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GREENMOSS BUILDERS, INC. v. DUN & BRADSTREET INC. INVITES CONTROVERSY

ELMER GERTZ*

In little more than two decades, the United States Supreme Court has handed down several landmark decisions that define and refine the constitutional guidelines in the troublesome area of defamation.[1] It appeared that there was little more for the Court to decide except for certain largely peripheral aspects. Then, on June 26, 1985, the Court decided, on certiorari to the Supreme Court of Vermont, the case of *Dun & Bradstreet Inc. v. Greenmoss Builders, Inc.*[2] The judgment in favor of *Greenmoss* was affirmed, but there was no majority opinion. Justice Powell, who eleven years earlier had written the opinion of the Court in the important decision of *Gertz v. Robert Welch, Inc.*,[3] announced the judgment of the Court in the *Greenmoss* case and delivered an opinion, in which only Justices Rehnquist and O'Connor joined. Other opinions in the case were delivered by Chief Justice Burger and Justice White concurring only in the judgment, and by Justice Brennan, with whom Justices Marshall, Blackmun and Stevens joined, dissenting. State courts generally assumed that, just as public officials and public figures had to prove actual malice in the *New York Times v. Sullivan*[4] sense, private persons involved in matters of public interest had, also, to prove such actual malice in order to prevail in a defamation action. Then came *Gertz*[5] and the courts were disabused in their interpretation of *Rosenbloom.*[6] Even the United States Court of Appeals for the Seventh Circuit had shared the common error when it affirmed the dismissal of *Gertz* in the first trial.[7] It was only

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1. Rosenbloom v. Metromedia, 403 U.S. 29 (1971); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); Press v. Walker, 388 U.S. 130 (1967); Rosenblatt v. Baer, 383 U.S. 75 (1966); Garrison v. Louisiana, 379 U.S. 64 (1964); New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

2. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 105 S. Ct. 2939 (1985).

3. 418 U.S. 323 (1974).

4. 376 U.S. 254, 257 (1964) (a statement made with "actual malice" is one made "with knowledge that it was false or with reckless disregard of whether it was false or not").

5. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

6. Rosenbloom v. Metromedia, 403 U.S. 29 (1971).

7. Gertz v. Robert Welch, Inc., 471 F.2d 801 (7th Cir. 1972).

after the Supreme Court decided otherwise and there was a retrial resulting in a resounding Gertz victory that the Court of Appeals upheld the new view with respect to private persons involved as plaintiffs in defamation actions.[8] There followed case after case in which the highest Court of the land reaffirmed the position it had taken in *Gertz*.[9]

Thus, one must be very careful in reaching conclusions as to the effect of plurality opinions. This is especially true in considering *Greenmoss*. It is necessary as in all reviewing court cases, to ascertain the precise situation that gave rise to the judgment and the differing opinions.

We start with the unanimous opinion of the Vermont Supreme Court in *Greenmoss*,[10] where the case was first reviewed. This court handed down its decision on April 15, 1983, a bit more than two years prior to the United States Court judgment. As the Vermont court recited, Greenmoss, a building contractor, brought a defamation action against Dun & Bradstreet, a credit reporting agency, as a result of an erroneous credit report issued to the contractor's creditors.[11] The trial court entered judgment in favor of Greenmoss for $50,000 in compensatory or actual damages and $300,000 for punitive damages,[12] but granted the motion of Dun & Bradstreet for a new trial because the court thought its instructions to the jury were erroneous.[13] Thereupon several questions of law were certified by the trial court to the state supreme court, which held: (1) as a matter of federal constitutional law, qualified protections afforded media in "private" defamation actions, pursuant to the First and Fourteenth Amendments, do not extend to defamation actions involving nonmedia defendants;[14] (2) there is no qualified common-law privilege for credit reporting agencies, such as Dun & Bradstreet, in defamation actions;[15] (3) the trial court did not abuse its discretion in denying the defendant's motion to set aside the verdict as to the issue of punitive damages;[16] and (4) any error by the trial court in instructing in the standards of liability under the United States Supreme Court affording qualified protections to media in "private" defamation action was harmless error.[17] Therefore, the trial court's

8. Gertz v. Robert Welch, Inc., 680 F.2d 527 (7th Cir. 1982).
9. Wolston v. Reader's Digest Ass'n, 443 U.S. 157 (1979); Hutchinson v. Proxmire, 443 U.S. 111 (1979); Time, Inc. v. Firestone, 424 U.S. 448 (1976).
10. Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc., 143 Vt. 66, 461 A.2d 414 (1983).
11. *Id.* at 67, 461 A.2d at 415.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*

original jury verdict for Greenmoss was affirmed and the order for a new trial set aside.[18]

The Vermont Supreme Court stressed that Dun & Bradstreet operated a business in which factual and financial reports about individual business enterprises are issued exclusively to subscribers of its service.[19] These reports are based, purportedly, on information elicited from the individual business itself, the business' banking and credit sources, trade suppliers, and public records.[20] When Greenmoss' president met with its principal creditor, a bank, to discuss the possibility of future financing, it was informed by the bank that it had just received a credit report issued by Dun & Bradstreet that Greenmoss had recently filed a voluntary petition in bankruptcy.[21] This was totally false, as Greenmoss had never suffered a major economic reversal and its financial condition was sound.[22] As a result the bank put off any consideration of credit to Greenmoss and then terminated its credit, allegedly for reasons other than the unfavorable report.[23]

Greenmoss demanded that Dun & Bradstreet immediately correct the report and tender a list of those creditors who had received the false report in order that it might reassure them.[24] Dun & Bradstreet refused to give Greenmoss such list.[25]

On the basic issue as to whether the *Gertz* rule would apply both to media and nonmedia defendants in defamation cases the Vermont Supreme Court had much to say.[26]

In fact, one is tempted to quote at too great a length what the court had to say. It pointed out that the issue of whether *Gertz* applied to nonmedia defendants had never been decided by the United States Supreme Court. But the matter had been considered in a number of state courts.[27] The court pointed out that the nonmedia proponents emphasized that they have rights worthy of First Amendment protection and it is, therefore, illogical to afford them fewer protections than the media.[28] The Vermont Supreme Court declared the distinction between media and nonmedia, illusory and difficult to draw.[29]

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18. *Id.* at 72-73, 461 A.2d at 420-21.
19. *Id.* at 88, 461 A.2d at 416.
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.* at 73, 461 A.2d at 417.
27. *Id.*
28. *Id.*
29. *Id.*

The court decided, however, that it is not difficult to draw the distinction between media and nonmedia in cases involving credit reporting agencies, such as Dun & Bradstreet, which are in the business of selling confidential financial data to a limited number of fee-paying subscribers.[30] The court, therefore, expressed its agreement with the majority of circuit courts, and found that credit agencies, such as Dun & Bradstreet, are not entitled to the same First Amendment protection as contemplated by *New York Times* and its progeny, including *Gertz*.[31] The court observed:

> [I]n carefully surveying the decisions of those jurisdictions which have specifically addressed the issue of whether *Gertz* should be applied to nonmedia defendants, we note that the majority have refused such an extension. Although we are not bound by these decisions, their reasoning is both persuasive and compelling. In nonmedia defamation actions, "[t]he crucial elements . . . which brought the United States Supreme Court into the field of defamation law are missing. There is no threat to the free and robust debate of public issues: there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the press."[32]

Of course, the losing party, Dun & Bradstreet, petitioned the United States Court on certiorari.[33] The petitioner reduced the issue presented in the case to whether the First Amendment's limitations on the award of presumed and punitive damages for libel, recognized in *Gertz*, apply to "non-media" defendants.[34] It declared that there could be no recovery for compensatory or "general" damages against a "non-media" defendant absent a showing of "actual malice" as defined in *New York Times v. Sullivan*.[35] It reasoned that the law of libel would become too complex if there had to be a threshold ruling as to the defendant's status and that, in any event, it would be too difficult to apply any such distinction.[36]

After the original argument before the Court on March 21, 1984, that Court entered an order on July 5, 1984, that "requested" the parties to brief and argue the following questions: (1) Whether, in a defamation action, the constitutional rule of *New York Times* and *Gertz* with respect to presumed and punitive damages should apply where the suit is against a non-media defendant, and (2) Whether, in a defamation action the constitutional rule of *New York Times* and *Gertz* with respect to presumed and punitive damages should

30. *Id.*
31. *Id.* at 69-70, 461 A.2d at 417-18.
32. *Id.* at 70, 461 A.2d at 418.
33. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 105 S. Ct. 2939 (1985).
34. *Id.* at 2941.
35. *Id.* at 2942.
36. *Id.*

apply when the speech is of a commercial or economic nature.

Significant *amicus curiae* briefs were filed. The one that the Information Industry Association filed vigorously argued that the *New York Times* and *Gertz* rule should apply irrespective of the status of the defendant, and that the fact that the speech involves commercial or economic information does not deprive the speaker of First Amendment protection against the unrestricted imposition of presumed or punitive damages.[37] The brief pointed out that the Association represents approximately 300 information publishers and information service organizations. Dow Jones & Company, in its *amicus* brief in support of Dun & Bradstreet, pointed out that it publishes the *Wall Street Journal* and is, also, involved in the dissemination of information through a variety of electronic news.[38] A somewhat surprising *amicus* brief was filed by the American Federation of Labor and Congress of Industrial Organization in support of the Dun & Bradstreet position. The AFL-CIO, it declared, is a federation of 95 national and international trade unions with a total membership of 13,500,000 working people.[39] It opined that if Dun & Bradstreet is not part of the media, neither is the AFL-CIO or its affiliated unions.[40] Thus the unions will be faced with the increased danger of defamation actions. On the other hand, the *amicus* brief in support of *Greenmoss* filed by Sunward Corporation advised the Court that it was involved in litigating similar issues in a case then ending in the United States Court of Appeals for the Tenth Circuit.[41]

After the grant of certiorari and while the case was still pending before the United States Supreme Court, the Vermont Law Review published an extensive analysis of the Vermont Supreme court judgment as if to influence the thinking of the highest court of the land.[42] The article stated:

> When the Vermont Supreme Court decided *Greenmoss* by reference to the federal defamation law of *Gertz*, it coincidentally embraced Justice Stewart's view that the Constitution of the United States differentiates between those within and without the "institutional

37. Information Industry Association *amicus curiae* brief at 1-2, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 105 S. Ct. 2939 (1985).

38. Dow Jones & Co. *amicus curiae* brief at 1-2; Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 105 S. Ct. 2939 (1985).

39. American Federation of Labor and Congress of Industrial Organization *amicus curiae* brief, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 105 S. Ct. 2939 (1985).

40. *Id.*

41. Sunward Corp. *amicus curiae* brief at 1, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 105 S. Ct. 2939 (1985), *see* Sunward Corp. v. Dun & Bradstreet, Inc., No. 83-2644 (10th Cir. Dec. 23, 1983).

42. Case Comment, *Greenmoss Builders v. Dun & Bradstreet*, 10 VT. L. REV. 205 (1985).

> press," if not for exactly Justice Stewart's reasons. The defense, after all, had asked the Vermont court to extend to all defamation defendants the protections of *Gertz* specifically—an extension quite beyond the power of the court as a matter of federal constitutional law. The supreme court had no choice but to apply the *Gertz* rules exactly as it did, and to find that the first amendment does not protect defamatory remarks made by individuals about other private parties. No such result, however, is necessary under state law. The competing interests of reputation and freedom of speech are recognized by the Vermont Constitution. An adjudication of the rights of the parties in *Greenmoss* would have been quite possible based exclusively on the relevant provisions of the state charter. The court could have determined, under the freedom of speech and freedom of the press language contained in the state constitution, that the privileges afforded to private speakers and to the institutional press are equal and co-extensive. The court might just as well have determined that the state document offered a degree of protection identical to that created by its federal counterpart.[43]

In considering *Greenmoss*, one should bear in mind that the First Amendment to the Constitution of the United States forbids the making of any law "abridging the freedom of speech, or of the press."[44] The press is expressly given the broadest protection without any limitation or any language distinguishing between the different products of the press, nor, indeed, of speech generally. Does this mean that all expression by the press or of speech are equally entitled to constitutional protection since the enactment of the fourteenth amendment? That is the question that was largely avoided as of the time of *New York Times* and *Gertz*. It should be noted, too, that there is no express reference to the press in the freedom of speech provision of the Illinois Constitution.[45] That is the difficulty that we face in interpretation in this State.

We come now to what Justice Powell and his brethren said about the case in a 5 to 4 decision affirming the judgment of the Vermont Supreme Court. They spoke not on the media-nonmedia issue that was issued in the petition for a writ of certiorari and in the "request" made by the Court itself in connection with the reargument of the case, but on the distinction between matters of public interest and those purely private.

Just as he had done earlier in *Gertz*, Justice Powell began his opinion in *Greenmoss* with a clear statement of the issue.[46] He observed:

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43. *Id.* at 218-19.

44. U.S. CONST. amend. I.

45. ILL. CONST. art. I, 4 ("all persons may speak, write and publish freely, being responsible for the abuse of that liberty").

46. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 105 S. Ct. 2939, 2941 (1985).

> In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), we held that the First Amendment restricted the damages that a private individual could obtain from a publisher for a libel that involved a matter of public concern. More specifically, we held that in these circumstances the First Amendment prohibited awards of presumed and punitive damages for false and defamatory statements unless the plaintiff shows "actual malice," that is, knowledge of falsity or reckless disregard for the truth. The question presented in this case is whether this rule of *Gertz* applies when the false and defamatory statements do not involve matters of public concern.[47]

It should be noted immediately that it was on this issue alone that Chief Justice Burger and Justice White agreed with Justice Powell in voting for the affirmance of the Vermont Supreme Court opinion, and not on the media-nonmedia issue.

Justice Powell went on to say: "Recognizing disagreement among the lower courts about when the protections of *Gertz* apply we granted certiorari."[48] Then he stated his objections to the Dun & Bradstreet analysis in the courts below:

> As an initial matter, respondent contends that we need not determine whether *Gertz* applies in this case because the instructions, taken as a whole, required the jury to find "actual malice" before awarding presumed or punitive damages. The trial court instructed the jury that because the report was libelous per se, respondent was not required "to prove actual damages . . . since damages and loss [are] conclusively presumed." It also instructed the jury that it could award punitive damages only if it found "actual malice." Its only other relevant instruction was that liability could not be established unless respondent showed "malice or lack of good faith on the part of the Defendant." Respondent contends that these references to "malice," "lack of good faith," and "actual malice" required the jury to find knowledge of falsity or reckless disregard for the truth—the "actual malice" of *New York Times*—before it awarded presumed or punitive damages.
>
> We reject this claim because the trial court failed to define any of these terms adequately. It did not, for example, provide the jury with any definition of the term "actual malice." In fact, the only relevant term it defined was simple "malice." And its definitions of this term included not only the *New York Times* formulation but also other concepts such as "bad faith" and "reckless disregard of the [statement's] possible consequences." The instructions thus permitted the jury to award presumed and punitive damages on a lesser showing that "actual malice." Consequently, the trial court's conclusion that the instructions did not satisfy *Gertz* was correct, and the Vermont Supreme Court's determination that *Gertz* was inapplicable was necessary to its decision that the trial court erred in granting the motion for a new trial. We therefore must consider whether *Gertz* applies to the case before us.[49]

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47. *Id.* at 2941-942.
48. *Id.* at 2942.
49. *Id.* at 2942-43.

While it would be enlightening to quote at length from Justice Powell's opinion, I believe that it may be fairly summed up in the following excerpts from it:

> We have never considered whether the *Gertz* balance obtains when the defamatory statements involve no issue of public concern. To make this determination, we must employ the approach approved in *Gertz* and balance the State's interest in compensating private individuals for injury to their reputation against the First Amendment interest in protecting this type of expression. This state interest is identical to the one weighed in *Gertz*. There we found that it was "strong and legitimate." . . .
>
> The First Amendment interest, on the other hand, is less important than the one weighed in *Gertz*. We have long recognized that not all speech is of equal First Amendment importance. It is speech on "matters of public concern" that is "at the heart of the First Amendment's protection."
>
> In contrast, speech on matters of purely private concerns is of less First Amendment concern. As a number of state courts, including the court below, have recognized, the role of the Constitution in regulating state libel law is far more limited when the concerns that activated *New York Times* and *Gertz* are absent. . . .
>
> In light of the reduced constitutional value of speech involving no matters of public concern, we hold that the state interest adequately supports awards of presumed and punitive damages — even absent a showing of "actual malice."[50]

Chief Justice Burger's opinion was quite brief. He asserted that he had dissented in *Gertz* because he believed that, insofar as the ordinary private citizen was concerned, he objected to the abandonment of the traditional theme of the law up to that time. He preferred to allow this area of the law to continue to evolve, rather than to embark on a new doctrinal basis. "*Gertz*, however, is now the law of the land, and until it is overruled, it must, under the principle of *stare decisis*, be applied by this Court."[51] "The single question before the Court today is whether *Gertz* applies to this case."[52] He agreed with the plurality opinion "that *Gertz* is limited to circumstances in which the alleged defamatory expression concerns a matter of general public importance, and that the expression in question here relates to a matter of essentially private concern."[53] His belief remains, as suggested by Justice White, that *Gertz* should be overruled. He believes, also, that *New York Times* should be reconsidered, so that, at the very least, a writing should be actionable if in the exercise of reasonable care it should be revealed as untrue.[54]

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50. *Id.* at 2944-46 (citations omitted).
51. *Id.* at 2948.
52. *Id.*
53. *Id.*
54. *Id.*

As with his dissenting opinion in *Gertz*, Justice White deals with the *Greenmoss* issues more fully. He noted:

> I joined the judgment and opinion in *New York Times*. I also joined later decisions extending the *New York Times* standard to other situations. But I came to have increasing doubts about the soundness of the Court's approach and about some of the assumptions underlying it. I could not join the plurality opinion in *Rosenbloom*, and I dissented in *Gertz*, asserting that the common-law remedies should be retained for private plaintiffs. I remain convinced that *Gertz* was erroneously decided. I have also become convinced that the Court struck an improvident balance in the *New York Times* case between the public's interest in being fully informed about public officials and public affairs and the competing interest of those who have been defamed in vindicating their reputation.[55]

Justice White went on more fully as to the vices of *New York Times*. He stated:

> The *New York Times* rule thus countenances two evils: first, the stream of information about public officials and public affairs is polluted and often remains polluted by false information; and second, the reputation and professional life of the defeated plaintiff may be destroyed by falsehoods that might have been avoided with a reasonable effort to investigate the facts. In terms of the First Amendment and reputational interests at stake, these seem grossly perverse results.[56]

And more specifically with respect to the failings of *Gertz* Justice White wrote:

> Although there was much talk in *Gertz* about liability without fault and the unfairness of presuming damages . . . [and] protecting the press from intimidating damages liability . . . it is evident that the Court in [*New York Times* and *Gertz*] engaged in severe overkill in both cases.
>
> In *New York Times*, instead of escalating the plaintiff's burden of proof to an almost impossible level, we could have achieved our stated goal by limiting the recoverable damages to a level that would not unduly threaten the press. Punitive damages might have been scrutinized as Justice Harlan suggested in *Rosenbloom*, or perhaps even entirely forbidden. Presumed damages to reputation might have been prohibited, or limited, as in *Gertz*. Had that course been taken and the common-law standard of liability been retained, the defamed public official, upon proving falsity, could at least have had a judgment to that effect. His reputation would then be vindicated; and to the extent possible, the misinformation circulated would have been countered. He might have also recovered a modest amount, enough perhaps to pay his litigation expenses. At the very least, the public official should not have been required to satisfy the actual malice standard where he sought damages but only to clear his name. In this way, both First Amendment and reputational interests would have been far better

55. *Id.* at 2950.
56. *Id.* at 2951.

served.[57]

Thus while Justice White joined in the affirmance of the *Greenmoss* judgment, he had heavy reservations with respect to the direction in which the law of defamation was going. It is clear that he would have preferred that we live with the common-law, at least with respect to the rights of individuals.

The dissent that Justice Brennan wrote, which was joined by Justices Marshall, Blackmun and Stevens, is twice as long as the plurality opinion of Justice Powell. He declared that Justice Powell has, in effect, undermined *Gertz* by introducing what he regards as the new element of matters of public or general interest.[58] *Gertz,* he says, does not make such distinction, and it is really not justified in the plurality opinion.[59] Having said this and much more in opposition to that opinion, he concludes by declaring that "Greenmoss Builders should be permitted to recover for any actual damages it can show resulted from Dun & Bradstreet's negligently false credit report, but should be required to show actual malice to receive presumed or punitive damages."[60] Brennan might well have reminded Powell that the latter had made a special point in *Gertz* of the impracticality of *ad hoc* decisions of what is important or unimportant in substance as a reason for limiting *Rosenbloom.*

Justice Brennan makes one statement that is not necessarily true, as I read the various opinions in the case. He says that at least six members of the Court agree that "the rights of the institutional media are no greater and no less than those enjoyed by other individuals or organizations engaged in the same activities."[61] I do not see that the Court has indicated that it expressly rejects the media — nonmedia distinction as a constitutional matter. It has simply not decided the case on that basis, possibly because it was easier to do so on another basis. It is not impossible that, in a more appropriate context, it will embrace the distinction in at least a limited fashion. It may yet be impressed by what the Supreme Court of Vermont and a majority of jurisdictions say on the subject of the distinction between media and nonmedia.

Some are troubled because the *Greenmoss* Court seems to have created a new category of expression, thus further complicating an already complex field of the law. Until *Greenmoss* the Court seemed to have dropped the common-law rules of defamation, in which there might be recovery without proof of either fault to injury. That

57. *Id.* at 2951-52.
58. *Id.* at 2959.
59. *Id.*
60. *Id.* at 2965.
61. *Id.* at 2959.

seemed to be the meaning of *Gertz*. Now it seems to be saying that, after all, the common-law will apply and not *New York Times* or *Gertz* if the aggrieved party is a private person and the defamatory expressions does not relate to a matter of public concern.

Some questions remain unanswered, but may be resolved in the present term of the Court. Who determines if the material is of public concern — the trier of the facts or the court? We must also, ask if the burden of proof as to all issues, except possibly the fact of publication, remains in the defendant as at common-law. This would mean that the defendant would have the burden in *Greenmoss* cases of proving the truth of the expression, and more than the truth — that the publication was made without malice and for laudable purposes.

There remains the issue of the recovery of punitive damages. Under both *New York Times* and *Gertz*, such damages may be recovered only if there is "actual malice" as defined in *New York Times*, not malice as at common-law. It is not unlikely that a majority of the Court will so conclude one day. But it only means that if the defamation is sufficiently heinous the jury will, somehow, find a way to enlarge actual damages.

It may be unfair or unfounded to say so, but, in some moods, it seems to me that there are three principal opponents of permitting aggrieved parties to recover for defamation. There are those who would abolish the action of libel completely or require proof of "actual malice" in all instances, public or private, or would limit recovery in every case to actual damages and exclude completely punitive damages. There are individuals or entities, such as the media, with a pecuniary stake in defending such actions, or rigid civil libertarians with an inflexible belief in an absolute privilege for all expression under the First Amendment, or Ivory Tower academic persons without any great experience in the real world. It seems to me that damages to the reputation can be as serious or more serious than bodily harm, recompensed by recovery in personal injury cases. A blatant enough lie or misstatement about a professional, business or lay person can destroy or reduce a practice or a business or one's standing in the community or one's self esteem. The circumstance that the media may be involved and that we are all concerned with the freedom of speech and the press should not be the sole consideration or necessarily the most important. "Media" is a too general expression. If it includes reputable organs like the *New York Times* and the *Christian Science Monitor*, it also includes, perhaps more often than not, the most irresponsible tabloids and scandal sheets. In a civilized society we owe it to each other not to be careless or trifling with reputations. At the very least, ordinary care ought to be expended to ascertain the truth.

When *New York Times* and *Gertz* were decided, there was reasonable certainty, so far as most litigants and lawyers were concerned, as to the circumstances in which both cases applied and the consequences thereof. It seems to me that there is not the same assurance with respect to *Greenmoss*. It may prove as evanescent as *Rosenbloom v. Metromedia*.[62] Virtually all of the lower courts assumed after *Rosenbloom* that it reflected the true state of the law, even if it was nominally only a plurality opinion. With *Gertz* that misconception was corrected. Then came *Greenmoss* to complicate the situation once more. One will have to await further rulings of the highest court.

While six justices accepted the basic premise of Justice Powell in *Greenmoss*, it would have been much better precedentially and practically if the six had joined in one majority opinion, expressing, if necessary, any doubts or reservations in addenda to the majority opinion. But that is not the way of Supreme Court justices. Thus we must accept the situation and be concerned only about the application of *Greenmoss* and how long a life there may be to it.

One returns again and again to the issue of damages in defamation actions. It is anomalous, to say the least, that we accept the likelihood of huge recoveries in personal injury cases, but some people, particularly the media and their advocates, gag at the thought of damages being determined by the selfsame kind of jury that will assess damages in a defamation case. Is there really a difference? Until 1964, when *New York Times* was decided, few would have thought of establishing constitutional guidelines in defamation or limiting the recovery in any way. The truth is that there is a kind of mythology that has sprung up in this area, suddenly and unreasonably. It does not help us in the evolving process of the development of the law. As Lincoln said in another context, "We must disenthrall ourselves." We must do so if we are to arrive at just and workable solutions. There is room for simplification, but not obfuscation.

62. 403 U.S. 29 (1971).