highly-publicized litigation are no longer private persons:

\begin{quote}
Respondent did not assume any role of especial prominence in the affairs of society, other than perhaps Palm Beach society, and she did not thrust herself to the forefront of any particular public controversy in order to influence the resolution of issues involved in it. Petitioner [\textit{Time Magazine}] contends that because the Firestone divorce was characterized by the Florida Supreme Court as a "cause célèbre," it must have been a public controversy and respondent must be considered a public figure. But in doing so petitioner seeks to equate "public controversy" with all controversies of interest to the public.\textsuperscript{78}
\end{quote}

\textsuperscript{75} See \textit{supra} note 55 and accompanying text. See also Franklin and Bussel, \textit{What does "Negligence" Mean in Defamation Cases?} 25 \textsc{William and Mary Law Rev.} 825-89 (1984). (Vol. 25 is devoted entirely to libel and the first amendment).

\textsuperscript{76} \textit{443 U.S. 157} (1979).

\textsuperscript{77} \textit{418 U.S.} at 345.

\textsuperscript{78} \textit{424 U.S.} at 453-54.
The *Gertz* and *Firestone* definitions of public figures put the states in a difficult position. Some individuals who had attained notoriety, but had not "thrust" themselves to the forefront of a particular issue, nevertheless were designated by states as public figures on the basis that the issue was a matter of public interest. By focusing on the actions of the plaintiff, rather than the status of the issue, the Supreme Court placed states in the awkward position of applying a "covert" two-step test which resurrected the "public interest" standard of *Rosenbloom* that was rejected in *Gertz.* This meant that standards among states in choosing which plaintiffs will be public figures and which will be private persons varied greatly.

In Pennsylvania, the judge has the responsibility of determining whether the plaintiff is a public official, public figure or private person. Because the standard of liability varies by category, the decision by the judge as to the status of the plaintiff is one of the most important decisions made in a libel case. The following persons have been held to be public officials in Pennsylvania:

- United States Navy civilian employee working as a supervisory contract negotiator at a Navy ships parts control center in *Rusack v. Harsha* in 1978.  

The following persons have been held to be public figures:

- Well-known local singer who voluntarily posed as a *Playboy* model, for the limited purpose of her role in *Playboy Magazine* in *Vitale v. National Lam-
President of a taxicab company who voluntarily involved himself in a public debate regarding fare increases in *Fram v. Yellow Cab Company of Pittsburgh* in 1974.89

Directors of a non-profit organization which treated brain-injured children in *Doman v. Rosner* in 1977.90

The following persons have been held to be private persons:

Lawyer who represented individuals on drug charges and who was indicted on drug charges in *Marcone v. Penthouse Intern., Ltd.* in 1982.91

Individual who participated in Mummers’ costume parade in *Martin v. Municipal Publications* in 1981.92

Person who represented himself as a charitable fundraiser in *Hanish v. Westinghouse Broadcasting Co.* in 1980.93

As mentioned above, in *Marcone*, the United States District Court for the Eastern District of Pennsylvania determined that a lawyer who had represented individuals charged with drug offenses and who had been indicted on drug charges himself was a private person. After reviewing *Gertz*, Judge Broderick seemed to closely pattern his ruling after the Supreme Court’s decision in that case:

This record is devoid of evidence that Mr. Marcone is an individual who has achieved such pervasive fame or notoriety that he has become a public figure for all purposes and in all contexts. . . . It is clear that Mr. Marcone’s representation of private individuals on drug charges and his own indictment on such charges does not evidence an attempt on his part to engage the public’s attention, or to thrust himself into the vortex of the controversy giving rise to the defamation, or to influence its outcome.94

In *Hanish v. Westinghouse Broadcasting Co.* in 1980, the same Judge Broderick employed a covert “public interest” test, rather than a test based merely on the actions of the plaintiff. The court needed to determine the status of an individual who had been engaged in fundraising and was accused in a television broadcast of selling, for his own profit, items meant for charity. Judge Broderick, in citing *Firestone*, seemed to assert that because fundraising is not a public controversy, the plaintiff should not be considered a public figure.95

94. 533 F. Supp. at 359-60.
95. 487 F. Supp. at 403. In pertinent part, Judge Broderick stated that, “This Court
Judge Broderick quoted the section of *Firestone* dismissing *Time*'s contention that Mrs. Firestone's divorce was a public controversy: "In so doing [defendant] seeks to equate public controversy with all controversies of interest to the public. Were we to accept this reasoning, we would reinstate the doctrine advanced in *Rosenbloom*." Judge Broderick seemed to have first decided that fundraising is not such a public controversy and thus the plaintiff could not be a public figure.  

agrees with plaintiff that, on the basis of this record, he should not be deemed a public figure. Defendant argues that plaintiff, in connection with his charitable fundraising activities, naturally became the subject of press attention. This Court must reject this contention."

96. Judge Broderick's reliance on *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), raises the question of whether the Supreme Court in that case, and Judge Broderick in *Hanish*, actually employed a two-step test that was supposedly rejected by the Court in *Gertz*. To Justice Marshall, dissenting in *Firestone*, Mrs. Firestone was clearly a public figure and not a private person. 424 U.S. at 485. Justice Marshall also raised the issue of whether the majority in *Firestone*, having rejected the public interest test in *Rosenbloom* in favor of a public figure/private person test in *Gertz*, simply ignored or circumvented the very tests it had just established. The majority in *Firestone* concluded that the subject matter of the alleged defamation, her divorce, was not a "public controversy" as that term was used in *Gertz*. Considering the attention that Mrs. Firestone and her lawsuit had attracted, it was hard for Justice Marshall to understand what the term "public controversy" meant. "The only explanation I can discern from the Court's opinion is that the controversy was not of the sort deemed relevant to the 'affairs of society,' and the public's interest not of the sort deemed 'legitimate' or worthy of judicial recognition." 424 U.S. at 487. To Justice Marshall, that is precisely what *Gertz* was intended to avoid. The Court did not want to force state and federal judges to decide on an ad hoc basis which issues are of general or public interest and which are not; to determine, in other words, "what information is relevant to self-government." If *Gertz*, therefore, is to have any meaning at all, in Justice Marshall's view, the "focus of the analysis must be on the actions of the individual, and the degree of public attention that had already developed, or that could have been anticipated, before the report in question." 424 U.S. at 489.

If Justice Marshall is correct in suggesting that the Court first made the determination that Mrs. Firestone's divorce was not a matter of public interest, and then secondarily decided that she was not a public figure, then it is apparent that the Court created a public figure/private person test from which it was willing to deviate while, at the same time, pretending that the test was still in effect. *Gertz* and *Firestone* seem to indicate that in order for someone to be considered a public figure, the controversy in which they are involved must first pass a "covert" public interest test, similar to the test too quickly discarded by the Court majority in *Gertz* after its adoption in *Rosenbloom*.

One observer argued that once the Court determined that discussion of Mrs. Firestone's divorce was not deserving of first amendment protection, it would follow that she would be considered a private and not a public person: "The result in *Firestone* indicates that the Court actually will not subjugate reputational interests—even those of arguably public figures—to what it considers weak or nonexistent first amendment interests. . . . By defining the controversy . . . as the divorce itself . . . [and] . . . by carefully categorizing and labeling her actions in that controversy, the Court could deny that she had injected herself into it voluntarily." Prager, *Public Figures and Public Interest*, 30 STAN. L. REV. 175-76 (1977).
In *Martin v. Municipal Publications*, the same district court held that a man participating in the “Mummer’s” parade was a private person because he had not voluntarily interjected himself into a public controversy. In 1979, *Philadelphia Magazine* published a photograph of plaintiff Joseph Martin in his Mummer’s costume without his permission. The photograph was accompanied by a humorous but unflattering caption. Among other things, the defendant argued that Martin was a public figure and must demonstrate actual malice. The court rejected that contention on several grounds, among them being the facts that the plaintiff was not famous and had not thrust himself into the forefront of a public controversy.

In *Martin* the defendant had requested summary dismissal, but the judge held that even if Martin had been considered a public figure, he would not be able to grant the motion. The defendant conceded that it had no basis to believe that the unflattering caption was true. The judge recognized such an admission as preventing the granting of summary judgment.

In the absence of clear guidelines provided by the Supreme Court, and because of state court decisions that sometimes appear contradictory, it is often difficult to discern clear patterns that will tell future litigants who will be designated a public figure and who a private person. Often, both sides will not know in advance which way the trial judge will rule on that very important question. Some decisions of the state and federal courts in Pennsylvania designating both well-known and lesser-known individuals to be limited-purpose public figures demonstrates that they are sometimes willing to assign public figure status to those who might ordinarily be considered private persons under a strict interpretation of *Gertz*.

In *Corabi*, the Pennsylvania Supreme Court had no trouble determining that a well-known entertainer was a public figure. The *Saturday Evening Post* had published on October 26, 1963, what was purported to be the life story of Lillian Reis (*Corabi*). The

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97. 510 F. Supp. at 257. The photograph bore the following caption:
“Dead animal of the month.
A New Year’s tribute here to all the ostriches who gave their tails to make the world free for closet transvestites from South Philly to get themselves stinking drunk. Have a nice year.”
98. 510 F. Supp. at 258.
99. Id. at 259. The court stated: “[D]efendant apparently concedes not only that the information included in the caption below Mr. Martin’s picture was not accurate but also that the magazine was aware of this inaccuracy prior to publication. I find accordingly that *Philadelphia Magazine* has failed to show that it is entitled to summary judgment.”
court noted that she was a professional entertainer in the Philadelphia area who had gained widespread public attention "after she was charged with having masterminded a large burglary allegedly committed in Pottsville, Pennsylvania." In holding that she was a public figure, the court examined previous Supreme Court decisions that held that having "sufficient access to counterargument" is one characteristic of a public figure. Just after the article was published, Reis was interviewed on a popular radio talk show and she had the opportunity to refute some of the charges made in the article.

In Fram v. Yellow Cab Company of Pittsburgh in 1974, the United States District Court for the Western District of Pennsylvania held that a president of a taxicab company was a public figure in his libel suit against the counsel of a competing taxi company who allegedly defamed him on a television news program. Citing Gertz, the court held that Fram had voluntarily become involved in a public controversy:

Fram's activities are clearly distinguishable from those of Gertz; it is evident that Fram intentionally sought the press and the media to publicize his criticism of Yellow Cab's rate increase. Fram appeared before Pittsburgh's City Council to petition its support in forcing the P.U.C. to hold public hearings on Yellow Cab's fare hike. During Fram's appearance before City Council and again in his appearance on "Newsroom" Fram has thrust his person into the "vortex" of a public controversy.

Four years later in Vitale v. National Lampoon, Inc., the United States District Court for the Eastern District of Pennsylvania held that a singer who voluntarily posed for "nude and seminude" photographs which were published by Playboy Magazine, then in another magazine poking fun at Playboy, was a public figure:

Plaintiff . . . both consented to and received payment for their publication. She obviously sought international circulation of her photographs and her

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100. 441 Pa. at 457-58, 273 A.2d at 912.
101. See, e.g., the Supreme Court in Curtis Publishing Co. v. Butts and Associated Press v. Walker (decided together), holding that the fact that Butts and Walker both had access to channels of communication to refute the defamatory charges was a factor:

[B]oth Butts and Walker commanded a substantial amount of independent public interest at the time of the publications; both, in our opinion, would have been labeled 'public figures' under ordinary tort rules. . . Both commanded sufficient continuing public interest and had sufficient access to the means of counterargument to be able to 'expose through discussion the falsehood and fallacies' of the defamatory statements.

102. 441 Pa. at 457 n.15, 273 A.2d at 912 n.15.
103. 380 F. Supp. at 1334.
expectations were fulfilled. Her position is clearly distinguishable from the situation presented in *Time, Inc., v. Firestone*, upon which she relies. Plaintiff voluntarily placed herself in the public domain in the role of a *Playboy* model, inviting attention and comment.\(^{104}\)

The parody in *National Lampoon* followed the format for advertisements used in *Playboy*, which depicts the *Playboy* reader as a "well-to-do gentleman accompanied by two or more beautiful women." But *National Lampoon*’s spoof on *Playboy* did not feature one of the "beautiful people." The court, rather than merely describing the ad in *Lampoon*, attached it as an exhibit, providing a rare display of judicial humor. It was stated that in order "[t]o spare ourselves the literary voyage... which would be required to describe the picture, we have appended a copy to this opinion so the reader may share the euphoria of this unique aesthetic experience without the unwelcome intervention of an interpreter."\(^{105}\) The court overruled the objections of the plaintiff and determined that she was a limited-purpose public figure.

The directors of an institute which dealt with brain-injured children were held to be public figures by the Pennsylvania Superior Court in *Doman v. Rosner* in 1977. The plaintiffs sued a professor of psychology who had become associated with the institute and had prepared a report on an institute project. The court had no trouble determining the plaintiffs to be public figures. The work of the institute was of "immense public interest" and the Governor of Pennsylvania had discussed its work when he proclaimed the week of October 14, 1967, to be "Achievement of Human Potential Week." The judge noted that the plaintiffs' names and positions appeared in many of the articles written about the institute and that they had made many speeches and written several books and articles.\(^{106}\) The Supreme Court, on the other hand, seemed to be less persuaded in *Hutchinson v. Proxmire* that such visibility qualifies a plaintiff for public figure status.\(^{107}\)

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104. 449 F. Supp. at 445 (emphasis in original).
105. *Id.* at 443. The photograph shows a magazine on the floor of a bathroom stall; two sneaker-covered feet and pants are visible. The caption says in part: 
WHAT SORT OF MAN READS PL*YB*Y? A young man in touch with himself and his own imagination. Self-reliant, and with an appreciation for his personal privacy. . . .
107. In *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), the Supreme Court held that a research scientist who had been criticized in a press release and speech by Senator William Proxmire was a private person. At the time Hutchinson was given Proxmire's "Golden Fleece" award, he was director of research at the Kalamazoo State Mental Hospital. He had received about half a million dollars in research money from several federal agencies during
As the above cases indicate, judges seem willing to assign public figure status even when the plaintiff's participation in the controversy at hand hardly seems voluntary. Although the Court in *Gertz* said that incidences of involuntary public figures would be "exceedingly rare," the cases discussed here suggest that trial judges look not only at the actions of the plaintiff, but at the nature of the controversy as well, in determining the status of the plaintiff. Such an approach is similar to the now discredited public interest test in *Rosenbloom* and suggests that in the wake of *Gertz*, trial judges are applying a "covert" public interest test while still paying homage to *Gertz* and *Firestone*.

VI. A "COVERT" PUBLIC INTEREST TEST AND TAMPERING WITH THE LEVEL OF PROOF IN ACTUAL MALICE CASES

Perhaps *Curtis Publishing Company v. Butts* set the precedent for all those involved in professional sports, because in *Chuy v. Philadelphia Eagles*, decided by the United States Court of Appeals for the Third Circuit sitting *en banc*, the court ruled that a former professional football player who had been involved in a well-publicized trade and whose contractual dispute with the football team was a matter of public knowledge was a public figure. The court maintained that:

> Professional athletes, at least as to their playing careers, generally assume a position of public prominence. Their contractual disputes, as well as their athletic accomplishments, command the attention of sports fans. Chuy, in particular, was a starting player. ... He had gained special prominence for being involved in a major and well-publicized trade. ...

The court then noted the difference between Chuy and Mrs.

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the preceding seven years. Before working at the Kalamazoo hospital, Hutchinson had held a position at another facility operated by the Michigan State Department of Mental Health. When he became research director at The Foundation for Behavioral Research, the federal funds he had been receiving were transferred to the foundation. 443 U.S. at 114-15.

In reversing the district court, the Supreme Court rejected the notion that Hutchinson, by accepting federal research funds and publishing his research findings, had thrust himself into a public controversy. *Id.* at 135-36. Chief Justice Burger, writing the majority opinion, was not certain that Proxmire had even designated a "public controversy"; at best, it was a concern about general public expenditures:

> But that concern is shared by most and relates to most public expenditures; it is not sufficient to make Hutchinson a public figure. If it were, everyone who received or benefited from the myriad public grants for research could be classified as a public figure—a conclusion that our previous opinions have rejected.

*Id.* at 135.

108. 595 F.2d 1265 (3d Cir. 1979).

109. *Id.* at 1280.
Firestone:

We believe that Chuy's public prominence was a good deal more marked than the status of the plaintiff in *Time v. Firestone*. The former Mrs. Firestone was found not to have attained a role of prominence in affairs of society and her divorce action was deemed not a public controversy. Although the marital troubles of the wealthy do not make them public figures, a professional athlete's contractual troubles relating to his playing performance commands the attention of a more sustained and wider public audience.\(^{110}\)

The court's statements seemed to suggest once again that the issue considered first in determining the *status* of the libel plaintiff is the *nature* of the controversy. Because Chuy participated in an activity, namely professional football, that attracted a lot of attention, he was considered to be a public figure. Mrs. Firestone's divorce, on the other hand, was not a public controversy and therefore she was a private person. If, in fact, courts apply a *covert* public interest test before determining the status of the plaintiff, then it is difficult to see how such a two-step examination differs from the discredited public interest test in *Rosenbloom*. Judges still seem to be deciding which issues are matters in which the public has a legitimate interest, and therefore deserving of first amendment protection, and which are not. Only after the first step is passed do the courts move to the second step of determining if the plaintiff is a public figure. That is the precise quagmire which *Gertz* was supposed to eliminate.

If the two-step test is applied literally, lower courts would be able to determine first, that no public controversy exists and, therefore, that no first amendment interests are at stake. If no first amendment interests are at stake, reputational interests can prevail. In such a case the controversy does not involve the balancing of reputational interests against precious first amendment freedoms. If the *Gertz* public figure test is, as was suggested by the Supreme Court, devoid of any determinations of the public interest, then it assigns a constant weight to the first amendment side of the scales. That side theoretically remains weighted whether or not the subject is a matter of public interest, because the focal point is the actions taken by the plaintiff and not the nature of the controversy. The result may be that public figures who cannot prove actual malice and private persons who cannot prove negligence may be sacrificed to less than compelling first amendment

\(^{110}\) *Id.* at 1280-81 n.21.
interests.¹¹¹
That may have been what happened in the Chuy case. It is difficult to imagine that the public has a more compelling interest in the activities of professional athletes in their contractual disputes than in the role that wealthy and prominent individuals play in society. It is most paradoxical that libel standards have developed that grant the media substantial protection to cover the problems of professional athletes and much less protection in their coverage of individuals who, even without holding public office, may be important in influencing the affairs of government and society. It appears that lower courts, in attempting to apply Gertz and Firestone, have followed the Supreme Court’s lead in developing the two-step test and thus continue to decide which issues constitute public controversies. Such an evolution of libel laws would probably have startled one commentator who might not understand how Chuy’s contractual and health problems have been granted the same status as issues of “governing importance.”¹¹²

In Chuy, the United States Court of Appeals had an opportunity to clarify another important issue relating to the level of proof required in libel cases. The Supreme Court in New York Times not only created the actual malice test for public officials, it also ruled that the level of proof would not be mere “preponderence of evidence,” the usual standard in civil suits, but “clear and convincing” evidence, a standard the Court considered to be more protective of first amendment interests.¹¹³

Three years after requiring public officials to prove actual malice

¹¹¹. See supra note 95 and accompanying text.
¹¹². Alexander Meiklejohn argued that the people created a form of government under which they granted only some powers to the federal and state instruments they established; they reserved significant powers of government to themselves. These reserved powers, which Meiklejohn called of “governing importance,” are concerned not with a private right, but with a public power, a governmental responsibility. In his view, freedom of expression relating to issues of public affairs is an absolute:

Public discussion of public issues, together with the spreading of information and opinion bearing on those issues, must have a freedom unbridged by our agents.

Though they govern us, we, in a deeper sense, govern them. Over our governing, they have no power. Over their governing, we have sovereign power.


¹¹³. 376 U.S. at 285-86. See infra note 115 and accompanying text. In Anderson v. Liberty Lobby, ___ U.S. ___, 106 S.Ct. 2505 (1986), the Supreme Court extended such protection to the pre-trial stage where motions for summary dismissal are heard. The Court held that a public figure must offer evidence of actual malice by “clear and convincing” evidence if he is to avoid the granting of summary judgment for the defendant: “Just as the ‘convincing clarity’ requirement is relevant in ruling on a motion for directed verdict, it is relevant in ruling on a motion for summary judgment.” 106 S.Ct. at 2513.
in *New York Times*, the Supreme Court extended the test to cases involving public figures in *Curtis Publishing Company v. Butts* and *Associated Press v. Walker*. While the Court did not specifically state that public figures who must meet the same actual malice test as public officials would also have to do so with convincing clarity, it may be assumed that if the Court wanted to change the level of proof in cases involving public figures, it would have said so. By extending the actual malice test to public figures, the Supreme Court retained within its jurisdiction decisions as to the level of protection provided media defendants in libel suits involving public officials and public figures.

That view was not shared by Pennsylvania courts, which felt that they could tamper with the level of proof in actual malice cases. In *Corabi*, the Supreme Court of Pennsylvania specifically rejected the interpretation that public figures must prove their cases by convincing clarity:

We do not agree . . . that the jury must be instructed that a public figure plaintiff must prove "actual malice" by "clear and convincing" evidence rather than by a preponderence of evidence. . . . While the existence or absence of actual malice is a question of fact for the jury, whether there is sufficient evidence in the case to warrant such a finding by the jury is a question of law for the court and is reviewable on appeal. . . . We believe that the . . . Court . . . was not addressing itself to the degree of proof . . . but to the standard by which the court must review the evidence.

The actual malice standard, which has protected media organizations when covering public officials and public figures, is diluted when the level of proof required is lessened. The issue remains unsettled even though the Third Circuit, in *Chuy*, conceded that the "convincing clarity" standard probably applies to public figures; yet, while the Third Circuit was aggressive in helping Pennsylvania choose negligence as the correct standard for private persons, it declined to end the apparent discrepancy between the Supreme Court decisions and state court rulings on the issue of level of proof.

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115. Id. (decided with Butts).
116. 441 Pa. at 456-57, 273 A.2d at 911-12. In *Gertz*, the Supreme Court did state that public figures must also prove actual malice with "convincing clarity": "Those who . . . are properly classed as public figures and those who hold governmental office may recover for injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth." 418 U.S. at 342.
117. 595 F.2d at 1281. The court provided:

Because Chuy is a public figure, this may require that he prove by "convincing
It is not always immediately clear what issues will confront lower courts in the wake of complex Supreme Court decisions. It may take years before cases move through the appellate system to answer the numerous questions that arise. But when an appellate court has the opportunity to clarify apparent discrepancies between the Supreme Court and state courts, it should not follow the road of self-restraint and “reserve a decision for another day,” as courts are fond of doing. It should make a decision one way or the other so that plaintiffs, defendants and judges in libel cases will know in advance what standards will apply. It does not seem appropriate to leave “unsettled” a question as fundamental as the degree of proof that must be met by public officials and public figures.

The Supreme Court intended for the actual malice test to provide substantial protection to media organizations when discussing the activities of public officials and public figures. While it has struck a new balance between first amendment and reputational interests by narrowing the categories of individuals who are considered public figures, it has not altered the degree of proof required in cases where the actual malice standard applies. Until the Supreme Court changes the level of proof in cases involving public officials and public figures, or specifically allows states greater autonomy in this key area, the states should not take it upon themselves to choose an interpretation that is less accommodating to fundamental first amendment interests. It can be argued that the actual malice test places an intolerable burden on even the public official or public figure libel plaintiff. But state discretion over libel laws should not include tampering with an actual malice test the Supreme Court has determined must remain under federal constitutional standards.

In Pennsylvania, there have been some developments in the clarity that [the] statement was capable of defamatory meaning. This is the standard enunciated in New York Times v. Sullivan, for proof of actual malice required of a public figure. Without deciding whether the evidence of defamatory content should be measured by that standard or one less stringent, we are satisfied that Chuy failed to prove defamation.

Id.

118. The Supreme Court often counsels self-restraint by suggesting that judges decide cases on as narrow grounds as possible, avoiding formulating a rule of constitutional law broader than is required by the precise facts to which it is to be applied. See Justice Brandeis’ famous concurring opinion in Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936).

119. See supra note 85 and accompanying text.
public figure/private person area which are accommodating to first amendment interests. A decision that has had some impact within the state and has been cited by other state courts as well is *Steaks Unlimited v. Deaner.* Decided by the United States Court of Appeals for the Third Circuit in 1980, the case examined the question of whether a business can be considered a public figure for the purposes of a libel suit.

A consumer reporter for a Pittsburgh television station did a series of reports on a retail meat company, alleging that the company was engaged in fraudulent activities including misrepresenting the price and quality of its product. A central issue in determining that the company would be considered a public figure in its suit against the television station and the reporter was that it had advertised in the area. The company's advertisements were featured on radio and in newspapers, and the company erected large signs and distributed handbills. The advertising campaign cost more than $16,000.

The trial court had granted the defendant's motion for summary judgment on the grounds that the company was a public figure and had failed to provide evidence of actual malice. The court of appeals in *Steaks Unlimited* undertook a detailed examination of the Supreme Court's efforts to define public figures. The court understood *Gertz* to mean that there were three classes of public figures: those who became public figures through no purposeful action of their own, although they recognized that the instances of truly involuntary public figures would be "exceedingly rare;" those who occupy such power and influence that they are public figures for all purposes; and the more common situation where they have thrust themselves to the forefront of a public controversy to influence the resolution of the issues involved. In such a situation, the public figures invite attention and comment.

Public figures, in the view of the court of appeals, are distinguished by their greater access to channels of communication in order to counteract false statements; and they are "less deserving of [judicial] protection because they have, 'voluntarily exposed themselves to increased risk of injury from defamatory falsehood

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121. 623 F.2d at 267.
122. Id. at 273.
In the words of the court of appeals, "public figures effectively have assumed the risk of potentially unfair criticism by entering into the public arena and engaging the public's attention."124

In the opinion of the court of appeals, Steaks Unlimited assumed such a risk by advertising:

Steaks is not a public figure in the general sense of the term. . . . There is nothing in the record here to indicate that Steaks is famous or widely involved in public affairs. . . . There is uncontroverted evidence, however, that Steaks so thrust itself into the purview of the Pittsburgh area public that the company can be characterized as a public figure for purposes of the controversy giving rise to this litigation.125

The court also noted that because Steaks Unlimited was able to purchase advertising time, it also possessed regular and continuing access to channels of communication. If the company had desired, it could have purchased additional advertising time to respond to or refute the charges made by the television station. The court of appeals agreed with the district court that the company, through its advertising campaign, had "voluntarily injected itself into a matter of public interest—indeed, it appears to have created a controversy—for the purpose of influencing the consuming public. In short . . . Steaks invited public attention, comment and criticism."126 The judgment of the district court was sustained.

Such a ruling obviously encourages news organizations to examine product and advertising claims of private businesses. Yet, the court seemed to suggest that the size of the company's advertising budget will be a factor in determining whether it is considered a public or a private figure. There is the implication that a company that spends less on advertising or whose advertising campaign is less effective would be considered a private individual.

VII. LIBEL PLAINTIFFS AND SUMMARY JUDGMENT

Journalists rely heavily on summary judgments in protecting themselves against frivolous libel suits brought by plaintiffs who may not have suffered actual injury as a result of irresponsible reporting, but who are unhappy with the way they have been portrayed in media coverage. When media defendants win summary

123. Id. (quoting Gertz, 418 U.S. at 345).
124. Id.
125. Id.
126. Id. at 274.
dismissal, they are spared the substantial time and financial commitment of defending the suit at trial and often through the appeal process. How often and under what circumstances judges grant summary dismissals in libel actions is a question of much importance. Plaintiffs argue that they are entitled to their day in court; journalists claim that many libel suits are brought to harass them, so that those without merit must be quickly dismissed.

The Libel Defense Resource Center, which gathers statistics on libel cases from around the country, concluded in a study covering the period from 1980 to 1984 that cases are much more likely to be dismissed on a motion by the defendant for summary judgment if the plaintiff has to prove actual malice. In a survey that covered 250 summary judgment motions, the LDRC study found that the success rate of the defendants seeking summary dismissal was eighty percent in cases where actual malice was the standard and sixty-five percent in cases where negligence was the issue.\(^{127}\)

Of the 136 cases involving private persons, in only three was the issue of negligence dispositive on the motion for summary judgment. In all three cases, the motion was denied.\(^{128}\) The LDRC study recognized that the sample of summary judgment motions in the cases where a standard other than actual malice applied is very small, but the study claimed that too is relevant:

Indeed, the paucity of motions may well itself be indicative of the significance of the choice of standard on pre-trial motion practice—suggesting that fewer defendants will even attempt to seek summary judgment where lesser standards of fault apply and, where sought, fewer such motions will be granted. Most courts consider negligence to be peculiarly a question of fact appropriate for resolution by a jury and not by the court. On the other hand, the far more demanding standard of fault in actual malice cases—and the higher clear and convincing evidentiary burden—have kept the success rate on summary judgment in actual malice cases high, despite footnote 9 of *Hutchinson v. Proxmire*.\(^{129}\)

In Pennsylvania, there has been an attitude on the part of some judges that summary judgment ought not to be granted hastily, on the assumption that a libel plaintiff is entitled to present evidence to a jury. In *Curran v. Philadelphia Newspapers*,\(^{130}\) decided by the Pennsylvania Supreme Court in 1981, Justice Roberts seemed to

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127. 12 LDRC Bulletin at 7 (December 31, 1984).
128. Id.
129. The LDRC study actually covered two two-year periods, 1980-82 and 1982-84. This quote is from the previous study covering the 1980-82 period. 6 LDRC Bulletin at 35 (March 15, 1983).
suggest that summary judgment should be granted not only when
the plaintiff has failed to offer evidence that a jury should con-
sider, but when it is almost a certainty that the plaintiff would lose
at trial.131 Quoting a series of cases, Justice Roberts outlined the
circumstances under which summary judgment should be
considered:

Summary judgment is granted only in the clearest of cases, where the right
is clear and free from doubt. . . . The moving party has the burden of prov-
ing the non-existence of any genuine issue of fact. . . . All doubts as to the
existence of a genuine issue of a material fact must be resolved against the
moving party.132

In Curran, the Pennsylvania Supreme Court went so far as to
say that a judge should be careful in accepting the testimony of
those seeking a summary judgment that there is no actionable
question which a jury should decide; and it warned against depriv-
ing a jury of the chance to hear the case, particularly since a jury
should be able to assess the credibility of testimony.133

More than fifty years ago in Nanty-Glo Borough v. American
Surety Company,134 the Pennsylvania Supreme Court stated its
determination to let questions of fact get to a jury: "[H]owever
clear and indisputable may be the proof when it depends on oral
testimony, it is nevertheless the province of the jury to decide . . .
as to the law applicable to the facts."135

In the wake of the Supreme Court's rulings in libel, the Pennsyl-
vania Supreme Court in Curran had to decide if the Nanty-Glo
rule was consistent with the constitutional privileges discussed in
New York Times v. Sullivan, St. Amant v. Thompson,136 and
Chief Justice Burger's suggestion in footnote nine in Hutchinson v.
The court was convinced that the rule was still good law: "We are satisfied that the case law of the Supreme Court of the United States supports our adherence to the Nanty-Glo rule in this controversy over the existence of actual malice." The court then cited Chief Justice Burger's footnote expressing doubt about a rule favoring summary judgment in determining whether a plaintiff had demonstrated actual malice, proof of which calls a defendant's state of mind into question and does not, in the view of the Supreme Court, readily lend itself to summary disposition. To the Pennsylvania court, St. Amant provided even more justification for limiting the use of summary judgment: "More significant, in St. Amant v. Thompson, the Supreme Court specifically stated that the defendant in a defamation action cannot insure a favorable verdict 'by testifying that he published with a belief that the statements were true.'"

Thus, Pennsylvania's Nanty-Glo rule, in the view of its highest court, can be derived "directly from the language of the Supreme Court." The language of the Pennsylvania Supreme Court would seem to indicate that the granting of summary judgment on behalf of a media defendant in a libel case would be the exception and not the rule.

Despite this apparently strict interpretation, Pennsylvania courts do grant summary judgment dismissals requested by media defendants. In fact, in Curran, the very case in which Justice Roberts described Pennsylvania law on the subject, a grant of summary judgment by the court of common pleas was sustained, although in the other libel action in the case it was reversed and the case was sent back to the lower court for further proceedings.

Summary judgment motions have been granted in a number of other Pennsylvania cases in recent years. In Brophy v. Philadel-

137. 443 U.S. 111 (1979). There was widespread concern among media organizations at the time that Chief Justice Burger's footnote would make it more difficult for judges to grant summary judgment for media defendants. The trial judge in Hutchinson had said that in cases involving actual malice, summary judgment "might well be the rule rather than the exception." But Chief Justice Burger warned lower courts not to be hasty: "Considering the nuances of the issues raised here, we are constrained to express some doubt about the so-called 'rule.' The proof of 'actual malice' calls a defendant's state of mind into question and does not readily lend itself to summary disposition." 443 U.S. at 120 n.9. The footnote has apparently not greatly reduced the number of summary dismissals awarded to media defendants. See 12 LDRC Bulletin (December 31, 1984).

138. 497 Pa. at 163, 439 A.2d at 652.

139. 390 U.S. at 732 (cited with approval, 497 Pa. at 184-85, 439 A.2d at 662).

140. 497 Pa. at 167, 439 A.2d at 654.
pha Newspapers,\textsuperscript{141} for example, decided by the Pennsylvania Superior Court in 1980, the court sustained a dismissal by summary judgment requested by a newspaper and granted by the trial court. The Superior Court recognized the many precedents for not granting summary judgment and, in fact, said that many of those arguments were persuasive. But in the \textit{Brophy} case, involving police officers who would have to meet the actual malice standard, there was, in the view of the court, no evidence of actual malice or deliberate falsification and, therefore, summary judgment was sustained.\textsuperscript{142}

But in \textit{Marcone v. Penthouse}, discussed above, the United States District Court for the Eastern District of Pennsylvania refused to grant a motion for summary judgment. The refusal was on the grounds that the plaintiff was not a public figure for the purposes of the present case, and "is not entitled to summary judgment on the ground that Mr. Marcone is a public figure who cannot produce evidence of malice as required of public figures by \textit{New York Times} and Gertz."\textsuperscript{143}

\section*{VIII. Pennsylvania's Shield Law in Libel Suits}

Whatever criticism the United States Court of Appeals for the Third Circuit deserves by those concerned about the first amendment, it must be commended for its decision in \textit{Steaks Unlimited} in another area of the law. The trial judge had denied a motion by Steaks Unlimited demanding outtakes on the grounds that such materials were protected by the Pennsylvania Shield Law.\textsuperscript{144} The court defined outtakes as "nonconfidential material, filmed or recorded in preparation for the . . . report, but not included in the broadcast."\textsuperscript{145}

The company claimed in its appeal that the outtakes were not protected by the shield law and that they would reveal that the television station had omitted from the broadcast material favorable to Steaks Unlimited. The company claimed that the outtakes would be relevant to the question whether the defendants had acted with "knowing or reckless disregard of the truth." The

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142. \textit{Id.} at 603, 422 A.2d at 633.
143. 533 F. Supp. at 360. Penthouse had argued for summary judgment on other grounds as well, such as fair reporting of judicial proceedings, which the court rejected.
144. 42 PA. CONS. STAT. ANN. § 5942 (Supp. 1979). \textit{See supra} note 41 and accompanying text.
145. 623 F.2d at 277 n.60.
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televisi0n station admitted that the outtakes contained relevant in-
formation, but argued that the Commonwealth through its shield
law had chosen to “deny litigants access to materials that might
reveal a source of information.”

The court noted that comparing the broadcast material with ma-
terial that was in the defendant’s possession but omitted is proba-
bly the most common way of proving that the defendants acted
with actual malice. “The jury is asked to infer from such a compar-
ison that the defendants acted with subjective doubts about the
truthfulness of their publication.”

Yet, the court was convinced that the Pennsylvania courts had
granted broad application of the shield law in a number of cases
and the trial court’s refusal to order the outtakes turned over to
the company was correct. The television station had claimed
that if it were forced to turn over the outtakes, sources to whom
confidentiality had been promised would be revealed. There was,
however, a more perplexing problem for the court. The television
station also sought to protect additional portions of an interview
with the primary sources. Because some portions had been used,
the primary source was known and viewing the outtakes would not
reveal the identity of the source. Nevertheless, the court held that
the seminal case on the shield law, In re Taylor, protects those
outtakes as well. The court expressed concern that even though the
primary source was known, the outtakes may have revealed sec-
ondary sources.

While the court of appeals had little discretion in the face of the
Pennsylvania courts’ strong endorsement of the shield law, it is re-
assuring to those concerned about the ability of media organiza-
tions to do investigative stories that a United States Court of Ap-

146. Id. at 277.
147. Id. at 277 n.62.
148. See In re Taylor, 412 Pa. 32, 193 A.2d 181 (1963); Hepps v. Philadelphia Newspa-
ners, 3 D. & C. 3d 693 (1977). In Steaks Unlimited, the court rejected the defendants’ argu-
ment that Herbert v. Lando required that the television station turn over the outtakes:
The [Supreme] Court did not hold . . . that it is unconstitutional for the states to
establish a privilege against state-of-mind discovery. The Constitution has never been
construed as requiring the states to provide persons or organizations who have been
defamed with a remedy for their injuries. It follows that, to the extent a state chooses
to authorize a cause of action for defamation, it may also limit the plaintiff’s ability
to prove his claim in order to promote other social purposes. Therefore, Pennsylva-
nia’s shield statute, adopted for the purpose of fostering freedom of the press, is not
inconsistent with the Supreme Court’s First Amendment analysis in Herbert.

623 F.2d at 279 n.74.
149. Id. at 279.
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peals has placed into law such a strong statement on the rights of journalists to keep confidential the names of sources. In a number of recent cases around the nation, judges have ordered journalists who are defendants in libel suits to reveal the names of sources even if confidentiality had been offered to the source; when they refused, the judges have instructed the juries to assume no source existed. In one case, the judge entered a default judgment for the plaintiff when a newspaper reporter refused to identify a source. While the holding of the Third Circuit may be limited because it was interpreting a state shield law and strong state court endorsement of it, it is nevertheless a case that favors first amendment interests.

The question of the applicability of the Steaks Unlimited decision is related to the issue of jurisdiction, a problem that arises when plaintiffs sue media defendants who circulate newspapers and newscasts across state lines. The television station in Steaks Unlimited, WTAE-TV, is licensed in Pittsburgh and serves the Pittsburgh area including portions of Eastern Ohio. Steaks Unlimited was incorporated and maintained its principle place of business in Ohio but was, in this case, selling meat at department stores in the Pittsburgh area.


151. One of the Americans taken hostage in Iran, Jerry Plotkin, sued the Daily News in Los Angeles after it quoted "federal law enforcement officials" as saying that he faced questioning about drug smuggling. Plotkin, who was not charged with any criminal offense, demanded to know the identity of the sources for the articles, which were published on January 21, 1981. According to the New York Times, Judge Sara Radin, in pretrial actions, told the reporters to identify their sources. When they refused, she granted a default judgment, meaning Plotkin, who had sued the newspaper for $60 million, won the lawsuit.

In a most interesting development, the parent company of the Daily News, the Tribune Company of Chicago, ordered the reporters who wrote the story to disclose their sources. According to the Times, it argued that the survival of the paper outweighed the reporters' promise to protect their informants. The judge eventually reversed the default judgment and allowed the case to be tried. The reporters eventually persuaded their sources, two officials of the Federal Drug Enforcement Agency, to allow themselves to be identified. Another judge ruled later that the two officials would be allowed to testify. Friendly, Reporters Who Hid Identity Of Sources Win Libel Ruling, N.Y. Times, Jan. 3, 1984, at B9.

The district court and court of appeals heard the case in their diversity jurisdiction. Because both parties to the case agreed that Pennsylvania law governed the substantive issue, the courts had no reason to challenge that agreement:

Inasmuch as Pennsylvania has an interest in the outcome of this litigation—the allegedly defamatory acts as well as the subject of the disputed broadcast occurred in Pennsylvania—there is no cause for this Court sua sponte, to challenge the parties' consensual choice of law. Accordingly, we turn to the determination of how a Pennsylvania court would be expected to resolve the substantive questions presented by this appeal.153

Interestingly, if the case had been tried under Ohio and not Pennsylvania law, the issue of the outtakes might have been decided differently. In Ohio v. Geis,154 the state court of appeals for Franklin County recognized the importance of protecting sources, as expressed by Ohio's shield law, but it was also concerned about other societal interests such as those discussed in Branzburg v. Hayes155 by the Supreme Court. In Geis, the court would have ordered an in camera inspection by the judge to determine whether the evidence requested by the defendant was admissible and relevant. That way, in the view of the court, the identity of the source would be protected.156 But some journalists, such as Myron Farber of the New York Times, feel that even an inspection by the judge in his chambers of notes or materials that would reveal the identity of sources is not permissible under shield laws.157 To its credit, the Ohio appeals court in Geis reversed the trial court's decision that the television station in Columbus had waived any right to protect outtakes by airing portions of the interview.158

There are many other areas of the law that have been left to the discretion of the states, and a brief review indicates that Pennsylvania's standards do not vary widely from those of other states. Pennsylvania has adopted the Restatement (Second) of Torts (Section 559), which provides a definition of defamatory communication. In Merton Center v. Rockwell International,160 the Penn-

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153. 623 F.2d at 269-70.
156. 2 Ohio App.3d at 264, 441 N.E.2d at 807.
158. 2 Ohio App.3d at 267, 441 N.E.2d at 809.
sylvania Supreme Court quoted the standard used by state courts, which was that "a communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third parties from associating or dealing with him."\(^{160}\)

The Pennsylvania Supreme Court made it clear, in Merton and in other cases, that it is up to the trial judge to make an initial determination of whether the challenged statement is capable of defamatory meaning. If the trial court decides the words are not capable of such meaning, "there is no basis for the matter to proceed to trial."\(^{161}\) If the court finds that the communication is capable of defamatory meaning, "it is for the jury to determine whether it was so understood by the recipient."\(^{162}\)

Many states, including Pennsylvania, had "malice" components in their libel laws before the Supreme Court changed the term malice from the traditional meaning, usually described as ill-will or spite, to the standard adopted in *New York Times* and extended in *Butts* and *Walker*. It has been difficult for Pennsylvania, as it probably has been for other states, to synthesize state statutes and court decisions relating to malice with the new Supreme Court standards. For example, Pennsylvania law provided, as did the law of most states, that a cause of action for defamation is "implied or presumed to exist from the unprivileged publication of defamatory words actionable per se."\(^{163}\) But in *Gertz*, the Supreme Court struck down state laws that allowed "presumed" damages where the statements were libelous per se, and thus called into question the continued validity of distinguishing between defamation per se and statements not defamatory on their face.

Pennsylvania allowed an exception to the libel per se rule if the published material furthered "[s]ome interest of social importance, which is entitled to protection even at the expense of uncompensated harm to the plaintiff's reputation."\(^{164}\) Even though this statement was made some years before *Butts*, *Walker* and *Rosenbloom*, it seems to combine many of their elements. In fact, the court of appeals in *Steaks Unlimited* noted Pennsylvania's ability to com-

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160. *Id.* at 464, 442 A.2d at 215.
161. *Id.* at 464-65, 442 A.2d at 215-16.
bine state standards with first amendment requirements:

Pennsylvania courts have tended to look for guidance to the First Amendment decisions of the United States Supreme Court . . . Pennsylvania cases do not distinguish precisely between the common law basis for recovery and the limitations placed on such tort claims by the First Amendment.\(^{165}\)

In a case decided by the same court two years earlier, the court of appeals recognized how difficult it is to tell where common law ends and constitutional law begins:

"[E]ven though in analyzing this case we start with Pennsylvania tort law, no rigid line of demarcation may be maintained between state law rules and constitutional norms, for both are intermixed in the Pennsylvania precedents.\(^{166}\)"

Judges, constitutional scholars and others have noted that it is these characteristics that make libel law so perplexing. Few areas of the law are as complex as libel, where courts try to combine modern first amendment principles with common law precedents, some of which have been on the books for many years. Trying to separate state law issues from constitutional standards has proved to be difficult; attempting to combine them and apply them in the context of modern mass media has not proved to be much easier.

**IX. Conclusion**

If Pennsylvania has become the libel capital of the nation, it is a dubious honor. Public officials, undaunted by the actual malice test, and private persons who need to prove only negligence, sue media organizations there at a frenzied pace.\(^{167}\) Media defendants often find Pennsylvania courtrooms to be hostile environments in which to press first amendment claims.

This article has suggested that states may settle many issues in the post-*Gertz* era. Pennsylvania has answered only some of those questions, while other issues remain less settled: Is it now as clear as can be who will be a public figure and who will be a private person in libel suits? If Pennsylvania courts are applying a "covert" public interest test, will the nature of the controversy, rather than just the actions of the plaintiff, continue to be an important factor?

Now that the Supreme Court has resolved the question of bur-

\(^{165}\) *Id.*
\(^{166}\) Pierce v. Capital Cities Communications, Inc., 576 F.2d at 502.
\(^{167}\) See 12 LDRC Bulletin (December 31, 1984) and 13 LDRC Bulletin (March 31, 1985) for other examples of libel suits involving news organizations in Pennsylvania.
den of proof in Hepps for cases involving private persons, must it also consider the level of proof that is appropriate in cases involving public officials and public figures? Will such plaintiffs in Pennsylvania and other states have to prove actual malice by "convincing clarity" or "preponderance of evidence?" Also, under what circumstances can media defendants reasonably expect summary dismissal?

In this era of legal "decentralization," states have been granted substantial autonomy to interpret what had previously been considered federal rights. States have reacted to such independence by relying more directly on their own constitutions, and by interpreting vague federal constitutional provisions in a way that conforms more with state and local standards. States know that the Supreme Court, with a crushing case load of its own, is willing to allow state experimentation in areas that previously required uniform national standards.

Such decentralization of the legal system may mean greater protection of fundamental rights, such as those of the first amendment, in states more committed to such principles; it may also mean a narrowing of such precious rights in states where reputation is considered to be on nearly equal footing with first amendment interests.168

Pennsylvania's experience in libel and the standards developed by its courts may or may not be representative of those of other states in this vital area of the law. But as more states react to Supreme Court libel decisions in this era of decentralization, it is likely that the first amendment is going to mean one thing in one state, and something very different in another.

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168. For a discussion of the "preferred position" theory of the first amendment, see LABUNSKI, supra note 3.