St. John's Law Review

Volume 61
Number 1 *Volume 61, Fall 1986, Number 1*

Article 5

June 2012

New Jersey Creates a New "Semi-Public Figure" in Defamation Actions: Sisler v. Gannett Co., Inc.

Helen W. George

NEW JERSEY CREATES A NEW "SEMI-PUBLIC FIGURE" IN DEFAMATION ACTIONS: *SISLER v. GANNETT CO., INC.*

Since the trial of John Peter Zenger,[1] American courts have struggled with the scope of a publisher's liability for false and defamatory statements.[2] For more than two centuries, the matter was left largely to the states,[3] which often imposed a standard of strict

---

[1] *See* Attorney General v. Zenger, 17 HOWELL'S STATE TRIALS 675 (cited in C. LAWHORNE, THE SUPREME COURT AND LIBEL xvi-ii (1981)); LEVY, FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON 43-61 (1966). Zenger's 1735 trial for defamation of the governor of New York is deemed a turning point in American libel law in that the jury ignored the judge's instructions that publication of criticism was defamation as a matter of law; instead, the jurors took it upon themselves to acquit Zenger based on his defense of truth. *See* C. LAWHORNE, *supra*, at xvi-ii.

[2] *See* W. PROSSER & W. KEETON, THE LAW OF TORTS §§ 111-12, at 771-97 (5th ed. 1984). "[D]efamation is an invasion of the interest in reputation and good name." *Id.* at 771. It includes two forms of action: slander (an oral defamatory statement) and libel (defamatory statements that are written or otherwise expressed in some physical format, such as movies, signs, or pictures). *Id.* at 785-87. English courts adopted a further distinction between the two forms: in an action for slander, injury to the plaintiff's good name had to be specifically proven before damages were awarded. *Id.* at 795. Libel, however, was actionable per se and damages could be awarded for the presumed harm to the plaintiff's reputation. *Id.* This was also the position held by most American courts until Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). *See infra* note 9. *See also* Eldredge, *The Spurious Rule of Libel per Quod*, 79 HARV. L. REV. 733 (1966) (discussion of anomaly of libel per quod, requiring proof of injury).

In early common law cases, truth was a complete defense to an action for defamation. *See* Eaton, *The American Law of Defamation Through* Gertz v. Robert Welch, Inc. *and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1353 n.16 (1975). The burden of proving the truth of a defamatory statement was on the defendant; the plaintiff did not have to show falsity, only publication. *Id.* at 1353. The Supreme Court has recently vacated that long-standing assumption. *See* Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. ____, 106 S. Ct. 1558, 1563 (1986) (burden of proving falsity is on plaintiff).

[3] *See* United States v. Worrall, 2 U.S. (2 Dall.) 384, 393-94 (1798) (circuit court ruling that federal prosecution of common law crimes was illegal); *see also* United States v. Hudson and Goodwin, 11 U.S. (7 Cranch) 32 (1812), discussed in C. LAWHORNE, *supra* note 1, at 3-4 (Supreme Court, in its first libel decision, declared it had no criminal jurisdiction over common law cases). Moreover, since the Bill of Rights did not constrain the individual states, *see* Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243, 246 (1833), the Supreme Court retained limited jurisdiction in civil actions for libel. C. LAWHORNE, *supra* note 1, at 5. It was not until the twentieth century that the Supreme Court concluded that certain fundamental rights, including freedom of speech and of the press, are guaranteed to all citizens through the mechanism of the Due Process Clause of the fourteenth amendment. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925).

liability.[4] In 1964, however, the Supreme Court in *New York Times Co. v. Sullivan*[5] introduced a constitutional dimension to the question, holding that the first and fourteenth amendments protected criticism of public officials in their official conduct.[6] In such a case damages could only be awarded by proof of the defendant's "actual malice."[7] A decade later, in *Gertz v. Robert Welch, Inc.*,[8] the Court decreed that in actions where the plaintiff was a

---

[4] *See generally* W. PROSSER & W. KEETON, *supra* note 2, § 113, at 808-10 (English courts held defendants liable in defamation actions without regard to any question of negligence). The rationale for strict liability is based on two assumptions. First, there would have been no defamation without some negligence on the part of the publisher. Eaton, *supra* note 2, at 1359. Second, since media dissemination is likely to cause widespread harm, "enterprise liability" dictates that the publisher insure against the risk of that harm and, if necessary, pass on its costs through advertising and subscription rates. *Id.*

[5] 376 U.S. 254 (1964).

[6] *Id.* at 283. In *New York Times*, a Montgomery, Alabama, city commissioner alleged that he had been defamed by an advertisement appearing in the New York Times on March 29, 1960, which had mistakenly claimed that the Montgomery police had surrounded a college campus, padlocked the student dining hall during a peaceful civil rights demonstration, and been responsible for having arrested Dr. Martin Luther King Jr. seven times. *See id.* at 256-58. Although the advertisement did not mention Sullivan by name, he contended he had been libeled because he was the commissioner in charge of supervising the city police. *Id.* at 258.

A state trial court awarded Sullivan $500,000 in damages and the Supreme Court of Alabama affirmed. *Id.* at 256. The Supreme Court reversed and remanded, ruling that the Constitution constrained the states' power to punish defamation of public officials. *See id.* at 292.

The Court declined to delineate the parameters of "official conduct." *See id.* at 283 n.23. It also refused to specify which governmental employees would fit into the category of "public official." *See id. But see* Rosenblatt v. Baer, 383 U.S. 75, 85 (1966) (public official is government employee who has "substantial responsibility for or control over . . . governmental affairs"); *see also* Eaton, *supra* note 2, at 1377 (lower courts soon turned public official category into "government affiliation" test). The Supreme Court later extended the protections and requirements of *New York Times* to public figures in Curtis Publishing Co. v. Butts, 388 U.S. 130, 154-55 (1967) (university football coach held to be public figure by reason of position alone).

In light of the recent Supreme Court decision in Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985), one commentator has argued that the constitutional guidelines now used in defamation cases may be subsumed into a more general analysis applicable to all first amendment free speech issues. Note, *The De-Constitutionalization of Defamation Law—Is It Really That Far Off?*, 9 HAMLINE L. REV. 279 (1986).

[7] *New York Times*, 376 U.S. at 283. Early common law defined malice as spite or ill-will. Eaton, *supra* note 2, at 1353, n.15. Writing for a unanimous Court in *New York Times*, however, Justice Brennan defined actual malice as "knowledge that [the statement] was false or . . . reckless disregard of whether it was false or not." *New York Times*, 376 U.S. at 280. The Court refined this definition somewhat in St. Amant v. Thompson, 390 U.S. 727, 731 (1968) (recklessness must be proven by "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication").

[8] 418 U.S. 323 (1974).

private individual, the states were free to impose any standard of fault, so long as it was not strict liability.[9] As the Supreme Court has delineated the constitutional limits to freedom of expression,[10] states have slowly moved from their pre-*Gertz* position of strict liability[11] to an ever-increasing protection of the media.[12] Although states addressing the issue in terms of the plaintiff's status have thus far elected a variety of standards, all have employed the *Gertz* criteria for distinguishing public figures from private individuals.[13] Recently, in *Sisler v. Gannett Co., Inc.*,[14] New Jersey be-

---

[9] *See id.* at 352. Elmer Gertz was a Chicago attorney retained to represent the family of a youth killed by a policeman in a civil action against the officer. *Id.* at 325. The defendant's magazine, *American Opinion*, falsely labeled Gertz as the architect of a "frame up" in connection with the criminal prosecution of the officer. *Id.* at 325-26. The article also alleged that Gertz had a criminal record and was a "Communist-fronter." *Id.* at 326.

The Supreme Court ruled that, in an action for defamation, the *New York Times* actual malice burden of proof need not be met by an individual who was neither a public official nor a public figure. *See id.* at 352. The Court distinguished between public and private figures on two bases. *See id.* at 344. First, public figures enjoy much greater access to the media and therefore have a greater opportunity to correct false statements. *Id.* Second, the public figure has voluntarily placed himself in the middle of a public controversy in order to influence its outcome. *Id.* at 344-45. Neither criterion can be applied to a private individual, and thus the states retain a significant interest in promoting a legal remedy for defamation of a private individual. *Id.* at 345-46.

In a vehement dissent, Justice White objected to the abolition of the strict liability standard, arguing that it abrogated the common law in all or nearly all of the states and could not be justified as an intent of the original framers of the Bill of Rights. *See id.* at 370, 380 (White, J., dissenting).

[10] *See, e.g.*, Wolston v. Reader's Digest Ass'n, Inc., 443 U.S. 157 (1979) (publicity received in light of individual's failure to appear before grand jury did not render him a public figure); Hutchinson v. Proxmire, 443 U.S. 111 (1979) (scientist who had no special prominence or access to the media deemed not to be a public figure); Time, Inc. v. Firestone, 424 U.S. 448 (1976) (wife of wealthy industrialist not a public figure because neither of *Gertz* public figure criteria met).

[11] *See* Comment, *Defamation and State Constitutions: The Search for a State Law Based Standard after Gertz*, 19 WILLAMETTE L. REV. 665 (1983); Note, *supra* note 6.

[12] *See generally* Chapadeau v. Utica Observer-Dispatch, Inc., 38 N.Y.2d 196, 341 N.E.2d 569, 379 N.Y.S.2d 61 (1975) (private individual can recover in defamation action only by showing gross negligence on part of newspaper); The Gazette, Inc. v. Harris, 229 Va. 1, 325 S.E.2d 713, *cert. denied*, 472 U.S. 1032 (1985) (where statement is defamatory on its face and plaintiff is private individual, ordinary negligence prevails). For a recent compilation of cases, categorized by fault standard, see Annotation, *State Constitutional Protection of Allegedly Defamatory Statements Regarding Private Individuals*, 33 A.L.R.4th 212 (1986); *see also* LIBEL DEFENSE RESOURCE CENTER, FIFTY STATE SURVEY 1985-86 (1986) (state-by-state outline of defamation law).

[13] *See* B. SANFORD, LIBEL AND PRIVACY: THE PREVENTION AND DEFENSE OF LITIGATION § 7.2.2 (1985). However, in Aafco Heating & Air Conditioning Co. v. Northwest Publications, Inc., 162 Ind. App. 671, 321 N.E.2d 580 (1974), *cert. denied*, 424 U.S. 913 (1976), the Indiana Court of Appeals discussed the *Gertz* distinction, but rejected the notion of distinguishing among libel plaintiffs. *See id.* at 679, 321 N.E.2d at 588. The court established an actual

came the latest state to broaden the ambit of protection offered to the press beyond what the first amendment requires. In *Sisler*, the New Jersey Supreme Court imposed the actual malice burden on an individual who, while admittedly not a public figure by constitutional standards, was nevertheless a knowledgeable and experienced person who could have foreseen the risk of publicity engendered by his private transactions.[15]

The plaintiff in *Sisler* was one of the founders and former president of the Franklin State Bank.[16] Soon after he retired, Sisler obtained from the bank substantial loans for another business, a horse breeding farm.[17] In 1981, in a series of articles detailing a federal investigation into the bank's questionable loan practices,[18] the defendant's newspaper, *The Courier-News*, erroneously reported that Sisler's loans had been undercollateralized.[19] In Sisler's subsequent defamation suit, the appellate division affirmed the trial judge's conclusion that Sisler was a private figure,[20] and

---

malice standard of liability for all defamation plaintiffs, provided only that the subject matter involved an event of general or public interest. *See id.* at 677, 321 N.E.2d at 586. The court rejected the assumption that private individuals are any more deserving of state protection of their reputations than are public figures, *see id.* at 679, 321 N.E.2d at 588, and quoted approvingly from the pre-*Gertz* case of Time, Inc. v. Hill, 385 U.S. 385, 388 (1967): "Exposure of the self to others in varying degrees is a concomitant of life in a civilized community." 162 Ind. App. at 679, 321 N.E.2d at 588. The Indiana court expressly adopted the plurality opinion in another pre-*Gertz* case, Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971) (*New York Times* privilege extends to all publications on matters of public interest, regardless of plaintiffs' status). *See* 162 Ind. App. at 681, 321 N.E.2d at 590. The Supreme Court abandoned the *Rosenbloom* rationale in *Gertz*. *See Gertz*, 418 U.S. at 346 (1974).

[14] 104 N.J. 256, 516 A.2d 1083 (1986).

[15] *See id.* at 279, 516 A.2d at 1095.

[16] *Id.* at 259. 516 A.2d at 1085.

[17] *Id.* at 260, 516 A.2d at 1085.

[18] *Id.* The articles appeared on August 15, 19, and 20, 1981. The first story recounted the investigation of the bank, but did not mention the plaintiff. *Id.* Sisler's only objection to the second story was the word "ties" in the headline, "Bank officials have ties with firm in loan probe." *Id.* Sisler's primary claim of defamation arose from the third article which misstated the facts of his own loan. *Id.*

[19] *Id.* at 260, 516 A.2d at 1085. At the time that the articles were published, Sisler was negotiating to have three of the top breeding horses of the season stand stud at his farm. *Id.* The articles were anonymously mailed to the horse syndicator with whom Sisler was dealing, and negotiations were immediately terminated. *Id.* at 261, 516 A.2d at 1085. These losses formed the basis of Sisler's claims for actual and special damages. *Id.* at 280-82, 516 A. 2d at 1096. Although the question of damages was the subject of several secondary issues on appeal, *id.* at 279-85, 516 A.2d at 1095-98, this Comment is limited to a discussion of the primary focus of the case, the proper burden of proof.

[20] *See* 199 N.J. Super. 307, 312 (1985).

therefore subject to a lesser burden of proof than actual malice.[21] On appeal, the New Jersey Supreme Court, while conceding that Sisler did not meet the Supreme Court's criteria for a public figure,[22] nevertheless relied on the state's common law tradition of vigorous support of freedom of the press to subject Sisler to the more stringent actual malice standard.[23]

In *Sisler*, the court discussed two criteria developed by the Supreme Court in deciding libel cases: the plaintiff's status and the nature of the speech involved.[24] The *Sisler* court first concluded that an on-going federal investigation of a bank was a matter of legitimate public concern.[25] In examining Sisler's status, the court admitted that he was not a first amendment public figure.[26] The court, however, also found that federal law in this area did not totally supplant state law,[27] and that New Jersey's demonstrated commitment to free speech[28] dictated that the courts make a case-

---

[21] *See id.* at 315-16. The appellate division of the state superior court reached this conclusion by examining Lawrence v. Bauer Publishing & Printing, Ltd., 89 N.J. 451, 446 A.2d 469, *cert. denied*, 459 U.S. 999 (1982). In *Lawrence*, the state's highest court had carefully analyzed the plaintiffs' status, concluded that they were "limited purpose public figures" under *Gertz*, and imposed an actual malice standard. *See id.* at 465, 446 A.2d at 477. The intermediate appellate court in *Sisler* reasoned that there would have been no need for this analysis unless a private figure were to be subject to proving a lesser standard of fault. *See Sisler*, 199 N.J. Super. at 313. The court also noted that the overwhelming majority of the states addressing the issue since *Gertz* had adopted an ordinary negligence standard, and held that negligence was also the proper standard for a private individual against a media defendant in New Jersey. *See id.* at 315-16.

[22] *See Sisler*, 104 N.J. at 275, 516 A.2d at 1093.

[23] *See id.* at 271-72, 516 A.2d at 1091. In a case decided the same day as *Sisler*, the New Jersey Supreme Court also refused to apply the label "public figure" to a corporation whose product was the subject of defamatory statements. *See* Dairy Stores, Inc. v. Sentinel Publishing Co., 104 N.J. 125, 145, 516 A.2d 220, 228 (1986). In *Dairy Stores*, the court held the corporation to establishing proof of the defendant's knowledge of falsity or reckless disregard for truth or falsity. *See id.* at 150, 516 A.2d at 233.

[24] *See Sisler*, 104 N.J. at 265-69, 516 A.2d at 1088-89.

[25] *See id.* at 268, 516 A.2d at 1089. In particular, the court noted that its decision with regard to the public issue prong of the actual malice test was based largely on the extensive federal and state regulation of banking, with its special guidelines for a bank's loans to its executive officers. *See id.*

[26] *See id.* at 270, 516 A.2d at 1090. Writing for the majority, Justice Handler declared that the lower courts were correct in ruling that Sisler was not a first amendment public figure because he had neither attained special prominence nor voluntarily sought the public's attention on this issue. *See id.*

[27] *See id.* at 270-72, 516 A.2d at 1090-91.

[28] *Id.* at 272, 516 A.2d at 1091. The New Jersey Constitution provides:

> Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press. In all prosecutions or indictments for

by-case assessment of the equity of imposing the actual malice burden of proof.[29] Here the majority found that, although Sisler had not sought publicity, he was nonetheless a sophisticated business executive who should have known that his loan transactions would elicit public scrutiny.[30] Justice Handler reasoned that, because of Sisler's participation in a matter of legitimate public concern, it was not inequitable for the court to subjugate his individual reputational concerns to the interests of free speech by imposing a stricter burden of proof upon the plaintiff.[31] The court further justified this holding by enumerating problems it perceived in the negligence standard of liability and dismissing the use of expert testimony as ineffective.[32]

---

libel, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.

N.J. CONST. art. I, ¶ 6. The *Sisler* court noted that the New Jersey Legislature's enactment of the Shield Law, *see infra* note 62, was evidence of a strong state commitment to free speech. *See Sisler*, 104 N.J. at 271, 516 A.2d at 1091. Recent decisions had, in turn, interpreted both the state constitution and this statute to effect a wider protection of public debate on public issues. *Id.*

[29] *See Sisler*, 104 N.J. at 274, 516 A.2d at 1092. This same fairness to the individual, the court reasoned, was implied from the state common law decisions regarding the qualified privilege of "fair comment." *See id.* at 272, 516 A.2d at 1091. New Jersey defines the privilege as protection of even false ideas where the statements are honest expressions of actual opinion, imply no dishonorable motive other than the one stated, and are based on true facts. *See* Leers v. Green, 24 N.J. 239, 254-55, 131 A.2d 781, 789 (1957). The majority in *Sisler* also pointed to Kotlikoff v. The Community News, 89 N.J. 62, 444 A.2d 1086 (1982), as an example of "fair comment protection to speech regarding individuals who had assumed the risks of publicity." *See Sisler*, 104 N.J. at 272, 516 A.2d at 1091. However, it is submitted that *Kotlikoff* applied federal constitutional standards. *See Kotlikoff*, 89 N.J. at 68, 444 A.2d at 1092 (1982) ("fair comment" privilege obsolete after *Gertz*). *See generally* Note, *Fact and Opinion after* Gertz v. Robert Welch, Inc.: *The Evolution of a Privilege*, 34 RUTGERS L. REV. 81 (1981) (discussing elements of fair comment privilege and impact of Supreme Court decisions).

[30] *See Sisler*, 104 N.J. at 275, 516 A.2d at 1093. The court admitted that Sisler had not voluntarily sought publicity, and yet it contended that most business people would expect a large "insider" loan to engender legitimate public scrutiny. *See id.* On this basis, the court found that Sisler had "relinquished part of his reputation to the public eye." *Id.* at 274, 516 A.2d at 1093.

[31] *See id.* at 275, 516 A.2d at 1093.

[32] *See id.* at 276-79, 516 A.2d at 1093-95. The court feared that an ordinary negligence standard in the area of libel would serve only to promote censorship in that its unpredictable application would force a publisher to steer clear of topics involving private individuals. *See id.* at 276-78, 516 A.2d at 1093-94. Moreover, the court stated that this standard had great potential for use as a weapon to punish unpopular speakers and notions. *See id.* A standard of gross negligence had the same flaws, the majority asserted, and was useful where the jury had to assess ordinary human behavior, but not helpful in the context of defama-

Although concurring in the majority's order to remand the case, Justice Garibaldi argued against the imposition of the actual malice standard for several reasons.[33] The concurrence posited that the application of this standard struck an improper balance between the competing claims of a free press and the private individual by leaving the latter with no practical avenue of redress for defamation.[34] Second, in Justice Garibaldi's view, Sisler had done nothing to surrender any part of his reputation to public scrutiny.[35] Third, the creation of what Justice Garibaldi termed a "semi-public figure" would potentially affect many executives of high profile corporations and further confuse an already befuddled area of the law.[36] The concurrence suggested instead that the proper burden to be imposed on a private individual would be proof of professional negligence, ascertainable with recourse to the level of care required of the reasonably prudent media defendant.[37]

The concern for the public interest nature of speech evidenced throughout the *Sisler*[38] opinion is consistent with recent Supreme Court cases emphasizing the importance of the content of speech in libel actions.[39] It is suggested, however, that to effectuate that

---

tion. *See id.* at 278, 516 A.2d at 1094.

The court also commented that expert testimony might be useful only where the issues were unusual and complex, but that such testimony could not solve the problems of jury variance and press self-censorship inherent in either negligence standard. *See id.* at 278-79, 516 A.2d at 1095.

[33] *See id.* at 285-97, 516 A.2d at 1098-1104 (Garibaldi, J., concurring). Indeed, remand was the only point on which Justice Garibaldi agreed with the majority. *See infra* notes 34-37 and accompanying text.

[34] *See id.* at 285-87, 516 A.2d at 1098-99 (Garibaldi, J., concurring). Justice Garibaldi accused the majority of resurrecting the *Rosenbloom* rationale. *See id.* at 288, 516 A.2d at 1100 (Garibaldi, J., concurring); Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971).

[35] *See Sisler* at 290-91, 516 A.2d at 1101 (Garibaldi, J., concurring).

[36] *See id.* at 291-92, 516 A.2d at 1101-02 (Garibaldi, J. concurring). In addition, Justice Garibaldi asserted, the majority's holding would have made "semi-public figures" of the private individuals in several Supreme Court libel cases. *See id.* at 291, 516 A.2d at 1101-02 (Garibaldi, J., concurring). Justice Garibaldi also predicted that the lack of any specific criteria for the new category would only serve to promote second-guessing of the majority's intent. *See id.* at 291-92, 516 A.2d at 1102 (Garibaldi, J., concurring). The concurrence asserted that the court imposed the stricter standard of proof on Sisler solely because the majority was concerned with protecting speech on a matter of public interest. *See id.* at 291, 516 A.2d at 1101 (Garibaldi, J., concurring).

[37] *See id.* at 293-94, 516 A.2d at 1102-03 (Garibaldi, J., concurring). The key factors in assessing the level of care required of a professional would be the paper's size, financial and technical resources, and the period of time reasonably allotted to verification, given the pressures of deadline and topicality. *Id.* (Garibaldi, J., concurring).

[38] *See id.* at 263-75, 516 A.2d at 1087-92.

[39] *See* Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. ____, 106 S. Ct. 1558, 1564

concern, the New Jersey court has in essence created a third category of plaintiffs in defamation actions. It is submitted that such a path is fraught with uncertainties both for potential plaintiffs and for lower state courts. Further, the New Jersey court ignored several possible intermediate protections which would have properly balanced the rights and expectations of both parties in a defamation suit.

THE "SEMI-PUBLIC FIGURE": A PROBLEMATIC APPROACH

In the decade after *New York Times*, the Supreme Court began to refine its classification of defamation plaintiffs.[40] While the *Gertz* Court reaffirmed that both public officials and public figures had to prove actual malice to recover in a defamation suit against a media defendant,[41] it allowed the states to fix their own standard of liability where the plaintiff was a private person.[42] Despite its recent focus on the content of the speech, the Supreme Court has nevertheless continued to employ its public figure-private person dichotomy.[43] It is entirely within this framework that the Supreme Court has invited states to set the level of fault necessary for recovery of actual damages by a private individual.[44] The court in

---

(1986) (where case involves private figure and public issue, Constitution requires balance be struck in favor of protecting speech); Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758-59 (1985) (communication on matters of public concern is entitled to special protection).

[40] *See* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); St. Amant v. Thompson, 390 U.S. 727 (1968); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); Time, Inc. v. Hill, 385 U.S. 385 (1967); *supra* note 10.

[41] *See Gertz*, 418 U.S. at 342; *see also* Bamberger, *Public Figures and the Law of Libel: A Concept in Search of a Definition*, 33 BUS. LAW. 709, 712 (1978); Note, *General Public Figures Since* Gertz v. Robert Welch, Inc., 58 ST. JOHN'S L. REV. 355, 379-80 (1984) (limited public figure approach). *See generally* Note, *Determination of Public Figure Status in Libel Actions*, 6 AM. J. TRIAL ADVOC. 204, 205-07 (1982) (collection of cases and articles on topic).

[42] *See Gertz*, 418 U.S. at 347. The broad area of discretion returned to the states had two significant limitations. The first was that strict liability could not be imposed. *Id.* The second constraint was that, regardless of the burden of proof used to recover actual damages, presumed and punitive damages could not be awarded without proof of actual malice. *Id.* at 350.

[43] *See* Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. ____, 106 S. Ct. 1558, 1562-63 (1986) (first amendment requires examination of whether speech is of public concern and whether plaintiff is public or private figure).

[44] *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761 (1985) (states may permit recovery of presumed and punitive damages on showing of less than actual malice where plaintiff is private individual and speech does not involve matter of public concern).

Sisler utilized the language of the Supreme Court in its analysis. Ultimately, however, the court went beyond the Supreme Court guidelines[45] and chose instead to impose the actual malice burden of a public figure on a private individual who, while not thrusting himself voluntarily into public controversy,[46] should, in the court's view, have expected that his private transactions might become a matter of public concern.[47] The court found that New Jersey common law provided a rationale for preferring free speech over the reputational interests of at least some private persons.[48] It is suggested that the majority's holding is tantamount to creating a new type of defamation plaintiff, the "semi-public figure,"[49] and that such an ambiguous concept unnecessarily muddies the already turbid waters of libel cases.[50]

While the court's underlying rationale of fostering a free press is laudatory, it could have accomplished the same end more clearly and efficaciously, as a few other states have done,[51] by extending the actual malice standard to any private individual, in line with the Supreme Court's framing of the choice.[52] At a minimum, this path would have had the salutary effect of obviating ad hoc judicial decisions, with their attendant unpredictability, on the status

---

[45] *See Gertz*, 418 U.S. at 344-45. The Supreme Court in *Gertz* distinguished private individuals from public figures in that the latter (1) enjoy greater access to the media to rebut false statements and (2) invite comment by having voluntarily thrust themselves into public controversies in order to influence their outcome. *See id.* More recently, the Court has reiterated that the *Gertz* criteria are applicable to defamation plaintiffs where the speech involves a matter of public concern. *See Dun & Bradstreet, Inc.*, 472 U.S. at 757-58.

[46] *See Sisler*, 104 N.J. at 269-70, 516 A.2d at 1090. The court candidly admitted that "[p]laintiff has not attained 'especial prominence' . . . nor . . . 'thrust [himself] to the forefront of particular public controversies' . . . Plaintiff does not command 'a substantial amount of independent public interest' . . . [or] 'pervasive fame or notoriety' . . . even in the Franklin Township area." *Id.* (citations omitted).

[47] *See id.* at 275, 516 A.2d at 1093.

[48] *See id.* at 272-73, 516 A.2d at 1091-92.

[49] *See id.* at 291-92, 516 A.2d at 1102 (Garibaldi, J., concurring).

[50] *See id.* at 291, 516 A.2d at 1102 (Garibaldi, J., concurring); Eaton, *supra* note 2, at 1449-50.

[51] *See, e.g.*, Gay v. Williams, 486 F. Supp. 12, 15-16 (D. Alaska 1979) (actual malice standard extended to all defamation plaintiffs based on pre-*Gertz* common law); Aafco Heating & Air Conditioning Co. v. Northwest Publications, Inc., 162 Ind. App. 671, 677, 321 N.E.2d 580, 587 (1974) (actual malice applied in all issues of public concern regardless of status of plaintiff), *cert. denied*, 424 U.S. 913 (1976); Peisner v. Detroit Free Press, Inc., 421 Mich. 125, 136-37, 364 N.W.2d 600, 606 (1984) (actual malice burden imposed on private figure in suit against media defendant).

[52] *See Gertz*, 418 U.S. at 347-48.

of any plaintiff.[53] Moreover, it is suggested that treating any experienced and knowledgeable individual as such a public figure may ultimately raise due process questions. Since such a category, as the concurrence points out, arguably includes many executives in a number of businesses,[54] it is questionable whether either private individuals or the media will have sufficient notice of the potential classification of any heretofore private person.[55] Additionally, it is not clear from the decision at what point a truly private person becomes subject to the burden of proof of a public figure.[56] The court did not specifically indicate whether it was by virtue of the individual's business status, the nature of the transaction, or by a confluence of both that Sisler was eventually deemed to have relinquished part of his reputation to the public eye.[57]

ALTERNATIVE SAFEGUARDS FOR BOTH PARTIES

Even conceding the New Jersey Supreme Court's contention that Sisler was a sophisticated and knowledgeable businessperson whose interests should not supersede those of the press,[58] there are several other safeguards, less damaging to the interests of private persons, which nevertheless allow the press "breathing space."[59] One such safeguard suggested by Justice Garibaldi would maintain the constitutional guidelines for distinguishing between public and

---

[53] *See Sisler*, 104 N.J. at 291-92, 516 A.2d at 1102 (Garibaldi, J., concurring). Although the imposition of the actual malice standard on private individuals may have been impliedly discouraged by the Supreme Court in its *Gertz* retraction of the *Rosenbloom* rationale, it is to be noted that thus far, the Court has denied certiorari in the only such case to seek a Supreme Court hearing, Walker v. Colorado Springs Sun, Inc., 188 Colo. 86, 538 P.2d 450, *cert. denied*, 423 U.S. 1026 (1975).

[54] *See Sisler*, 104 N.J. at 291, 516 A.2d at 1101 (Garibaldi, J., concurring).

[55] For a related discussion of the possible due process problems involved in ascertaining what is a public issue, see Note, *The Supreme Court, 1984 Term—Leading Cases: Constitutional Law*, 99 HARV. L. REV. 120, 220-21 (1985).

[56] *See Sisler*, 104 N.J. at 279, 516 A.2d at 1095. This holding is, at best, ambiguous. On the one hand, the majority may mean that a private person engaging in a private transaction remains private unless and until his financial affairs come under public scrutiny; then he is a public figure. It is submitted that this reasoning is tautological. On the other hand, the court may be implying that such a private person becomes a public figure at the time he enters into the transaction. It is suggested that this interpretation is Hutchinson v. Proxmire, 443 U.S. 111, 135-36 (1979) (defendant cannot make plaintiff a public figure merely by subjecting him to public scrutiny), turned on its head.

[57] *See Sisler*, 104 N.J. at 275-76, 516 A.2d at 1093. *Cf.* Curtis Publishing Co. v. Butts, 388 U.S. 130, 154 (1967) (in libel cases court looks to plaintiff's position and prior activities to determine appropriate degree of judicial protection).

[58] *See Sisler*, 104 N.J. at 275, 516 A.2d at 1093.

[59] *See* New York Times Co. v. Sullivan, 376 U.S. 254, 271-72 (1964).

private figures, and instead subject the press to a kind of professional negligence test.[60] In her view, such a standard could be objectively verified by recourse to the usual standards of responsible journalists of similar resources.[61] It is suggested that such a test is a much more reasonable burden for a private person to carry in a state where a strong "shield law"[62] makes it exceedingly difficult to obtain, through pre-trial discovery, objective proof of the defendant's state of mind, as required by the actual malice burden of proof.[63]

Finally, it is suggested that the *Sisler* court, in rejecting a negligence or gross negligence standard, overlooked two other corollary safeguards which would effectuate these standards—the evidentiary burden and the scope of review. In the first instance, the majority could have required lower courts to impose on the private plaintiff an evidentiary burden of clear and convincing proof of any lesser standard of liability than actual malice, both at the summary judgment stage and for the jury's verdict.[64] This more stringent standard would ensure both parties a more reasonable chance of airing only valid complaints. In regard to the scope of review in libel cases, the Supreme Court has encouraged *de novo* review of all the findings of a trial court.[65] It is submitted that the mandat-

---

[60] *See Sisler*, 104 N.J. at 293-94, 516 A.2d at 1102-03 (Garibaldi, J., concurring). Justice Garibaldi wrote that "a reasonably-prudent-media-defendant standard would have little, if any, practical effect on the functioning of responsible journalism." *Id.* at 294, 516 A.2d 1103 (Garibaldi, J., concurring).

[61] *See id.* at 293-94, 516 A.2d at 1102-03 (Garibaldi, J., concurring) (quoting L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 312-13, at 646-47 (1978)).

[62] *See, e.g.*, N.J. STAT. ANN. § 2A:84A-21 (West 1976) (newspaper employee has privilege to refuse to disclose source of information); *see also* Note, *The Triumph of the Press: New Jersey Departs from Federal Trends in Libel Law*, 36 RUTGERS L. REV. 91 *passim* (1983) (state shield law creates absolute privilege in civil action for libel).

[63] *See* Herbert v. Lando, 441 U.S. 153, 160-77 (1979). *But see* Oakes, *Proof of Actual Malice in Defamation Actions: An Unsolved Dilemma*, 7 HOFSTRA L. REV. 655, 666 (1979) (suggesting actual malice may be proven circumstantially or inferentially).

[64] *See Sisler*, 104 N.J. at 293, 516 A.2d at 1102 (Garibaldi, J., concurring). It is uncertain whether this is the evidentiary burden proposed by Justice Garibaldi when she suggested allowing recovery on a "clear preponderance." *Id.; see* Anderson v. Liberty Lobby, Inc., 106 S. Ct. 2505, 2512-14 (1986) (plaintiff must furnish clear and convincing evidence of actual malice to avoid summary judgment). It is submitted that a clear and convincing burden of proof throughout the proceedings might result in more defendants winning at the summary judgment stage, even with a negligence standard. It might also avoid discovery problems. *See supra* note 63.

[65] *See* Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 505-11 (1984) (appellate courts must use independent judgment in reviewing whether actual malice was established with proof of convincing clarity).

ing of *de novo* review by the New Jersey Supreme Court would provide defendants with an effective weapon on appeal, while still protecting the private individual's legitimate interest in clearing his reputation at trial.[66]

CONCLUSION

The New Jersey Supreme Court's decision in *Sisler v. Gannett Co., Inc.* substantially departs from the established method for defining the status of a plaintiff in a defamation suit. As it stands now, New Jersey has, on the one hand, an amorphous category of semi-public figures subject to an actual malice standard of proof and, on the other hand, a still undefined class of truly private persons subject to an as-yet unannounced burden of proof. Lower courts must now resolve on an ad hoc basis the public-private figure dichotomy without definite guidelines as to the boundaries of either category. This Comment has suggested that alternative approaches with stricter procedural safeguards would provide a more enlightening and efficacious solution.

Helen W. George

---

[66] *See Sisler*, 104 N.J. at 293, 516 A.2d at 1102 (Garibaldi, J., concurring). *See also* Comment, *supra* note 11, at 693 (urging adoption of negligence standard as protecting free speech and citizens' reputational concerns).