UIC Law Review

Volume 29 | Issue 4 Article 22

Summer 1986

Bench Memorandum Fourth Annual Benton National Moot Court Competition Briefs, 19 J. Marshall L. Rev. 1110 (1986)

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IN THE SUPREME COURT
OF THE
STATE OF MARSHALL
No. 85-211

DAVID GORDON, Petitioner vs. RICHARD DOUGLAS, d/b/a EZ CONSTRUCTION COMPANY Respondent.	) On appeal from the Appellate Court) of the State of Marshall, there) heard on appeal from the Circuit) Court of Plymouth County, State) of Marshall.

BENCH MEMORANDUM

GEORGE B. TRUBOW*

STATEMENT OF THE CASE

This case comes before the Supreme Court of the State of Marshall on its order granting Petitioner, David Gordon, leave to appeal the decision of the Appellate Court of the State of Marshall. The parties are instructed to address all issues raised in the Appellate Court opinion.

The case came before the Appellate Court on an appeal from an order of the Circuit Court of Plymouth County, granting the defendant-appellee's motion for summary judgment. The facts are not disputed. The Petitioner, David Gordon ("Gordon"), owns and operates a personal home computer and has programmed it to serve as the host for an electronic bulletin board.

Gordon advertises his bulletin board, which he calls "Gordotalk," in various trade magazines. Those who are interested in home repairs and do-it-yourself carpentry work are invited to use the bulletin board to communicate with others having similar interests. Anyone who has a computer equipped with a "modem"—a device that allows a computer to be connected with standard telephone lines—can gain access to Gordon's computer by telephone.

Once connected with the computer bulletin board, the caller can read messages that have been posted on the system. In order to post messages, however, one must obtain a unique password from Gordon

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by paying him an annual $20 registration fee which covers the costs of operating the system but provides no profits. Gordon generally does not know a user's identity. A user will typically send a money order to cover annual dues, using only a "moniker" or nickname to identify himself. The user will either enclose a stamped, self-addressed envelope or call Gordon personally to obtain his password. It is not practical for Gordon to keep records of the users' addresses because they often use blind box numbers. Gordon registers only 200 passwords and, if the annual fee is not paid, he will cancel the password when the one-year term expires.

Gordon operates the bulletin board as a hobby. Although "Gordotalk" could be programmed to hold messages before they are posted, there is too much traffic for Gordon to personally screen messages and operate the system merely as a hobby. Unless a user posts an identifier, messages will be anonymous because the system does not keep track of what password is used to post a message. Messages left on the bulletin board are stored in the computer's memory; the oldest messages are automatically deleted to make room for new ones when the memory becomes full. Gordon, as the system operator, is the only one who can remove messages from the bulletin board unless the computer's program automatically deletes messages.

On Saturday, March 17, 1984, Gordon and his family left town on vacation early in the morning. The bulletin board was left operating during Gordon's absence. Sometime during that morning, the following message appeared on the bulletin board:

> "Attention readers: Avoid doing any business with EZ Construction Co. of Plymouth City. The owner is not a licensed contractor and his work frequently does not meet building code requirements."

This message was brought to the attention of the plaintiff, Richard Douglas ("Douglas"), who is the owner of EZ Construction Company, at about noon on March 17. Douglas immediately tried to contact Gordon, but was unable to do so until Monday, March 26, by which time the message had disappeared from the bulletin board. Gordon did not see the message on the board before he left on vacation. He returned from vacation on Sunday, March 25, 1984, late in the evening. Douglas is a properly licensed contractor and the accusation that he does not comply with the building codes is false.

Douglas filed an action for defamation in the Circuit Court of Plymouth County seeking presumed damages of $400,000. Gordon subsequently filed a motion for judgment on the pleadings arguing (1) that Gordon was not the publisher of the defamatory statement, and (2) that even if Gordon were the publisher, presumed damages are not recoverable because Douglas failed to allege that Gordon

knew that the defamatory statement was false or that he exhibited reckless disregard as to its falsity. The trial court granted the motion.

On appeal to the Appellate Court of the State of Marshall, the order of the trial court was reversed and the case remanded. The appellate court found that Gordon was a publisher of the defamatory material that appeared on his bulletin board. Gordon authorized users to post messages and he had the power to remove messages. His control of the bulletin board, the court held, rendered him a publisher of any material that was posted on it.

The appellate court also found that Douglas is not required to prove the strict "actual malice" standard enunciated in *New York Times v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710 (1964), and its progeny. The appellate court found that Douglas is not a public official or a public figure and the subject matter of the defamatory statement is not a matter of public concern. Accordingly, the court held that the constitutional requirements in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997 (1974), are inapplicable to the instant case, and the common law of the State of Marshall applies.

Gordon filed his petition for leave to appeal to the Supreme Court of Marshall. The court granted the petition and directed the parties to address all the issues raised in the appellate court.

ANALYSIS

I. IS GORDON A PUBLISHER OF DEFAMATORY MATERIAL?

To state a cause of action for defamation it is "necessary for the plaintiff to prove as part of his prima facie case that the defendant (1) published a statement that was (2) defamatory (3) of and concerning the plaintiff." Prosser and Keaton, *The Law of Torts*, p. 802 (5th ed. 1984). An essential element to tort liability, therefore, is that the defendant communicated or "published" the defamatory material to someone other than the person defamed. *Id.* at 797.

In this instance, the petitioner operates a computer bulletin board available for others to post messages. There are no cases dealing with publication on a computer bulletin board, though for other media, the courts have said that liability depends upon an affirmative duty to remove or prevent a publication by another, or upon the extent of the defendant's participation in publishing the defamatory statement. In the following cases the defendant's duty, or his participation, was sufficient to incur liability.

In *Fogg v. Boston & L.R. Co.*, 148 Mass. 513, 20 N.E. 109 (1889), the defendant railroad was held liable when its employee posted a

defamatory message on the train station's bulletin board. The court held that the employee's physical posting of the notice and failure to remove it after being informed of its defamatory nature was sufficient to constitute participation in the publication of the information. *Id.*

In *Heller v. Bianco,* 11 Cal. App.2d 424, 244 P.2d 757 (1952), the defendant tavern owner was held liable when his employee, having been notified by plaintiff's husband, allowed a defamatory message to remain on the walls of the tavern's toilet. Heller is in accord with the Restatement of Torts 2d 577(2) (1977), "One who intentionally and unreasonably fails to remove defamatory matter that he knows to be exhibited on land or chattels in his possession or under his control is subject to liability for its continued publication." The court stated that "persons who invite the public to their premises owe a duty to other not to knowingly permit their walls to be occupied with defamatory matter." *Heller v. Bianco,* supra at 759.

In *World Publishing Co. v. Minahan,* 173 P. 815 (Sup. Ct. Okla. 1918), the court found the editor of a newspaper liable for the publication of a defamatory article which was published while he was away on vacation. The court said, "The managing editor of a newspaper is equally liable with the proprietor for the publication or not, as it is his duty to know the contents of all articles published." *Id.*

The court in *Sorensen v. Wood,* 243 N.W. 82 (Sup. Ct. Neb. 1932), *cert. denied,* 290 U.S. 599, 54 S.Ct. 209 (1933), held that a radio station has a duty to prevent defamatory words from being spoken by third parties and transmitted to the radio public through its facilities. The court found that the radio station was liable when it failed to censor a prepared script made available prior to the broadcast. *Id.*

In *Paton v. Great Northwestern Telegraph Co.,* 170 N.W. 511 (Sup. Ct. Minn. 1919), the court found the telegraph company liable for the publication of patently defamatory matter that it received and sent over its equipment without making any inquiry as to its truth or falsity. The court said, "(a) telegraph company may be required to respond in damages for transmitting and delivering a message libelous on its face, unless the message be privileged or the charge be justified." The court added that, a communication is "privileged if the operator acted carefully and in good faith, but was not privileged if he was negligent or wanting in good faith, in sending it." *Id.*

The following cases are instances where the courts have *not* found the defendant's duty or participation to be sufficient to establish responsibility for the publication of defamatory matter.

In *Scott v. Hull,* 22 Ohio App.2d 141, 259 N.E.2d 160 (1970),

the court held that the defendants were not liable for defamation where an unknown person inscribed grafiti defaming the plaintiff on the exterior wall of a building owned and maintained by the defendants. The court said that liability for defamation must be "predicated upon actual publication by the defendant or on the defendant's ratification of a publication by another." *Id.* at 161. Publication involves "a positive act or something done by the person sought to be charged, malfeasance in the case of an intentional defamatory publication and misfeasance in the case of a negligent defamatory publication. Nonfeasance, on the other hand, is not a predicate for liability." *Id.* at 162.

The court in *Folwell v. Miller*, 145 F. 495 (2d. Cir. 1906), held that the president of a newspaper was not individually liable for a libel published in his absence. The court said that "when it appears affirmatively that defendant was not on duty during any part of the time between the reception of the libelous matter by the newspaper and the publication, and could not have had any actual part in composing or publishing, we think he cannot be held liable without disregarding the settled rule of law by which no man is bound for the tortious act of another over whom he has not a master's power of control." *Id.* at 497.

The court in *Summit Hotel Co. v. National Broadcasting Co.*, 336 Pa. 182, 8 A.2d 302 (1939), did not find the defendant radio station liable for an impromptu defamatory statement extemporaneously spoken by a person hired by a lessee and not in the employ of the defendant. The court concluded that the broadcaster's liability is extinguished through its exercise of due care in the selection of a lessee and the inspection and editing of the script to be broadcast: "A broadcasting company which leases its time and facilities to another, whose agents carry on the program, is not liable for an interjected defamatory remark where it appears that it exercised due care in the selection of the lessee, and, having inspected and edited the script, had no reason to believe an extemporaneous defamatory remark would be made." *Id.*

In *Anderson v. New York Telephone Co.*, 35 N.Y.2d 746, 361 N.Y.S. 2d 913 (1974), the Court of appeals of New York ruled that the defendant telephone company was not a publisher of a defamatory message that was transmitted over the defendant's equipment. The court held that there was no publication by the defendant because it did not directly participate in disseminating the defamatory material. *Id.* at 752. Even if the defendant had been informed about the nature of the message being communicated, the court held that there is no publication because the defendant never "participated in preparing the message, exercised any discretion or control over its communication, or in any way assumed responsibility." *Id.*

In *Maynard v. Port Publications, Inc.*, 98 Wis. 2d 555, 297 N.E.2d 500 (1980), the defendant, a contract printer, was not held liable for printing a newspaper containing a defamatory statement. The court said, "that those who are held liable for defamation because of their role in the publication process must know or have reason to know of the existence of the libel." The court found that the defendant, like other contract printers, provided "a quick and inexpensive printing service that by its low cost allows access to the print media by groups that would otherwise not find such access." The court concluded that placing liability on contract printers might deter them from printing controversial material and have a deleterious effect on the free dissemination of information.

In the instant appeal, Douglas may contend that Gordon sufficiently participated in communicating the defamatory message to be deemed a publisher, because he had complete control over the bulletin board, made it available specifically for the publication of messages, invited the public to post and read messages on the system, and chose to ignore how the system was used.

Gordon may counter that he provides a free public service, has no knowledge of message content, does not directly participate in publishing messages, and has no duty to censor the speech of those who use the system.

II. IS THE DEFAMATORY MESSAGE A MATTER OF PUBLIC CONCERN?

Prior to 1964, defamatory publications did not come within the area of constitutionally protected speech because they were false statements and the constitution was held to protect the truth, not lies. The law of defamation was the sole province of state courts and legislatures. *Beauharnais v. Illinois*, 343 U.S. 250, 266, 72 S.Ct. 725, 735 (1952). In *New York Times Co. v. Sullivan*, 376 U.S. 254, 283, 84 S.Ct. 710, 727 (1964), the United States Supreme Court held that "the Constitution delineates a State's power to award damages for libel in actions brought by *public officials* against critics of their official conduct" (emphasis supplied). Subsequent to *New York Times*, the court developed the scope of the constitutional limitations on state defamation law in an attempt to reach an accommodation between the states' interests in compensating individuals for harm to reputation and First Amendment concerns for free speech. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341-43, 94 S.Ct. 2997, 3008 (1974).

A. Development of the "Actual Malice" Standard.

The plaintiff in *New York Times* alleged that he had been libeled by statements made in an advertisement published in the defendant's newspaper. 376 U.S. at 256-57, 84 S.Ct. at 713. The advertisement concerned widespread, non-violent demonstrations staged by "Southern Negro Students" in support of their rights guaranteed by the Constitution. *Id.* The advertisement claimed that these students were being met by a wave of terror. *Id.* The plaintiff, who was the commissioner of police when the incidents occurred, claimed that the illustrations of the "wave of terror" reported in the advertisement referred to him because the conduct complained of was either carried out by the police or imputable to the police department for which he was responsible. 376 U.S. at 258, 84 S.Ct. at 714. Some of the statements in the advertisement were inaccurate descriptions of the events that occurred. *Id.*

The court stated that the case must be considered in the context of "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." 376 U.S. at 270, 84 S.Ct. at 721. The Court also noted that the advertisement concerned a "movement whose existence and objectives are matters of the highest public interest and concern." 376 U.S. at 270, 84 S.Ct. at 721. In holding that the advertisement clearly qualified for constitutional protection, the Court found that it was "an expression of grievance and protest on one of the major public issues of our time." 376 U.S. at 266, 84 S.Ct. at 718. The only issue, according to the Court, is whether the advertisement loses its constitutional protection because some of its factual statements are false and by its alleged defamation of the plaintiff. *Id.*

The *New York Times* Court ruled that "neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct." 376 U.S. at 273, 84 U.S. at 722. The common law rule allowing only truth as a defense to libel actions was held inadequate to protect First Amendment rights. 376 U.S. at 278, 84 S.Ct. at 725. The Court found that by requiring the critics of official conduct to guarantee the truth of all factual assertions, they "may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. *** The rule thus dampens the vigor and limits the variety of public debate." 376 U.S. at 279, 84 S.Ct. at 725. Recognizing the threat of self-censorship, the Court ruled that the constitutional guarantees require a rule

> "that prohibits a public official from recovering damages for a defamatory falsehood relating to this 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."

376 U.S. at 279-80, 84 S.Ct. at 726.

After examining the evidence, the *New York Times* Court held that the plaintiff failed to demonstrate actual malice, and the judgment for the plaintiff was set aside. 376 U.S. at 285, 84 S.Ct. at 728-29.

The *New York Times* "actual malice" standard was subsequently extended by the Supreme Court to cases in which the plaintiff is a "public figure." *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 87 S.Ct. 1975 (1967). *Butts* was decided together with its companion case *Associated Press v. Walker.* In *Butts,* an article published in the defendant's magazine accused the plaintiff of conspiring to "fix" a football game. 388 U.S. at 135-36, 87 S.Ct. at 1981. The plaintiff was the athletic director of the University of Georgia and had previously served as head football coach. *Id.* He was a well-known and respected figure in coaching ranks. *Id.* In *Walker,* the defendant released a news dispatch giving an account of a riot that erupted because of Federal efforts to enforce a court decree ordering the enrollment of a black man as a student in the University of Mississippi. 388 U.S. at 140, 87 S.Ct. at 1983-84. The dispatch stated that the plaintiff led a violent crowd in a charge against federal Marshalls on the campus. *Id.* He was also described as encouraging rioters to use violence. *Id.* Although the plaintiff was a private citizen at the time of the riot and publication, he was "acutely interested in the issue of physical federal intervention, and had made a number of strong statements against such action which had received wide publicity." *Id.* The plaintiff had his own following, and he "could fairly be deemed a man of some political prominence." *Id.*

In *Rosenbloom v. Metromedia, Inc.,* 403 U.S. 29, 41 S.Ct. 1811 (1970), the defendant's radio station broadcast news reports concerning the plaintiff's arrest for possession of obscene literature. 403 U.S. at 34-35, 91 S.Ct. at 1815. Some of the reports, used the terms "smut literature racket" and "girlie book peddlers." *Id.* The plaintiff filed a libel action for damages after he was acquitted of criminal obscenity charges upon a ruling that the magazines were not obscene. 405 U.S. at 36, 91 S.Ct. at 1816.

In affirming the Court of Appeals, which reversed an award of damages for the plaintiff, the Supreme Court applied the *New York Times* "actual malice" standard. The Court ruled that the standard applies "to all discussion and communication involving matters of public or general concern, without regard to whether the persons in-

volved are famous or anonymous." 403 U.S. at 43-44, 91 S.Ct. at 1820. The Court did not define what "an issue of public or general concern" means, but explained that "it was leaving the definition of the reach of that term to future cases." 403 U.S. at 44-45, 91 S.Ct. at 1820.

Four years after it was decided, *Rosenbloom* was limited by the Supreme Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346, 94 S.Ct. 2997, 3010 (1974). The *Gertz* court held that "the *New York Times* rule states an accommodation between (the First Amendment) concern and the limited state interest present in the context of libel actions brought by public persons." 418 U.S. at 343, 94 S.Ct. at 3008. The Court said that

> " . . . the States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehoods injurious to the reputation of a private individual. The extension of the New York Times test proposed by the Rosenbloom plurality would abridge this legitimate state interest to a degree that we find unacceptable. And it would occasion the additional difficulty of forcing state and federal judges to decide on an ad hoc basis which publications address issues of 'general or public interest' and which do not—to determine, in the words of Mr. Justice Marshall, 'what information is relevant to self-government.' "

Accordingly, the result was that the New York Times "actual malice" standard was not required when the defamatory statement involved issues of general or public interest.

B. The New Standards Enunciated in *Gertz*.

In *Gertz*, the defendant published the American Opinion, a monthly magazine expressing the views of the John Birch Society. 418 U.S. at 325-26, 94 S.Ct. at 3000. As part of a continuing effort to warn the public of a nationwide Communist conspiracy to discredit local police, an article appeared in the magazine in March 1969 entitled "FRAME-UP: Richard Nuccio and The War On Police." *Id.* Nuccio was a policeman who was tried for the murder of a youth named Nelso. *Id.* The plaintiff, Elmer Gertz, was portrayed as the architect of "frame-up" and the article made several false and inaccurate statements about him. *Id.*

The Court held that the plaintiff was neither a public official nor a public figure, and that the New York Times standard does not apply. 418 U.S. at 345-46, 94 S.Ct. at 3010. In defining the appropriate standard of liability, the Court held that the

> "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."

Id. The court explained that this approach 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 348, 94 S.Ct. at 3011. Accordingly, subject to the *Gertz* case a private plaintiff must establish at least negligence to recover in a libel action.

Although the Court principally relied upon its recognition of the "strong and legitimate state interest in compensating private individuals" as the basis of this new standard, it ruled that

> "this countervailing state interest extends no further than compensation for actual injury . . . (W)e hold that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth."

418 U.S. at 348-49, 94 S.Ct. at 3011. The Court reasoned that the possibility of presumed and punitive damages "compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms." 418 U.S. at 349-50, 94 S.Ct. at 3012. Consequently, under *Gertz* presumed and punitive damages cannot be recovered by a private plaintiff absent a showing of "actual malice," though actual damages can be recovered for mere negligence alone.

There has been considerable speculation concerning whether the requirements enunciated in *Gertz* are limited to defamation only by media defendants. The Court's opinion is replete with references to "newspapers," "broadcasters," "publishers, and the "media." In the Court'a analysis of the accommodation which must be reached among competing interests, for instance, it characterizes the balance as one "between the needs of the *press* and the individual's claim to compensation for wrongful injury." 418 U.S. at 343, 94 S.Ct. at 3009 (emphasis added). With respect to presumed and punitive damages, the Court explained that they threaten "to inhibit the exercise of First Amendment freedoms" and increase "the danger of *media* self-censorship." 418 U.S. at 349-50, 94 S.Ct. at 3012 (emphasis added). As a result, there is disagreement in the lower courts as to whether *Gertz* applies only to media defendants. *Davis v. Schuchat,* 510 F.2d 731 (D.C. Cir. 1975): *Gertz* is applicable to cases involving both media and non-media defendants. *Rowe v. Metz,* 195 Cal. 424, 579 P.2d 83 (1978): Gertz applies only to cases involving media defendants.

C. Application of *Gertz*: The Public Concern Test.

The Supreme Court recently tried to settle the confusion surrounding the application of *Gertz* in *Dun & Bradstreet, Inc. v.*

Greenmoss Builders, Inc., _ U.S. _, 105 S.Ct. 2939 (1985). In *Greenmoss Builders*, a contractor brought a defamation action against a credit reporting agency. The defendant had erroneously reported that the plaintiff had filed a voluntary petition for bankruptcy, and defendant grossly misrepresented the plaintiff's assets and liabilities. This report was sent to five of the defendant's subscribers pursuant to an agreement under which subscribers will not reveal the information to others. 105 S.Ct. at 2941. The plaintiff brought an action for defamation. 105 S.Ct. at 2941-42.

The Vermont Supreme Court held that "as a matter of federal constitutional law, the media protections outlined in *Gertz* are inapplicable to non-media defamation actions." *Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc.*, 143 Vt. 66, 461 A.2d 414, 418 (1983). As a result, *Gertz* was held inapplicable to the case, and since the plaintiff was not a public official or public figure it was not required to prove "actual malice" to recover punitive damages. The United States Supreme Court affirmed the decision of the Vermont Supreme Court, but *not* based on the distinction between media and non-media defendants. 105 S.Ct. at 2942. Instead, the Court held that a distinction must be made between "matters of public concern" and "matters of purely private concern." 105 S.Ct. at 2945-46.

The *Greenmoss Builders Court* addressed the question "whether the *Gertz* balance obtains when the defamatory statements involve no issue of public concern." 105 S.Ct. at 1944. In applying the Gertz approach of balancing the State's interest against the First Amendment interest, the Court held that the State interest was "strong and legitimate." 105 S.Ct. at 2945. The First Amendment interest, however, the Court found to be "less important" than that involved in *Gertz*. *Id.* The Court explained that "(i)t is speech on 'matters of public concern' that is at the heart of the First Amendment's protection." *Id.* On the other hand, "speech on matters of purely private concern is of less First Amendment concern." 105 S.Ct. at 2946.

The Court reasoned that "(t)here 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." *Id.*

In summary, then, the principal cases provide as follows:

1. *New York Times* enunciated the "actual malice" (deliberate or reckless falsity standard, which must be alleged and proved if a *public official* is the defamation plaintiff.

2. *Walker* and *Butts* extended the "actual malice" requirement also to *public figure* defamation plaintiffs.

3. *Rosenbloom* said that "actual malice" was also required when the content of the defamation involved matters of general or public interest, regardless of whether the defamation plaintiff was a public or private person.

4. *Gertz* withdrew from the *Rosenbloom* extension, and said that matter of general or public interest did *not* require "actual malice." A private person defamation plaintiff could recover actual damages in accord with state law, except that there could not be liability without fault in such a case. To recover presumed or punitive damages, however, the plaintiff must allege and prove "actual malice."

5. *Greenmoss* held that *Gertz* itself applied only to matters of public concern, and therefore state law governs defamation actions brought by private person plaintiffs regarding communications that do not involve matters of public concern. "Actual malice" would be required to recover presumed damages if the defamation involved a matter of public concern. (the plurality opinion in *Greenmoss Builders* specifically dealt only with the applicability of the *Gertz* requirement with respect to presumed and punitive damages. 105 S.Ct. at 2941. It seems reasonable to infer, however, that *Greenmoss Builders* applies to *Gertz* as a whole, including its requirement that the states do not impose liability without fault. If this is so, a state could impose strict liability for the defamation of a private citizen plaintiff when no issue of public concern is involved. Such a conclusion is supported by Justice White's concurring opinion in *Greenmoss Builders.* He notes that although the plurality opinion speaks only with respect to presumed and punitive damages, "it must be that the *Gertz* requirement of some kind of fault on the part of the defendant is also inapplicable in cases such as this." 105 S.Ct. at 2953 (White J. concurring).)

D. What Constitutes A Matter of Public Concern?

The Supreme Court plurality found that *Greenmoss Builders* involved "no issue of public concern." 105 S.Ct. at 2944. The Court referred to the following factors as indicating that the defendant's credit report concerned no public issue:

> "It was speech solely in the individual interest of the speaker and its specific business audience. . . . the speech is wholly false and clearly damaging to the victim's business reputation. . . . Since the credit report was made available to only five subscribers (who) . . . could not disseminate it further, it cannot be said that the report involves any 'strong interest in the free flow of commercial information.' There is simply no credible argument that this type of credit reporting requires special protection to ensure that 'debate on public issues (will) be uninhibited, robust, and wide open.'" 105 S.Ct. at 2947 (citations omitted).

The Court found that credit reporting "is hardly and unlikely to be deterred by incidental state regulation." *Id.* Furthermore, it is "solely motivated by the desire for profit," and the reporting is "more objectively verifiable than speech deserving of greater protection." *Id.*

The Court cited another case in which it said that "(w)hether. . . .speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick v. Myers,* 461 U.S. 138 147-48, 103 S.Ct. 1684, (1983). In *Connick,* the plaintiff alleged that she was wrongfully discharged from the District Attorney's office because she exercised her constitutionally protected right of free speech. 461 U.S. at 141, 103 S.Ct. at 1687. After expressing her strong opposition to her transfer to a different section, the plaintiff prepared and distributed a questionnaire to her fellow staff members. *Id.* The questioned asked concerned the office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns. *Id.* Subsequently, the defendant told the plaintiff that she was being terminated for not accepting the transfer, and he also told her that her distribution of the questionnaire was considered an act of insubordination. *Id.*

The *Connick* court ruled that only the last question was a matter of public concern. 461 U.S. at 149, 103 S.Ct. at 1691. The Court held that "when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest", then it cannot be speech which is a matter of public concern. 461 U.S. at 147, 103 S.Ct. at 1690. If the questionnaire were released to the public, the Court noted that it "would convey no information at all other than the fact that a single employee is upset with the status quo." 461 U.S. at 148, 103 S.Ct. at 1691. The question concerning pressure to work in political campaigns, however, was found to involve a matter of public concern. 461 U.S. at 149, 103 S.Ct. at 1691. The Court based this conclusion upon its finding that such pressure "constitutes a coercion of belief in violation of fundamental constitutional rights" and that "there is a demonstrated interest in this country that government service should depend upon meritorious performance rather than political service." *Id.*

Of course, the situations involved in *New York Times, Gertz, Walker and Butts, and Rosenbloom,* previously discussed, were all examples of matters of public concern.

The *Connick Court* also noted some other cases dealing with matters of public concern. In *Pickering v. Board of Education,* 391 U.S. 563, 571-72, 88 S.Ct. 1731, 1736 (1968), a "matter of legitimate

public concern" was involved where a teacher openly criticized the Board of Education for its allocation of school funds between athletics and education and its methods of informing taxpayers about the need for additional revenue. Similarly, a matter of public concern involved in *Mt. Healthy City Board of Education v. Doyle,* 429 U.S. 274, 97 S.Ct. 568 (1977), where a teacher was not rehired because he relayed the substance of a memorandum concerning teacher dress and appearance to a radio station. The memorandum was circulated to various teachers because of the administration's view that there was a relationship between teacher appearance and public support for bond issues.

Absent any clear test for determining what is a matter of public concern, this question will have to be answered on the facts of each case. It is apparent from the Court's language in *Greenmoss Builders,* as well as the factors which the Court considered, that all of the circumstances surrounding the expression must be considered, not just the expression itself.