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THE RETURN OF A CONTENT BASED STANDARD FOR PRIVATE PLAINTIFF DEFAMATION

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

STEVEN T. NAUMANN*

The Supreme Court has struggled for the past two decades to determine the extent to which the first amendment limits the torts of defamation.¹ In 1964, the Court created a constitutional privilege by requiring public officials to show that defendants knowingly, or with reckless disregard for the truth, published defamatory statements.² The Court soon extended this privilege to suits by public figures³ and finally to suits by private individuals involving issues of public or general interest.⁴ Three years later, however, the Court redefined the standard of fault for suits involving private individuals.⁵ Under the new standard, private plaintiffs could recover actual damages simply by showing that the false statements were published negligently.⁶ Courts denied recovery of presumed and punitive damages, however, unless the plaintiff could show actual malice.⁷

In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,⁸ the Court considered a defamation case involving a false credit report which was not distributed to the general public. The Court held that speech involv-

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1. Defamation consists of two torts, libel and slander. See W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 111, at 771 (5th ed. 1984) [hereinafter cited as PROSSER]. Libel generally was in written form while slander was oral. *Id.* § 112, at 786. With the widespread use of television and radio, some authorities refer to defamation by these media as defamacast. See ELDREDGE, THE LAW OF DEFAMATION § 13, at 85-86 (1978). The modern distinction between libel (including defamacast) and slander focuses on the potential for harm of the communications media. See RESTATEMENT (SECOND) OF TORTS § 568 (1977); ELDREDGE, *supra* § 13, at 86.

2. *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964). The *New York Times* Court referred to this standard of fault as actual malice. *Id.* at 280. The *New York Times* standard is actually a change in the plaintiff's burden of proof rather than a privilege. Defendants must plead a privilege as an affirmative defense. ELDREDGE, *supra* note 1 § 53, at 293.

3. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

4. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971).

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

6. *Id.* at 347.

7. *Id.* at 349.

8. 105 S. Ct. 2939 (1985).

ing a "purely private concern" deserved less protection than speech involving "matters of public concern."⁹ According to the Court, plaintiffs in such situations could recover presumed and punitive damages without proof of actual malice.¹⁰

This Comment will first analyze the development of the first amendment constitutional privilege in defamation suits. The focus will then shift to the history of the *Greenmoss* litigation and how the Supreme Court arrived at its ruling. The analysis will discuss problems in applying the *Greenmoss* standard, suggest alternate grounds for arriving at the decision, and recommend that the Court articulate a standard for punitive damage awards. Finally, this comment will discuss the effect of *Greenmoss* on future defamation cases.

HISTORY OF DEFAMATION LITIGATION

From the Common Law to Gertz

Defamation developed according to common law rules which held defendants strictly liable for the publication of defamatory statements.¹¹ A defendant could avoid liability only by showing that the defamatory statements were true or that the publication fell within one of the multitude of privileges.¹² Furthermore, the courts presumed damage to a per-

9. *Id.* at 2946.

10. *Id.*

11. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 87 n.13 (Marshall, J., dissenting); PROSSER, *supra* note 1 § 113, at 804.

Publication is the term of art given to the communication of the defamation to a person other than the plaintiff. Publication is an element of the torts of libel and slander and must be alleged in the complaint. The term is not meant to limit defamation actions to newspapers, books or other written publications. See RESTATEMENT (SECOND) OF TORTS § 577(1) (1977); ELDREDGE, *supra* note 1 § 36, at 206-07; PROSSER, *supra* note 1 § 113, at 797-98.

12. PROSSER, *supra* note 1 § 113, at 804. Two types of privileges are available to defendants, absolute and conditional. Absolute privileges include statements made during judicial proceedings that are "relevant" or "pertinent" to the case. *Id.* § 114, at 816-17. A similar privilege is present for legislative proceedings and for executive communications published within the "outer perimeter" of an employee's job. *Id.* at 821-22. Finally, a communication made with the consent of the plaintiff is absolutely privileged. *Id.* at 823.

Qualified or conditional privileges include publication in the interest of the publisher, such as defending one's reputation against defamatory remarks of another; publication in the interest of others, such as warning someone about a person's past conduct; publication in the common interest, such as communication between employees in a business; publication in the public interest, such as reporting a person suspected of a crime to the police; and publication as "fair comment" on matters of public concern. *Id.* § 115, at 824-32. The qualified privilege can be lost if a defendant goes beyond the scope of the privilege such as publishing with an improper motive, publishing a falsehood knowingly or recklessly, publishing excessively, or publishing without a reasonable belief that the publication is necessary to accomplish the privileged purpose. *Henderson v. Pennwalt Corp.*, 41 Wash. App. 547, 559, 704 P.2d 1256, 1264 (1985) (quoting RESTATEMENT (SECOND) OF TORTS § 596 comment a (1977)); ELDREDGE, *supra* note 1 § 93, at 508-23; PROSSER, *supra* note 1 § 115, at 832-35.

son's reputation from the publication without requiring proof of actual injuries.¹³ Juries could award punitive damages even when the defendant did not publish the statement with actual malice.¹⁴

These common law rules collided with the first amendment in 1964 when the United States Supreme Court decided *New York Times v. Sullivan*.¹⁵ The Court concluded that errors occur during "free debate" and that speech, even though erroneous, must be protected to provide speakers with "breathing space."¹⁶ According to the Court, if a speaker criticizing a public official was required to prove his statements true to defend against a libel judgment, the result would be a "chilling effect" on speech and "self-censorship" on the part of speakers.¹⁷ The Court stated that such an effect was incompatible with the rights of free speech under the first amendment.¹⁸ A public official, therefore, could not recover for defamation relating to his official conduct unless he could prove that the defendant published the defamatory statement with actual malice.¹⁹

13. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974); *Rosenbloom v. Metromedia*, 403 U.S. 29, 83 (1971) (Marshall, J., dissenting); *Matherson v. Marchello*, 100 A.D.2d 233, 237, 473 N.Y.S.2d 998, 1002 (1984); PROSSER, *supra* note 1 § 112, at 795.

Presumed damages are generally applied in libel actions known as libel per se. Some courts required plaintiffs to plead and prove special damages when the statement was not defamatory on its face but required knowledge of extrinsic facts to make out a defamatory meaning. PROSSER, *supra* note 1 § 112, at 796 & n.37. *Contra* ELDREDGE, *supra* note 1 § 24, at 157-76.

At common law, plaintiffs were required to plead and prove special damages for slander unless the statement fell into one of four categories. These categories qualified the action as slander per se and damages could be presumed. *Marchello*, 100 A.D.2d at 236, 473 N.Y.S.2d at 1001; PROSSER, *supra* note 1 § 112, at 788. The four categories concerned statements that a plaintiff had committed a major crime; statements claiming that a plaintiff suffers or suffered from a "loathsome disease;" statements which affected the plaintiff's "business, trade, profession or office;" and statements imputing that a woman was unchaste. *Marchello*, 100 A.D.2d at 236, 473 N.Y.S.2d at 1001; PROSSER, *supra* note 1 § 112, at 788-93. The last category has sometimes been modified to include accusations of serious sexual misconduct and has been applied to statements imputing that a person is a homosexual. *Marchello*, 100 A.D.2d at 236 n.2, 473 N.Y.S.2d at 1001 n.2. These exceptions were probably established because of the high probability that such statements would cause plaintiffs actual harm. *Marchello*, 100 A.D.2d at 236, 473 N.Y.S.2d at 1001; PROSSER, *supra* note 1 § 112, at 788.

14. PROSSER, *supra* note 1 § 116A, at 845; *cf.* *Gertz*, 418 U.S. at 350.

15. 376 U.S. 254 (1964). The plaintiff was Commissioner of Public Affairs for Montgomery, Alabama and supervised the Police Department. He sued the *New York Times* and four civil rights leaders claiming that an advertisement published in the *Times* protesting actions by the police against civil rights workers and demonstrators defamed him. A jury in Montgomery County awarded the plaintiff \$500,000 in general and punitive damages. *Id.* at 256-58, 284.

16. *Id.* at 271-72.

17. *Id.* at 279. The Court noted the analogous privilege that a public official has to make defamatory statements "within the outer perimeter" of his duties." *Id.* at 282. Together with easy access to the communications media, this privilege allows a public official to vigorously rebut any defamation without fear of having to defend a defamation suit.

18. *Id.* at 283. The first amendment only limits Congress from abridging the rights of free speech. In 1925, the Court held that the first amendment restricts state actions through the fourteenth amendment. *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

19. *New York Times*, 376 U.S. at 279-80. The Court defined actual malice as "knowledge that [the statement] was false or with reckless disregard of whether [the statement] was false or not." *Id.* at 280. The term "reckless disregard" was further defined to require the plaintiff to show "that the

The next extension of first amendment protection came when the Court provided *New York Times* protection to defendants sued by public figures for statements relating to their involvement in public issues and events.²⁰ The same policies that dictated the decision in *New York Times* favored applying the actual malice standard to public figures. Like public officials, public figures occupy positions of power and influence in society and their conduct is thus of interest to the public. Furthermore, public figures are able to use communications channels, both to make their views known, as well as to reply to any adverse statements concern-

defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). Furthermore, the plaintiff must prove actual malice by clear and convincing evidence. *New York Times*, 376 U.S. at 285-86.

Following the decision in *New York Times*, courts and commentators argued whether the constitutional privilege was available to everyone or just the press. See *Redgrave v. Boston Symphony Orchestra*, 602 F. Supp. 1189, 1199 (D. Mass. 1985); Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 UCLA L. REV. 915, 921-22 (1978); Note, *Mediaocracy and Mistrust: Extending New York Times Defamation Protection to Non-Media Defendants*, 95 HARV. L. REV. 1876, 1877 (1982).

In *New York Times*, the Court extended protection to the four civil rights leaders as well as the *New York Times*. *New York Times*, 376 U.S. at 286. The question of the extent of *New York Times* protection remained because of a note in a subsequent Supreme Court case. See *Hutchinson v. Proxmire*, 443 U.S. 111, 133-34 n.16 (1979); see also Stewart, "Or of the Press", 26 HASTINGS L.J. 631, 635 (1975) ("[T]he Court has never suggested that the constitutional right of free speech gives an individual any immunity from liability for either libel or slander." (emphasis in original)). *But see* *Avins v. White*, 627 F.2d 637 (3rd Cir.), cert. denied, 449 U.S. 982 (1980); *Davis v. Schuchat*, 510 F.2d 731 (D.C. Cir. 1975).

Professor Shiffrin reconciles Justice Stewart's statement with the decision in *New York Times* by stating that the four clergymen were entitled to the same protection as the newspaper because they published in the newspaper. Shiffrin, *supra*, at 922. This line of reasoning has continued to be applied in more recent cases. *Woy v. Turner*, 533 F. Supp. 102 (N.D. Ga. 1981); *Pollnow v. Poughkeepsie Newspapers, Inc.*, 107 A.D.2d 10, 16, 486 N.Y.S.2d 11, 16 (1985).

The Court subsequently provided guidance on who was considered a public official for purposes of this constitutional privilege. *Rosenblatt v. Baer*, 383 U.S. 75 (1966). The Court stated that the public official category "applies at the very least to those . . . government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." *Id.* at 85 (footnote omitted).

20. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *Associated Press v. Walker*, 388 U.S. 130 (1967). The plaintiffs in these companion cases were a football coach for the University of Georgia, and a retired army general who had commanded the federal troops in 1957 during the school desegregation problems in Little Rock, Arkansas. *Butts*, 388 U.S. at 130, 140 (opinion of Harlan, J.).

In *Butts*, the defamatory article stated that Butts conspired with the coach of the University of Alabama to fix a football game. *Id.* at 135. In *Walker*, the Associated Press, in a news dispatch, accused General Walker of encouraging a riot during desegregation efforts at the University of Mississippi and leading the rioters charging against federal marshals. *Id.* at 140.

Justice Harlan joined by Justices Clark, Stewart and Fortas announced a lower standard for public figures which required a showing of "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." *Id.* at 133, 155.

Chief Justice Warren, however, stated that the *New York Times* standard was applicable to public figures. *Id.* at 164 (Warren, C.J., concurring). Justices Black, Douglas, Brennan and White concurred with the Chief Justice's reasoning. *Id.* at 170 (Black, J., concurring in part, dissenting in part); *id.* at 172 (Brennan, J., concurring in part, dissenting in part); see also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 336 n.7 (1974). For the Court's definition of a public figure see *infra* note 29.

ing their policies.²¹

In 1971, the Court further extended *New York Times* protection in *Rosenbloom v. Metromedia, Inc.*,²² to include protection from defamation actions initiated by private individuals involved in events of “public or general interest.”²³ Justice Brennan, in a plurality opinion, stated that first amendment protection extended to matters of public interest and that the event, not the participant, was the focus.²⁴ The plurality noted that a distinction between public and private plaintiffs could lead to chilling of speech on public issues involving private plaintiffs while providing unwarranted protection for discussion of the non-public lives of public figures.²⁵

Three years later in *Gertz v. Robert Welch, Inc.*,²⁶ the Court rejected

21. *Butts*, 388 U.S. at 162-65 (Warren, C.J., concurring).

22. 403 U.S. 29 (1971).

23. *Id.* at 44 (opinion of Brennan, J.). The event of public or general interest was the arrest of the plaintiff, a distributor of nudist magazines, during a police attempt to enforce Philadelphia’s obscenity laws. Mr. Rosenbloom was arrested while delivering magazines at the time police were arresting a newsstand operator. The defendant, a Philadelphia radio station, reported that the police confiscated “3000 obscene books” from the plaintiff’s barn. A second broadcast did not refer to the plaintiff by name but referred to a distributor of smut literature. *Id.* at 32-35. Mr. Rosenbloom was acquitted of the obscenity charges after the trial judge stated, as a matter of law, that the magazines were not obscene. Mr. Rosenbloom then filed suit for libel in federal court. *Id.* at 36. The jury awarded Mr. Rosenbloom \$25,000 in general damages and \$725,000 in punitive damages. *Id.* at 40. The award of punitive damages was reduced to \$250,000 by the district court. *Id.*

24. *Id.* at 42-43. See *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964) (“[W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . .”). The term “public or general interest” came from Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 214 (1890). *Rosenbloom*, 403 U.S. at 31 n.2.

Justice Black would have provided the press with absolute immunity from libel actions. *Id.* at 57 (Black, J., concurring). Justice White concurred that the *New York Times* standard applied because Mr. Rosenbloom was “involved in or affected by the official action” of public officials. *Id.* at 61-62 (White, J., concurring). These diverse opinions resulted in confusion in the lower courts. See *infra* note 106.

The three dissenters believed that the “general or public interest” standard for *New York Times* protection would require courts to determine which issues were subjects of public interest or concern and “somehow pass on the legitimacy of interest in a particular event.” *Rosenbloom*, 403 U.S. at 78-79 (Marshall, J., dissenting). Furthermore, the dissenters objected to the loss of predictability and certainty of requiring courts to make *ad hoc* determinations of the public interest of a particular event. *Id.* at 63 (Harlan, J., dissenting); *id.* at 81 (Marshall, J., dissenting). Justice Marshall would have reduced any chilling effect on speakers in suits by private plaintiffs involved in activities of general or public interest by limiting awards to actual damages. *Id.* at 84. He would also have allowed states to choose any standard of fault as long as they did not impose strict liability. *Id.* at 86-87.

Justice Harlan would have allowed punitive damages only if actual malice was proved. *Id.* at 73 (Harlan, J., dissenting). Like Justice Marshall, he would also have required a plaintiff to show fault to recover for actual damages. *Id.* at 64, 69.

Justice Douglas did not take part in the decision. *Id.* at 57.

25. *Rosenbloom*, 403 U.S. at 48 (opinion of Brennan, J.). The plurality specifically noted, however, that the Court was not deciding what constitutional standard was required for events not of general or public interest. *Id.* at 44 n.12, 48 n.17.

26. 418 U.S. 323 (1974). The defamatory publication in *Gertz* was an article in the American

the *Rosenbloom* general or public interest standard. The majority emphasized that states have legitimate interests in protecting individuals' reputations and that the Court should give this interest great weight.²⁷ They stated that protection of individuals' reputations conflicts with the need to avoid self-censorship and that courts must balance both interests.²⁸ While the *New York Times* standard accommodated both concerns when public plaintiffs²⁹ were involved, the Court stated that private plaintiffs were entitled to greater protection.³⁰ The *Rosenbloom* standard did not adequately protect private plaintiffs, and in certain cases, the standard did not protect the first amendment interests either.³¹ To accommodate these conflicting interests, the *Gertz* Court adopted two rules

Opinion which was published by an affiliate of the John Birch Society. The article at issue, published in April, 1979, was entitled "FRAME-UP: Richard Nuccio And The War On Police."

Nuccio was a Chicago policeman who had killed 17 year old Ronald Nelson in June, 1968. The plaintiff, a lawyer, was retained as co-counsel to represent the Nelson family in a civil suit against Nuccio, who had been convicted of murder. Mr. Gertz attended the coroner's inquest and asked a few questions but did not participate in the criminal case against Nuccio or talk to the press.

The article in American Opinion contained various false and defamatory statements about Mr. Gertz including that the police had a large file on him; that he had been a member of a group which advocated the overthrow of the United States government; that he was a "Leninist," "Marxist," and "Communist-frontier;" that he had been a pallbearer for Jack Ruby; and that he was an officer of a group which planned attacks on the Chicago Police during the 1968 Democratic National Convention. *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 530-31 (7th Cir. 1982), cert. denied, 459 U.S. 1226 (1983).

The jury awarded Gertz \$50,000 but the trial judge granted the defendant a judgment notwithstanding the verdict stating that proof of actual malice was required for matters of public interest. *Id.* at 531.

27. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974). Despite the fact that he had joined Justice Brennan's plurality opinion in *Rosenbloom*, Justice Blackmun reluctantly provided the fifth vote in *Gertz* to eliminate uncertainty and provide a definitive ruling. *Id.* at 353-54 (Blackmun, J., concurring).

28. *Id.* at 341-43.

29. Public plaintiffs refers to public officials and public figures. These plaintiffs must show actual malice to recover for defamation. See *supra* text accompanying notes 19-20.

The *Gertz* court further defined who is a public figure. First, there are the "public figures for all purposes"—people who occupy positions of prominence, power and influence in society. Second, are people who "thrust themselves to the forefront of particular public controversies." The Court also acknowledged that it was possible, albeit rare, for a person to become an involuntary public figure. *Id.* at 345. A "public controversy," however, is not the same as "all controversies of interest to the public." *Time, Inc. v. Firestone*, 424 U.S. 448, 454 (1976). For instance, the divorce of a woman married to a member of the Firestone family was not a "public controversy." *Id.*

Furthermore, the controversy must exist prior to the defamation. The defamation can not create the "public controversy" and make the plaintiff a public figure when he attempts to counter the defamation. *Hutchinson v. Proxmire*, 443 U.S. 111, 134-35 (1979). Additionally, a person does not become a public figure because events draw media coverage. *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157, 167 (1979).

30. *Gertz*, 418 U.S. at 343. Public persons, by virtue of their positions in society, must accept a greater risk of defamation. Private persons, however, have not assumed this risk. Furthermore, private plaintiffs are less able than public plaintiffs to use self help in responding to defamatory statements. Public persons, again by their positions, have more effective access to the media for response. *Id.* at 344.

31. *Id.* at 346. The Court noted that under *Rosenbloom* private plaintiffs involved in a subject

for defamation suits by private individuals. First, the states could adopt any standard of liability for defamation of private individuals except strict liability.³² Second, private plaintiffs could not recover for presumed or punitive damages without proving actual malice. Awards would be limited to "actual injuries" absent such proof.³³

The *Gertz* decision was criticized for reducing first amendment protection³⁴ as well as for undervaluing private plaintiffs' reputations.³⁵ Furthermore, *Gertz* did not provide the "definitive ruling" that Justice Blackmun desired.³⁶ Questions remained about whether *Gertz* applied only to media defendants³⁷ or only to events of "general or public interest."³⁸ Ten years later, the Court agreed to resolve some of these questions when the Court granted certiorari to consider *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*³⁹

DUN & BRADSTREET, INC. V. GREENMOSS BUILDERS, INC.

The Facts

The plaintiff, Greenmoss Builders, was a construction contractor.⁴⁰ On July 26, 1976, the defendant, a commercial credit reporting agency, issued a "special notice" credit report to five of its subscribers.⁴¹ This report falsely stated that Greenmoss had filed a voluntary petition in

of general or public interest would have to show actual malice to recover for injury to their reputation. In view of the greater protection that such plaintiffs deserved, this was too severe a standard.

The first amendment interests were similarly impaired when a private individual's activities were not related to a public or general interest issue. A defendant in such a case could be held strictly liable for presumed and punitive damages, far in excess of actual injury. *Id.*

32. *Id.* at 347. These standards are only constitutional minimums. *Pollnow v. Poughkeepsie Newspapers, Inc.*, 107 A.D.2d 10, 15, 486 N.Y.S.2d 11, 15 (1985).

33. *Gertz*, 418 U.S. at 349-50. Actual injury is not limited to pecuniary losses but can include damages to the plaintiff's reputation; humiliation; and mental anguish and suffering. *Id.* at 350. A plaintiff, however, may recover for these injuries even if she decides not to recover for injury to her reputation. *Time, Inc. v. Firestone*, 424 U.S. 448, 460 (1976).

34. *See Gertz*, 418 U.S. at 358 (Douglas, J., dissenting); *id.* at 365 (Brennan, J., dissenting); Note, *Defamation and the First Amendment: Protecting Speech on Public Issues*, 56 WASH. L. REV. 75 (1980).

35. *See Gertz*, 418 U.S. at 369-404 (White, J., dissenting).

36. *See supra* note 27.

37. *See infra* note 131.

38. *See infra* note 82.

39. 464 U.S. 959 (1983).

40. *Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc.*, 143 Vt. 66, 69, 461 A.2d 414, 415 (1983), *aff'd*, 105 S. Ct. 2939 (1985).

41. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939, 2941 (1985). The five creditors who received the "special notice" were Aetna Insurance Company, American Express Company, Goodyear Tire and Rubber Company, Howard Bank, and State Mutual Insurance Company. Brief for Petitioner at 2 n.3, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939 (1985).

bankruptcy.⁴²

A jury awarded Greenmoss \$50,000 in compensatory damages and \$300,000 in punitive damages.⁴³ The trial judge had told the jury that the "special notice" was libelous per se, and that damages therefore, could be presumed.⁴⁴ The judge subsequently concluded that his jury instructions did not comply with the requirements of *Gertz* and granted Dun & Bradstreet a new trial.⁴⁵

The Vermont Supreme Court Decision

The issue facing the Vermont Supreme Court was whether the constitutional protection outlined in *Gertz* applied to non-media defendants.⁴⁶ The court rejected constitutional protection for non-media defendants stating that such cases did not present substantial first amend-

42. *Greenmoss*, 105 S. Ct. at 2941. In fact, one of the plaintiff's former employees, not Greenmoss, had filed the bankruptcy petition. *Greenmoss*, 143 Vt. at 71, 461 A.2d at 416.

John Flanagan, the president of Greenmoss learned of this credit report on July 26, 1976, while meeting with a representative of his primary creditor, the Howard Bank, to explore additional financing. *Id.* at 70, 461 A.2d at 416. He called the defendant's regional office in Manchester, New Hampshire, and told the regional supervisor of the error in the earlier report. Mr. Flanagan requested a correction be sent out immediately, and he also demanded a list of the subscribers who received the erroneous report. He wished to contact these creditors directly and emphasize personally that the July 26 report had been in error. *Id.* at 71, 461 A.2d at 416.

On August 3, 1976, the defendant issued a "corrective notice" to the five creditors, but refused to supply Greenmoss with their names. *Id.* The plaintiff then told Dun & Bradstreet that it was not satisfied with the correction notice and once more requested the names of the five creditors who received the July 26 report. The defendant also refused this request. *Id.* at 71-72, 461 A.2d at 416. Flanagan's main objection to the correct notice was that Dun & Bradstreet had not stated that it was responsible for the erroneous bankruptcy report. *Id.* Greenmoss stopped providing Dun & Bradstreet with data and Dun & Bradstreet then issued a "blank rating" on Greenmoss. *Id.* at 72, 461 A.2d at 416. Howard Bank delayed consideration of the additional financing for Greenmoss until the credit report dispute was resolved and eventually refused to make further loans. *Id.* at 71, 461 A.2d at 416. Dun & Bradstreet, however, introduced testimony at trial that additional loans to Greenmoss were turned down because two senior officers who had not seen the "special notice" decided that Greenmoss' debt to worth ratio was too high. Brief for Petitioner at 5 & n.6, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939 (1985).

43. *Greenmoss*, 143 Vt. at 69, 461 A.2d at 415. Dun & Bradstreet claimed that the award of compensatory damages exceeded Greenmoss' projections of actual damages by \$14,000 and thus represented presumed damages. Brief for Petitioner at 7-8, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939 (1985). Actual damages, however, may exceed pecuniary losses. *See supra* note 33.

44. *Greenmoss*, 105 S. Ct. at 2943. Additionally, the court instructed the jury that it was required to find actual malice before awarding punitive damages. *Id.* The trial court did not define actual malice but the jury instruction included a definition of malice which listed terms such as "bad faith," "inten[t] to injure," "reckless disregard of the possible consequences," as well as "knowledge . . . or with reckless disregard of [the statement's] truth or falsity." *Id.* at n.3.

45. The trial court earlier denied the defendant's motion for judgment notwithstanding the verdict since the judge believed there was sufficient evidence to allow the jury to decide the issues of liability and damages. *Greenmoss*, 143 Vt. at 69-70, 461 A.2d at 415. Although the trial court granted the defendant's motion for a new trial, the judge expressed doubt that *Gertz* applied to non-media cases. *Greenmoss*, 105 S. Ct. at 2942.

46. *Greenmoss*, 143 Vt. at 72-73, 461 A.2d at 417.

ment problems. Debate on public issues, discussion of self-government, and problems of self-censorship were lacking, and therefore, a private plaintiff's interest in his reputation outweighed any first amendment concerns.⁴⁷ The court also noted that the majority of states that had considered the issue had decided that *Gertz* protection did not reach non-media cases.⁴⁸

THE SUPREME COURT DECISION

Justice Powell's Opinion

Justice Powell's plurality opinion⁴⁹ considered three issues: first, whether the jury instructions complied with *Gertz*;⁵⁰ second, whether *Gertz* applied to the instant case;⁵¹ and third, whether the libelous statement was protected under the Court's new public concern test.⁵² The plurality concluded that the trial court's instructions did not satisfy *Gertz* because the term of art, "actual malice," was never correctly defined for the jury. Presumed and punitive damages were thus awarded without the jury finding "actual malice."⁵³

The plurality stated that *Gertz* involved a "public issue" and that the Court had never decided whether *Gertz* protection applied in cases that did not involve "issue[s] of public concern."⁵⁴ To determine the degree of

47. *Id.* at 74, 461 A.2d at 418; see *Harley-Davidson Motorsports, Inc. v. Markley*, 279 Or. 361, 568 P.2d 1359 (1977).

The court first decided that *Dun & Bradstreet* was not a media defendant. The court emphasized that the defendant, as a commercial credit reporting agency, did not publish news to the general public, but provided financial information to organizations that paid for such services. *Greenmoss*, 143 Vt. at 73-74, 461 A.2d at 417-18.

48. *Id.* at 74-75, 461 A.2d at 418. *Dun & Bradstreet* also argued that the court should voluntarily extend *Gertz* to cover non-media defendants in the "interests of fairness, simplicity and clarity." The court declined and further stated that credit reporting agencies were not entitled to a qualified privilege under Vermont law. *Id.* at 75-76, 461 A.2d at 418-19; see *Retail Credit Co. v. Russell*, 234 Ga. 765, 770, 218 S.E.2d 54, 58 (1975).

The court also held that under Vermont law presumed as well as punitive damages could be awarded. Furthermore, proof of actual malice was not required for the plaintiff to receive such awards. *Greenmoss*, 143 Vt. at 76-77, 461 A.2d at 419. The court concluded that if the jury instructions were in error, the errors favored the defendant. *Id.* at 79, 461 A.2d at 421.

The court subsequently overruled the portion of its opinion that allowed recovery of presumed damages without proof of injury. *Lent v. Huntoon*, 143 Vt. 539, 549-50, 470 A.2d 1162, 1170 (1983).

49. Justice Powell was joined by Justices Rehnquist and O'Connor. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939, 2941 (1985). Chief Justice Burger and Justice White concurred in judgment. *Id.* at 2948.

50. *Id.* at 2942-43 (opinion of Powell, J.). Finding that the jury instructions complied with *Gertz* would have allowed the Court to sidestep the question of the extent of *Gertz* protection.

51. *Id.* at 2943-46.

52. *Id.* at 2947-48.

53. *Id.* at 2943. The jury instructions included many terms that were not actual malice as defined by the Court. See *supra* note 44.

54. *Greenmoss*, 105 S. Ct. at 2944. The plurality first reviewed the Court's decisions from *New*

constitutional protection that should apply to statements that were of no public concern, the plurality repeated the balancing test employed in *Gertz*.⁵⁵ They found the state interest in an individual's reputation unchanged from *Gertz*.⁵⁶ However, the plurality concluded that while private speech was protected by the first amendment, it was not entitled to the same degree of constitutional protection as speech on "matters of public concern."⁵⁷ Citing a number of state court decisions, they determined that the state interest in individuals' reputations was sufficient to overcome the less important interest of non-public speech.⁵⁸ Consequently, the plurality held that a plaintiff involved in a matter of "private concern" need not prove actual malice to receive presumed and punitive damages.⁵⁹

The plurality then analyzed whether *Dun & Bradstreet's* "special notice" was protected as a "matter of public concern."⁶⁰ Citing *Connick v. Meyers*,⁶¹ they stated that the statement's "content, form, and context" must be reviewed to determine if the statement implicated a "matter of public concern."⁶² The plurality concluded that for two reasons no pub-

York Times through *Gertz* and determined that these cases all involved "public issues." *Greenmoss*, 105 S. Ct. at 2943-44. *New York Times* involved comment on police actions in response to civil rights demonstrations. *New York Times v. Sullivan*, 376 U.S. 254, 271 (1964). See *supra* note 15. *Butts* concerned the issues of conspiracy to fix a football game and a political speech during an anti-civil rights demonstration. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 135-36, 140-41 (1967) (opinion of Harlan, J.). See *supra* note 20. Both matters involved public issues. *Butts*, 388 U.S. at 154. The holding of the plurality in *Rosenbloom* was specifically directed toward a test concerning "matter[s] of public or general interest." *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 44 (1971) (opinion of Brennan, J.). The public interest involved enforcement of obscenity laws. See *supra* note 23. *Gertz* involved the prosecution of a police officer for murder. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 325 (1974). See *supra* note 26.

55. *Greenmoss*, 105 S. Ct. at 2944-46; see *Gertz*, 418 U.S. at 343-46; see also *supra* note 30 and text at notes 26-30.

56. *Greenmoss*, 105 S. Ct. at 2944-46.

57. *Id.* at 2945-46. The plurality first stressed the great protection accorded speech on issues of public concern. See *Connick v. Myers*, 461 U.S. 138, 145 (1983); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978). However, they specifically stated that not all speech was entitled to equal protection under the first amendment.

The plurality noted that on other occasions the Court had stated that not all speech was entitled to equal first amendment protection. *Greenmoss*, 105 S. Ct. at 2945 n.5; see *Central Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557 (1980) (public utility advertising to promote the use of electricity); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (advertising of drug prices); *Roth v. United States*, 354 U.S. 476 (1957) (obscenity speech); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (fighting words); *Near v. Minnesota ex. rel. Olsen*, 283 U.S. 697 (1931) (publication of troop ship departure times may be enjoined during war time).

58. *Greenmoss*, 105 S. Ct. at 2946. See *Rowe v. Metz*, 195 Colo. 424, 579 P.2d 83 (1978); *Harley-Davidson Motorsports, Inc. v. Markley*, 279 Or. 361, 568 P.2d 1359 (1977); *Denny v. Mertz*, 106 Wis. 2d 636, 318 N.W.2d 141, cert. denied, 459 U.S. 883 (1982).

59. *Greenmoss*, 105 S. Ct. at 2946.

60. *Id.* at 2947.

61. 461 U.S. 138 (1983).

62. *Greenmoss*, 105 S. Ct. at 2947; see *Connick*, 461 U.S. at 147-48. *Connick* involved the

lic issue was at stake. First, the “special notice” was of interest only to Dun & Bradstreet and Greenmoss’ five creditors. Second, the publication of the statement was restricted to only those five creditors and they could not release the information to anyone else.⁶³ In these respects, the “special notice” was analogous to commercial speech which receives no protection when it is false.⁶⁴

The plurality finally noted that the concern expressed in *New York Times* about a “chilling effect” on speakers was not applicable to Dun & Bradstreet’s credit reports. They stated that credit reports, like advertising, were subject more to free market forces, and therefore, state regulation would not inhibit this type of speech. Dun & Bradstreet issued these reports for profit and if the reports were inaccurate, Dun & Bradstreet would lose customers.⁶⁵

The Concurring Opinions

In his concurrence, Chief Justice Burger agreed with the plurality that *Gertz* was limited to cases involving issues of “general public importance,” and, because *Greenmoss* concerned only private matters, *Gertz* was not applicable.⁶⁶ The Chief Justice also agreed with Justice White

discharge of an Assistant District Attorney for circulating a questionnaire concerning the policies and operations of her employer. The questionnaire in *Connick* addressed problems of employee transfers; employee morale; whether an employee grievance committee was needed; whether employees had confidence in their supervisors; and if there was official pressure for the assistant district attorneys to work for political campaigns. *Id.* at 141. The Court determined that the majority of the questions were not of importance to the public for evaluating the operations of the District Attorney’s office since they related only to one employee’s grievances over her transfer to another department. *Id.* at 148. The issue of whether employees “ever fe[lt] pressured to work in political campaigns on behalf of office supported candidates” was an area of public concern. *Id.* at 149.

63. *Greenmoss*, 105 S. Ct. at 2947; see *Roemer v. Retail Credit Co.*, 44 Cal. App. 3d 926, 119 Cal. Rptr. 82 (1975). In discussing a defamatory credit report the court stated: “Credit reports do not contain public policies or other matters of public or general concern.” *Id.* at 934, 119 Cal. Rptr. at 87; see also *Hood v. Dun & Bradstreet, Inc.*, 486 F.2d 25 (5th Cir. 1973), cert. denied, 415 U.S. 985 (1974). The *Hood* court stated: “[M]atters of general and public interest do not include libelous and defamatory publications of such a commercial nature as credit reports.” *Id.* at 29.

64. *Greenmoss*, 105 S. Ct. at 2947; see *Zauderer v. Office of Disciplinary Counsel*, 105 S. Ct. 2265, 2275 (1985); *Central Hudson Gas & Elec. v. Public Serv. Comm’n*, 447 U.S. 557, 565-66 (1980).

65. *Greenmoss*, 105 S. Ct. at 2947; cf. *Hood*, 486 F.2d at 32; Comment, *Protecting the Subjects of Credit Reports*, 80 YALE L.J. 1035, 1053-54 (1971).

The plurality specifically noted that they were not holding that all types of credit reports did not implicate issues of public concern. *Greenmoss*, 105 S. Ct. at 2947 n.8. The plurality indicated that the test stated in *Connick* of reviewing the “content, form, and context” of a statement would determine whether a particular report concerned public issues. *Id.* They also indicated that the use of economic speech and advertising were to show analogies of how those types of speech receive reduced constitutional protection. *Id.*

66. *Greenmoss*, 105 S. Ct. at 2948 (Burger, C.J., concurring). Chief Justice Burger also agreed with Justice White’s comments about re-evaluating the *New York Times* standard and proposed a reasonable care standard. *Id.*

that *Gertz* should be overruled.⁶⁷

Similarly, Justice White disagreed with the plurality's analysis of *Gertz* and stated that *Gertz* covered all defamatory statements of private individuals.⁶⁸ Justice White then agreed with the dissent that *Gertz* applies to non-media defendants and that non-media speakers were entitled to the same first amendment protections as media speakers.⁶⁹ He added, however, that media as well as non-media defendants would be liable under common law rules where the defamation did not involve an issue of "general or public importance."⁷⁰ Justice White then went a step further than the plurality and concluded that if *Gertz* protection concerning presumed and punitive damages was not applicable to private concern cases, then in such cases, the fault requirement of *Gertz* was also inapplicable.⁷¹

The Dissenting Opinion

In his dissent, Justice Brennan first discussed Greenmoss' argument that *Gertz* was restricted to media defendants. The dissent rejected this contention, stating that while the press is protected "to ensure the vitality of First Amendment guarantees," this does not mean that non-media speakers deserve less protection.⁷² A media/non-media distinction also

67. *Id.*; see also *id.* at 2953 (White, J., concurring).

68. *Greenmoss*, 105 S. Ct. at 2953 (White, J., concurring); see *Gertz*, 418 U.S. at 370 (White, J., dissenting); see also Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 54 TEX. L. REV. 199, 200 & n.12 (1976).

69. *Greenmoss*, 105 S. Ct. at 2953 (White, J., concurring). See *infra* text accompanying notes 72-74.

70. *Greenmoss*, 105 S. Ct. at 2953.

71. *Id.* See *supra* note 32 and accompanying text. In his extensive concurring opinion, Justice White proposed to restructure the constitutional limitations on defamation by eliminating presumed and punitive damages to mitigate the "chilling effect" on speakers. This alternative would allow plaintiffs to vindicate their reputations and possibly receive attorney's fees. *Greenmoss*, 105 S. Ct. at 2950-52.

Justice White expressed concern that the *New York Times* standard of liability made a public figure's burden of proof exceedingly difficult. In Justice White's opinion, this had led to the public being misinformed, which in turn did a disservice to first amendment ideals. *Id.* at 2950. He lamented that self help was the only method of vindication for public officials because such denials are not as effective in informing the public about events. *Id.* Justice White quoted from Justice Brennan's plurality opinion in *Rosenbloom* to emphasize the relative futility of self-help. See *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 46-47 (1971).

Justice White also expressed concern that public officials' reputations were being damaged when a "reasonable effort to investigate the facts" could have avoided the damage. However, under *New York Times*, public officials must show a knowing or reckless falsehood rather than a lack of reasonable diligence. *Greenmoss*, 105 S. Ct. at 2951. Justice White concluded that he saw no first amendment restriction against a suit to establish that the defamatory statement was false without reaching the issue of damages. *Id.* at 2950 n.2, 2952; see also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 391-93 (1974) (White, J., dissenting).

72. *Greenmoss*, 105 S. Ct. at 2958 (Brennan, J., dissenting). Furthermore, the Court had earlier

creates the new problem of line drawing.⁷³ More important, however, the dissent argued that it would be illogical to penalize a publisher with a limited distribution who could cause less damage to a plaintiff's reputation, than a publication with wider circulation.⁷⁴

The dissent next attacked the limitation of *Gertz* to "matters of public concern." They agreed with Justice White's understanding that *Gertz* protected all false statements, whether of public importance or not.⁷⁵ Assuming such a limitation of *Gertz* was proper, they stated that Dun & Bradstreet's report was a matter of public concern since public knowledge of bankruptcies was important for forming opinions about government regulation of the economy.⁷⁶ The dissent also faulted the plurality for not clearly stating what test for "matters of public concern" they were proposing.⁷⁷

The dissent insisted that even private speech, like commercial speech, should receive substantial first amendment protection.⁷⁸ Furthermore, the dissent noted that awarding presumed and punitive damages excessively restricts speakers and conflicts with the least restrictive

stated in another context that the worth of speech does not depend on the identity of the speaker. *Id.*; see *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978).

73. *Greenmoss*, 105 S. Ct. at 2957 & n.6. The dissent criticized the Vermont Supreme Court's analysis of Dun & Bradstreet as clearly a non-media defendant. *Id.*; see *supra* text accompanying note 47; see also Shiffrin, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 78 Nw. U.L. REV. 1212, 1269 n.328 (1983). The dissent also noted that most publishers charge for their products and furthermore, few publications are of interest to all. *Greenmoss*, 105 S. Ct. at 2957-58 n.6.

74. *Id.*; see also *id.* at 2953 (White, J., concurring); *infra* note 139.

75. *Greenmoss*, 105 S. Ct. at 2959 (Brennan, J., dissenting); see *id.* at 2953 (White, J., concurring).

76. *Greenmoss*, 105 S. Ct. at 2961-62 (Brennan, J., dissenting). The dissent noted that the Court had previously held that commercial speech and advertising affected areas of public interest. *Id.* at 2960-61; see *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (advertising of drug prices); see also *Bates v. State Bar*, 433 U.S. 350 (1977) (lawyer advertising). *But see* note 116 and accompanying text.

77. *Greenmoss*, 105 S. Ct. at 2959.

78. The dissent stated that commercial speech, such as advertising, that doesn't involve public issues, receives some first amendment protection. *Id.* at 2962; see *Zauderer v. Office of Disciplinary Council*, 105 S. Ct. 2265 (1985) (lawyer advertising); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (advertising of drug prices). *But see* *Central Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557, 563 (1980) ("The Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.").

The dissent also noted that most states provide a conditional privilege for credit reports and that the Court should therefore follow the majority of the states and grant such a privilege as a matter of constitutional law. *Greenmoss*, 105 S. Ct. at 2963. *But cf.* Maurer, *Common Law Defamation and the Fair Credit Reporting Act*, 72 GEO. L.J. 95 (1983).

While Professor Maurer stated that a conditional privilege for credit reporting agencies appears to exist in most states, she also indicated that the courts' attitudes were changing. The courts were rejecting the privilege and appear to be balancing the harm to the individual against the power of large credit companies. Maurer, *supra*, at 101-03.

means test for regulating commercial speech.⁷⁹ The dissent would therefore not have allowed *Greenmoss* to recover presumed and punitive damages since actual malice was not proved.

ANALYSIS

The Public Concern Test Is Unmanageable And Inconsistent With Gertz

Justice Powell was correct in stating that the "context of *Gertz*" concerned a private individual involved in a public issue.⁸⁰ However, the *Greenmoss* plurality's interpretation is inconsistent with the majority's reasoning in *Gertz*. This inconsistency between the reasoning in *Gertz* and the *Greenmoss* statement that *Gertz* was meant only to cover private plaintiffs involved in "matters of public concern" is apparent from the language used by the *Gertz* Court in rejecting the *Rosenbloom* test.⁸¹ The *Gertz* majority criticized the *Rosenbloom* standard as forcing judges to make *ad hoc* decisions as to whether a statement concerned "general or public interest."⁸² However, the *Greenmoss* test reinstates this inquiry.⁸³ *Greenmoss* thus returns to a content-based standard which *Gertz* rejected in favor of the target-based approach.⁸⁴

79. *Greenmoss*, 105 S. Ct. at 2964. The dissent noted that a least restrictive means test would allow compensatory damages only. *Id.* at n.17. *But see* *Central Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557, 564 (1980) (test applies only to speech that is not misleading).

Since the dissent defined commercial speech as speech that "do[es] no more than propose a commercial transaction," the dissent stated that credit reports were outside this definition and thus not subject to the restrictions on commercial speech. *Greenmoss*, 105 S. Ct. at 2962. *But see infra* note 108 and accompanying text.

80. *Greenmoss*, 105 S. Ct. at 2964 & n.4. The *Gertz* appeals court held that the theory that a national conspiracy to undermine the police existed was an "issue of significant public interest." *Gertz v. Robert Welch, Inc.*, 471 F.2d 801, 805-06 (7th Cir. 1972), *rev'd and remanded*, 418 U.S. 323 (1974).

81. *See Gertz*, 418 U.S. at 346.

82. *Id.* The Court stated: "We doubt the wisdom of committing this task [of deciding which publication address matters of "general or public interest"] to the conscience of judges." *Id.*; *see* L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-13, at 640 (1978); Shiffrin, *supra* note 19, at 925.

Many courts and commentators had therefore assumed that *Gertz* applied to all private plaintiffs, whether or not they were involved in a matter of "general or public interest." *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 370 (White, J., dissenting); *Marcone v. Penthouse Int'l Magazine for Men*, 754 F.2d 1072, 1081 (3rd Cir.), *cert. denied*, 106 S. Ct. 182 (1985); *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 533 (7th Cir. 1982), *cert. denied*, 459 U.S. 1226 (1983); *Gannett Co. v. Re*, 496 A.2d 553, 557 (Del. 1985); *Jacron Sales Co. v. Sindorf*, 276 Md. 580, 588-90, 350 A.2d 688, 693-94 (1976) (overruling the Court of Special Appeals on this specific issue); *Harley-Davidson Motor-sports, Inc. v. Markley*, 279 Or. 361, 365, 568 P.2d 1359, 1362 (1977); *Brosnahan, From Times v. Sullivan to Gertz v. Welch: Ten Years of Balancing Libel Law and The First Amendment*, 26 *HASTINGS L.J.* 777, 791-92 (1975); Robertson, *supra* note 68, at 236; Shiffrin, *supra* note 19, at 925. *But see* *Davis v. Schuchat*, 510 F.2d 731, 736 (D.C. Cir. 1975); *cf.* *Chapadeau v. Utica Observer—Dispatch, Inc.*, 38 N.Y.2d 196, 199, 341 N.E.2d 569, 571, 379 N.Y.S.2d 61, 63-64 (1975) (liability for defamation related to matter of public interest or public concern requires fault).

83. A commentator recently characterized this result as "ironic." Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 *CALIF. L. REV.* 772, 839 n.327 (1985).

84. *See Time, Inc. v. Firestone*, 424 U.S. 448, 456 (1976); Note, *supra* note 19, at 1882-83.

A second criticism the *Gertz* majority had of the *Rosenbloom* test was that it did not adequately protect defamation defendants if a court determined that the publication did not involve a matter of "general or public interest."⁸⁵ This concern is revived with the *Greenmoss* standard. A newspaper publishing a gossip column will now have no assurance that a court will find its publication to involve a public issue.⁸⁶ If a court finds no public issue, the newspaper could be liable for presumed and punitive damages without proof of actual malice. This inadequate protection will have a "chilling effect" on such publications.

A possible problem with returning to a content test is the loss of certainty in what is a matter of public concern. Courts have been quick to apply the *Greenmoss* test, however, these courts have not explained why the cases did not involve matters of public concern.⁸⁷ Although

Gertz did not entirely reject judicial determinations concerning the public importance of a plaintiff's actions when a court decides whether a plaintiff is a public or private person for purposes of the suit. *Gertz*, 418 U.S. at 345; see also *infra* notes 100-03 and accompanying text.

85. *Gertz*, 418 U.S. at 346.

86. See *Buckley v. Esquire, Inc.*, 344 F. Supp. 1133, 1134 (S.D.N.Y. 1972) (post-*Rosenbloom* decision refusing to extend *New York Times* protection "to include every aspect of a person's private life.").

Since the plaintiff in *Greenmoss* was a private figure, the Court did not decide whether the common law of presumed and punitive damages could also be applied to public figures not involved in "matters of public concern." *New York Times* first applied constitutional protection to defamation concerning the "official conduct" of a public official. *New York Times v. Sullivan*, 376 U.S. 254, 279 (1964). However, anything that concerns a public official's qualifications is a matter of public concern. *Garrison v. Louisiana*, 379 U.S. 64, 76-77 (1964). For example, almost everything concerning a political candidate bears on his fitness for office and is of public concern. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 273-75 (1971).

A similar argument would apply to those who are "public figures for all purposes." See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 134 (1967) (opinion of Harlan, J.). However, courts in privacy cases have drawn limits to the extent that public figures' lives implicate the public interest. *Galella v. Onassis*, 353 F. Supp. 196, 225 (S.D.N.Y. 1972) (private aspects of a public figure's life do not "bear significantly upon public questions."), modified, 487 F.2d 986 (2d Cir. 1973); see also *Virgil v. Time, Inc.*, 527 F.2d 1122 (9th Cir. 1975), cert. denied, 425 U.S. 998 (1976). Courts may possibly apply the *Greenmoss* standards to public figures' (and possibly some public officials') actions if the speech does not bear on a public issue.

Less questions arise about limited purpose public figures. If they are public figures, they are so classified for a "limited range of issues." *Gertz*, 418 U.S. at 351. If they are private figures, *Greenmoss* would apply. Finally, the involuntary public figures would have to be involved in a public event to be classified as public figures. See *TRIBE, supra* note 82, at § 12-13, at 643-44.

87. *Davis v. Ross*, 107 F.R.D. 326, 330 (S.D.N.Y. 1985) (employer writing letter about former employee work habits); *Saunders v. VanPelt*, 497 A.2d 1121, 1124 & n.2 (Me. 1985) (claiming a former coworker was discharged for incompetence); *Great Coastal Express, Inc. v. Ellington*, 230 Va. 142, 334 S.E.2d 846, 852 (1985) (telling a former employee's coworkers that he had been discharged for attempted bribery). Although the *Ellington* court allowed presumed damages without proof of actual malice, for policy reasons the court still required actual malice for punitive damages. 334 S.E.2d at 852. See *infra* note 128.

But cf. Mutafis v. Erie Ins. Exch., 775 F.2d 593 (4th Cir. 1985) (per curiam). In *Mutafis*, the court applied the *Greenmoss* standard to a first amendment defense challenging an award under West Virginia's Unfair Trade Practices Act. The defendant had placed a false and defamatory memorandum in an insurance claim file. The court stated that there was "no public issue . . . [the] speech

many cases of private concern will involve commercial speech,⁸⁸ this lack of guidance leaves speakers unclear as to what constitutes a "matter of public concern."

Although courts using the *Greenmoss* test may refine a method for determining whether an issue is public or private, a review of the results in the years between *Rosenbloom* and *Gertz* shows potential problems.⁸⁹ For example, in *Matus v. Triangle Publications, Inc.*,⁹⁰ a radio broadcaster warned listeners about the high prices charged for snow plowing but the court determined that this was not a matter of public interest.⁹¹ Conversely, in *Safarets, Inc. v. Gannett Co., Inc.*,⁹² a letter to a newspaper's complaint column concerning a pet store's inhumane treatment of animals was held to be a matter of public interest.⁹³

A post-*Greenmoss* case further illustrates this uncertainty problem. In *Saunders v. VanPelt*,⁹⁴ the defendant was director of a child development center which provided diagnoses and treatment recommendations of children. He stated that the plaintiff, a psychologist who had performed psychological testing of children, was "incompetent and not qualified to work with children" and "had been dismissed . . . [for] in-

[was] solely in the individual interest of the speaker and was on a matter of purely private concern." *Id.* at 595.

The Arkansas Supreme Court, however, did not discuss the public/private concern question in a case decided ten weeks after *Greenmoss*. *Hogue v. Ameron, Inc.*, 286 Ark. 481, 695 S.W.2d 373 (1985). The lower court had directed a verdict for the defendant on the grounds that the plaintiff did not prove actual damages. The supreme court reversed and remanded because they decided that there was some evidence of injury to the plaintiff's reputation. However, the court did not decide the applicability of *Gertz* to the case, even though the plaintiff raised the issue because the defendant was non-media. *Id.* at 373-74. The defamation related to a policeman driving an unlicensed vehicle and yelling obscenities. It could be argued that this case involved a matter of public concern—the conduct of a policeman.

88. For pre-*Greenmoss* cases involving credit reporting agencies see *Hood v. Dun & Bradstreet, Inc.*, 486 F.2d 25, 29 (5th Cir. 1973), *cert. denied*, 415 U.S. 985 (1974); *Oberman v. Dun & Bradstreet, Inc.*, 460 F.2d 1381, 1384 (7th Cir. 1972); *Kansas Electric Supply Co. v. Dun & Bradstreet, Inc.*, 448 F.2d 647, 649 (10th Cir. 1971), *cert. denied*, 405 U.S. 1026 (1972); *Grove v. Dun & Bradstreet, Inc.*, 438 F.2d 433, 436-37 (3d Cir.), *cert. denied*, 404 U.S. 898 (1971); *Roemer v. Retail Credit Co.*, 44 Cal. App. 3d 926, 934, 119 Cal. Rptr. 82, 87 (1975); *see also* *Harley-Davidson Motorsports, Inc., v. Markley*, 279 Or. 361, 568 P.2d 1359 (1977) (defamation by employee of one motorcycle dealership about another dealership). *But see* *Davis*, 107 F.R.D. at 330; *Saunders*, 497 A.2d at 1124; *Ellington*, 334 S.E.2d at 848-49 (cases all involving employment situations).

89. For a comparison of cases involving the *Rosenbloom* standard, see Robertson, *supra* note 58, at 207.

90. 445 Pa. 384, 286 A.2d 357 (1971), *cert. denied*, 408 U.S. 930 (1972).

91. *Id.* at 395-99, 286 A.2d at 363-65.

92. 80 Misc. 2d 109, 361 N.Y.S.2d 276 (N.Y. Sup. Ct. 1974), *aff'd*, 49 A.D.2d 666, 373 N.Y.S.2d 858 (1975). Although *Safarets* was decided after *Gertz*, the court still followed the *Rosenbloom* standard. *Id.* at 113, 361 N.Y.S.2d at 280.

93. *Id.* at 113, 361 N.Y.S.2d at 280. For other cases held to involve the "general or public interest" *see infra* note 98.

94. 497 A.2d 1121 (Me. 1985).

competence."⁹⁵ The Maine Supreme Judicial Court noted that this case did not "involve . . . an issue of public interest" but provided no analysis to support this conclusion.⁹⁶

A strong argument can be made, however, that the statements were of public concern. The statements concerned the competency of a psychologist to evaluate children who were having problems in school, and were made both to the child's parents as well as officials of the school district.⁹⁷ Both the content and the context of the statements would thus favor calling this a public issue. Furthermore, it is difficult to reconcile this case with pre-*Greenmoss* cases in other jurisdictions holding that a restaurant review and basketball scouting were matters of public interest.⁹⁸ A decision such as *Saunders* will result in uncertainty and will chill others from commenting on the competency of those who deal with school children.⁹⁹

The problems with a content based inquiry after *Greenmoss* differ from any judicial determinations that have been made concerning whether a plaintiff is a public or private figure. To determine if a plaintiff is a public figure, a court must decide if an event is a "public controversy."¹⁰⁰ While such determinations may also lead to uncertainty, there is a major difference between the *Greenmoss* test and whether a "public controversy" exists.

Under *Gertz*, even if a court found no "public controversy," a defendant would still receive some degree of constitutional protection.¹⁰¹

95. *Id.* at 1123-24.

96. *Id.* at 1124 n.2.

97. *Id.* at 1124. The fact that the court determined that the statement did not involve a matter of public concern did not effect the outcome of the case because the jury found actual malice. *Id.* at 1126-27. The court, however, relied on the fact that the statement was slanderous per se and thus damages could be presumed. *Id.* at 1126.

98. See *Twenty-five East 40th Street Restaurant Corp. v. Forbes, Inc.*, 30 N.Y.2d 595, 282 N.E.2d 118, 331 N.Y.S.2d 29 (1972); *Garfinkel v. Twenty-first Century Publishing Co.*, 30 A.D.2d 787, 788, 291 N.Y.S.2d 735, 736-37 (1968).

99. Defamation suits are already having a chilling effect on private citizens speaking out on what they consider to be issues of public concern. See *N.Y. Times*, Feb. 14, 1985, at B11, col. 1.

Companies that sell highly specialized analyses or data bases are also concerned. Such information, like *Dun & Bradstreet's* "special notice," has a limited distribution. If these companies experience a rash of libel suits, they will be forced to exercise self-censorship to protect themselves. *The Court Sends Mixed Signals On Free Speech*, *BUS. WK.*, July 15, 1985, at 40.

100. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974). The *Gertz* Court did not define "public controversy" but later provided some guidance. See *supra* note 29. One court recently relied on the dictionary to determine whether a publication involved a public controversy or a matter of public concern. *Gannett Co. v. Re*, 496 A.2d 553, 556-57 (Del. 1985) (decided before *Greenmoss*). For an extensive analysis deciding whether a plaintiff was a public figure see *Marcone v. Penthouse Int'l Magazine for Men*, 754 F.2d 1072, 1080-87 (2d Cir.), *cert. denied*, 106 S. Ct. 182 (1985).

Less difficulty exists in determining the other major type of public figure—the "public figure for all purpose." See *supra* note 29.

101. *Gertz*, 418 U.S. at 347-49; see *Shiffrin, supra* note 19, at 927.

However, if a court now finds that a publication does not involve a matter of public concern, a defendant receives no constitutional protection against presumed and punitive damages.¹⁰² This uncertainty may be justified where the decision only effects the level of protection, but should not be allowed when the decision effects whether or not a defendant receives the constitutional protection at all.¹⁰³

The *Greenmoss* plurality added to this problem by not defining the term, "matters of public concern."¹⁰⁴ Furthermore, because there was no majority opinion, no one standard represents the *Greenmoss* test. Chief Justice Burger and Justice White used different expressions, "general public importance" and "general or public importance," to distinguish *Greenmoss* from *Gertz*.¹⁰⁵ This lack of a majority opinion will add to the confusing situation because the Supreme Court has not provided the lower courts with sufficient guidance as to the standards to be used.¹⁰⁶

102. See *Greenmoss*, 105 S. Ct. at 2953 (White, J., concurring). Only Justice White discussed whether the requirement of fault survives *Greenmoss*. See *infra* text accompanying notes 146-49.

103. Cf. Shiffrin, *supra* note 19, at 927.

104. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939, 2959 (Brennan, J., dissenting). The plurality also used the term "public issue" interchangeably with "public concern." *Id.* at 2945-47 (opinion of Powell, J.).

105. *Id.* at 2948 (Burger, C.J., concurring); *id.* at 2953-54 (White, J., concurring).

106. See Davis and Reynolds, *Judicial Cripples: Plurality Opinions in the Supreme Court*, 1974 DUKE L.J. 59, 62. Another possible result of the lack of a majority opinion may be that plurality decisions will not be accorded full precedential value. *Id.* at 62. Such decisions may be limited or overruled as new justices join the Court or concurring justices change their positions. *Id.* at 66.

A federal appeals court discussed the problem of applying libel law after the *Rosenbloom* plurality decision. *Gordon v. Random House, Inc.*, 486 F.2d 1356 (3rd Cir. 1973), *vacated and remanded*, 419 U.S. 812 (1974) (remand "in light of *Gertz*"). The court stated:

We experience some discomfort in accepting the *Rosenbloom* plurality opinion as a definitive statement of the appropriate law for this proceeding. . . . [W]e are constrained to observe that the affirmance of this court's judgment in [the *Rosenbloom*] case was produced by a majority coalition of Supreme Court Justices for diverse reasons.

Confronted with the foregoing diverse expressions, we are unable to share the certainty of the district court in accepting the *Rosenbloom* plurality as the law of this case. *Id.* at 1359-60 (footnote omitted).

The court proceeded to discuss the effect on the law of the two new Supreme Court justices. "Confronted with such divergence on the Supreme Court level, we suggest that the accuracy of our 'prophecies' will depend upon the yet unarticulated First Amendment philosophies of Justices Powell and Rehnquist." *Id.* at 1360.

A note in a post-*Greenmoss* opinion further illustrates the problem. The Supreme Judicial Court of Massachusetts stated: "five Justices appear to take the view that private parties need not prove actual malice in order to recover presumed or punitive damages if the libelous matter is not one 'of public concern.'" *New England Tractor-Trailer v. Globe Newspaper Co.*, 395 Mass. 471, 477 n.4, 480 N.E.2d 1005, 1009 n.4 (1985) (emphasis added).

Even if the term "public concern" is accepted as the standard, the plurality did not make clear whether this term is different from the old *Rosenbloom* "general or public interest" standard. The plurality in a carefully worded opinion, did not use the term "general or public interest." There are two possible explanations for this omission. First, the plurality wanted to avoid the criticism of requiring judges to decide whether an issue was in the "general or public interest"—an action criti-

The Credit Reports Should Receive Less First Amendment Protection

As an alternative to creating a public concern test with its accompanying uncertainty, the Court could have held that commercial credit reports, like other commercial speech, were entitled to less first amendment protection. Although the Court has not fully defined what speech other than advertising is considered commercial speech,¹⁰⁷ the Court has provided some guidance by defining commercial speech as “expression related solely to the economic interests of the speaker and its audience.”¹⁰⁸ Commercial credit information, and in particular Dun & Bradstreet’s “special notice” fits this definition.¹⁰⁹

The Court has often stated that commercial speech, although entitled to some first amendment protection, is not protected at the same level as other speech¹¹⁰ and that the government may ban commercial speech that is “false, deceptive or misleading.”¹¹¹ One reason for allowing such government regulation is that the truth of commercial speech may be more easily verified than other speech. Furthermore, the free market provides incentives for such speech to be truthful, thus eliminating the “chilling effect” of government regulation.¹¹²

cized in *Gertz*. See *supra* note 82 and accompanying text. Second, they may have intended that the term “public concern” mean something entirely different. Possibly the plurality would define an issue of “public concern” as one of greater importance than a matter of “general or public interest” but less important than a “public controversy.”

These standards, however, appear to be the same as the Supreme Court, as well as state and lower federal courts, have equated the terms “public concern” and “public interest” prior to *Greenmoss*. See *Wolston v. Reader’s Digest Ass’n*, 443 U.S. 157, 167 (1979) (describing the *Rosenbloom* standard as applying to “matters of public or general concern”); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 44 (1971) (opinion of Brennan, J.); *Marcone v. Penthouse Int’l Magazine for Men*, 754 F.2d 1072, 1081 (2nd Cir.), *cert. denied*, 106 S. Ct. 182 (1985); *Oberman v. Dun & Bradstreet, Inc.*, 460 F.2d 1381 (7th Cir. 1972); *Jacron Sales Co. v. Sindorf*, 276 Md. 580, 350 A.2d 688 (1976); *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 341 N.E.2d 569, 379 N.Y.S.2d 61 (1975); *Harley-Davidson Motorsports, Inc. v. Markley*, 279 Or. 361, 568 P.2d 1359 (1977); *Matus v. Triangle Publications, Inc.*, 445 Pa. 384, 286 A.2d 357 (1971), *cert. denied*, 408 U.S. 930 (1972).

Justice Brennan evidently believes issues of “public concern” and “matters of public or general interest” are identical. *Greenmoss*, 105 S. Ct. at 2959 n.11.

Two post-*Greenmoss* courts also appear to equate the terms. *Saunders v. Van Pelt*, 497 A.2d 1121, 1124 & n.2 (Me. 1985); *Great Coastal Express, Inc. v. Ellington*, 230 Va. 142, 334 S.E.2d 846, 852 (1985).

107. See *Shiffrin, supra* note 73, at 1223; *cf. Zauderer v. Office of Disciplinary Counsel*, 105 S. Ct. 2265, 2275 (1985).

108. *Central Hudson Gas & Elec. v. Public Serv. Comm’n*, 447 U.S. 557, 561 (1980).

109. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939, 2947 (1985).

110. See *Zauderer v. Office of Disciplinary Counsel*, 105 S. Ct. 2265, 2275 (1985); *Bolger v. Youngs Drug Product Corp.*, 463 U.S. 60, 64-65 (1983); *In re R.M.J.*, 455 U.S. 191, 203-04 (1982); *Central Hudson Gas & Elec. v. Public Serv. Comm’n*, 447 U.S. 557, 563 (1980); *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978).

111. *Zauderer*, 105 S. Ct. at 2275; *cf. Central Hudson*, 447 U.S. at 564.

112. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.24 (1976).

The truth of the credit information is verifiable by careful checking of reports.¹¹³ More important, however, the major purpose of issuing credit reports is to make a profit. Recipients of these reports expect accurate information and this expectation acts as an incentive to eliminate false information.¹¹⁴ The results of applying the common law of defamation to such reports will not chill speech, but will spread the cost of the untruthful reports to the recipients from those defamed.¹¹⁵

Even if Dun & Bradstreet's reports could be distinguished from commercial speech because they did not "propose a commercial transaction," the credit reports have other attributes that result in lower first amendment protection. The reports, by their contractual terms, were distributed to a limited audience and had to be kept confidential.¹¹⁶ By insisting on such terms, the credit reporting companies remove their reports from the "mainstream of public discussion"¹¹⁷ and therefore should not be able to claim greater constitutional protection than commercial advertising. Under either theory, balancing reputation against the reduced first amendment interests results in a return to the common law of presumed damages.¹¹⁸

113. For example, a credit company could verify whether a firm filed a petition in bankruptcy by checking with the company. This, in fact, was Dun & Bradstreet's standard practice which was not observed in *Greenmoss*. *Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc.*, 143 Vt. 66, 71, 461 A.2d 414, 416 (1983), *aff'd*, 105 S. Ct. 2939 (1985).

114. See *Virginia State Bd.*, 425 U.S. at 771 n.24; Shiffrin, *supra* note 73, at 1250.

115. Shiffrin, *supra* note 73, at 1250 n.247; Comment, *supra* note 65, at 1053-54.

116. See *Greenmoss*, 105 S. Ct. at 2947 (opinion of Powell, J.). The "special notice" specifically stated the restrictions: "This report . . . is not to be exhibited or its contents revealed to anyone else." Joint Appendix at 13, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939 (1985). Lower courts have found this a significant reason to deny full first amendment protection to such credit reports. See *Hood v. Dun & Bradstreet, Inc.*, 486 F.2d 25, 29 (5th Cir. 1973), *cert. denied*, 415 U.S. 985 (1974); *Wortham v. Dun & Bradstreet, Inc.*, 399 F. Supp. 633, 639 (S.D. Tex. 1975), *aff'd*, 537 F.2d 1142 (5th Cir. 1976).

117. *Wortham*, 399 F. Supp. at 638 n.2; see *Mutafis v. Erie Ins. Exch.*, 561 F. Supp. 192, 198 (N.D.W. Va. 1983), *aff'd per curiam*, 775 F.2d 593 (4th Cir. 1985). One of the justifications for providing first amendment protection for commercial advertising is that the best way for consumers to make informed decisions is to "open the channels of communication rather than to close them." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976). Furthermore, the "free flow" of information is important to society. *Id.* at 764. With the restrictions on distribution of the "special notice" there is no free flow of information.

118. This is the same balancing performed by the plurality except the reduced first amendment interest results from the specific speech and not from a general category of "private concern." See Shiffrin, *supra* note 73, at 1268. While Professor Shiffrin agrees that determining which credit reporting agencies will not receive first amendment protection in defamation suits involves line drawing, he states that such line drawing is "a far cry from sending out the judiciary on a general ad hoc expedition to separate matters of general public interest from matters that are not." *Id.* at n.327.

*A Uniform Standard For Awarding Punitive Damages
Should Be Required*

The primary result of the *Greenmoss* decision will be a return to the common law which allowed presumed and punitive damages without proof of actual malice.¹¹⁹ Protection of defendants against excessive verdicts will once again depend on the common law privileges.¹²⁰ However, these privileges may be overcome without proof of actual malice.¹²¹ The *Greenmoss* decision, therefore, leaves defendants vulnerable to large damage awards, especially since the plurality sets no standards for the award of punitive damages.¹²²

The plurality justified the award of presumed damages without proof of actual malice by balancing the state interest in *compensating* a person for damage to his reputation against the reduced first amendment interest of private speech.¹²³ This led to the conclusion that the state's interest in awarding presumed damages was substantial.¹²⁴ The plurality, however, went through no similar balancing to justify removing constitutional protection for punitive damages.

Punitive damages are windfalls made to plaintiffs in excess of actual damages.¹²⁵ The state's interest in awarding punitive damages to plaintiffs is to deter as well as punish the defendant's reprehensible conduct.¹²⁶ These different interests should be balanced against the first amendment interests to determine a standard for the award of punitive damages.

The plurality admitted that private speech was still protected by the first amendment, albeit to a lesser degree than public speech.¹²⁷ This protection should therefore require some constitutional limit on the award of punitive damages.¹²⁸ If after balancing, the plurality perceived

119. See *supra* notes 13-14.

120. See *supra* note 12.

121. *Great Coastal Express, Inc. v. Ellington*, 230 Va. 142, 334 S.E.2d 846, 853-54 (1985). See *supra* note 12.

122. A recent commentator has suggested that the actual malice standard is insufficient to protect public defendants against punitive damage verdicts and that plaintiffs should be required to also prove common law malice. Note, *Punitive Damages and Libel Law*, 98 HARV. L. REV. 847, 860-61 (1985).

123. *Greenmoss*, 105 S. Ct. at 2944-46.

124. *Id.* at 2946. The interest in awarding presumed damages might also be substantial due to an undervaluation problem of actual damages. See Note, *supra* note 122, at 857.

125. See *Rosenbloom v. Metromedia*, 403 U.S. 29, 74 (Harlan, J., dissenting); PROSSER, *supra* note 1 § 2, at 9.

126. See *Rosenbloom*, 403 U.S. at 73; PROSSER, *supra* note 1 § 2, at 9.

127. *Greenmoss*, 105 S. Ct. at 2946. See *Connick v. Myers*, 461 U.S. 138, 147 (1983).

128. Justice Harlan would have restricted awards for punitive damages in private libel actions to cases where actual malice was proved and where the amount of punitive damages was reasonably related to the actual damages. *Rosenbloom*, 403 U.S. at 73-75.

Even courts that have held that *Gertz* did not apply to certain cases, still applied *Gertz's* reason-

that an actual malice standard was excessive for private defamation, they should have articulated a requirement of at least common-law malice for the award of punitive damages. A uniform requirement of common-law malice, defined as ill will or conscious disregard for the consequences of others, would be less restrictive of any first amendment interest than no standard because it would not allow punitive damages based on a finding of bad faith or refusal to retract a statement.¹²⁹ Such a standard would simultaneously protect the important state interests.¹³⁰ Although a second malice requirement might be confusing, a minimum standard is necessary to protect speech against self-censorship, even in the private area.

The Media/Non-Media Defendant Question

Considering the large number of questions about whether *Gertz* applied to non-media as well as media defendants,¹³¹ the *Greenmoss* Court provided little analysis on the question. Only Justice White and the dis-

ing and required as a matter of state law proof of actual malice for an award of punitive damages. See *Fleming v. Moore*, 221 Va. 884, 893, 275 S.E.2d 632, 638 (1981).

129. Punitive damages are allowed in Vermont on a finding of bad faith. See *Greenmoss*, 105 S. Ct. at 2943 n.3. New Jersey allows punitive damages in defamation actions for failure to retract following a written request. N.J. STAT. ANN. § 2A:43-2 (West 1952 & Supp. 1985).

130. Since common law malice focuses on the defendant's attitudes toward the plaintiff, it is more closely tailored toward awarding damages in cases where the defendant receives an illicit benefit. Note, *supra* note 122, at 855. This is a better standard than the fuzzy standard in *Greenmoss* where the jury could have awarded punitive damages on a finding of bad faith. See *Greenmoss*, 105 S. Ct. at 2943 n.3. Undervaluation problems should not occur if the court allows presumed damages. Finally, the common law malice standard furthers the retribution function because it directs punishment at those engaged in reprehensible conduct. Note, *supra* note 122, at 859.

131. Holding that *Gertz* was limited to media defendants: *Schomer v. Smidt*, 113 Cal. App. 3d 828, 170 Cal. Rptr. 662 (1980); *Rowe v. Metz*, 195 Colo. 424, 579 P.2d 83 (1978); *Retail Credit Co. v. Russell*, 234 Ga. 765, 218 S.E.2d 54 (1975); *Vinson v. Linn-Mar Community School Dist.*, 360 N.W.2d 108 (Iowa 1984); *Columbia Sussex Corp. v. Hay*, 627 S.W.2d 270 (Ky. Ct. App. 1982); *Jacron Sales Co. v. Sindorf*, 276 Md. 580, 350 A.2d 688 (1976); *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252 (Minn. 1980); *Gengler v. Phelps*, 92 N.M. 465, 589 P.2d 1056 (Ct. App. 1978), *cert. denied*, 92 N.M. 353, 588 P.2d 554 (1979); *Harley-Davidson Motorsports, Inc. v. Markley*, 279 Or. 361, 568 P.2d 1359 (1977); *Denny v. Mertz*, 106 Wis. 2d 636, 318 N.W.2d 141, *cert. denied*, 459 U.S. 883 (1982); *Fleming v. Moore*, 221 Va. 884, 275 S.E.2d 632 (1981); *cf. Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 499 (1975) (Powell, J., concurring) (stating *Gertz* holding applied to "media publication").

There has been a great deal of confusion concerning the holding in *Sindorf*. The Supreme Court cited *Sindorf* as a case holding *Gertz* applicable to non-media situations. See *Greenmoss*, 105 S. Ct. at 2942 n.1. The actual statement by the *Sindorf* court was: "It is plain that the holding in *Gertz* was limited to media expression." *Sindorf*, 276 Md. at 590, 350 A.2d at 694. The court then decided *Gertz* was applicable to non-media cases based on its prediction of a future ruling of the Supreme Court and as a matter of state law and based on the need for equity and simplicity. *Id.* at 591-94, 350 A.2d at 695-96; see also *Harley-Davidson*, 279 Or. at 367, 568 P.2d at 1363.

The *Fleming* court similarly decided that *Gertz* did not control non-media actions but the court was sympathetic to the policy concerns discussed in *Gertz* and continued to require proof of actual malice for punitive damage awards. *Fleming*, 221 Va. at 893, 275 S.E.2d at 638.

Holding that *Gertz* was not limited to media defendant: *Antwerp Diamond Exch. v. Better Business Bureau*, 130 Ariz. 525, 637 P.2d 733 (1981); see also *Stewart*, *supra* note 19, at 635. Justice

sent discuss this issue.¹³² It is surprising that the plurality does not mention this distinction because on its facts, *Gertz* clearly involved a media defendant. Furthermore, as many commentators have noted, *Gertz* referred to the terms “media,” “publisher,” and “broadcaster” often.¹³³

The Court, however, has continually held in non-defamation cases that the media have no greater first amendment rights than private citizens.¹³⁴ Furthermore, if special protection for media defendants is based on the assumption that these statements implicate public issues,¹³⁵ this is also no justification. Private individuals need to discuss public issues¹³⁶ but they also interact throughout society and need to speak about matters that concern them. Providing less protection for non-media defendants will chill not only such speech but also speech of public importance.¹³⁷ Finally, a media/non-media distinction would not eliminate the line drawing problem.¹³⁸

Special protection for the media should also be rejected on the issue of damages. Non-media defamation usually does not circulate to as wide an audience as statements published in the media. The potential damages are, therefore, less.¹³⁹ Moreover, in many cases of non-media defa-

Stewart’s speech, which came four months after the *Gertz* decision, contributed to the belief that *Gertz* applied only to media defendants. See Shiffrin, *supra* note 19, at 924 & n.71.

The Court was concerned with the media/non-media distinction and requested arguments on this question during reargument of the case. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 104 S. Ct. 3583 (1984).

132. See *supra* text accompanying notes 69, 72-74. Lack of a clear statement on this issue may account for the Arkansas Supreme Court stating that the question of whether presumed damages could be awarded against a non-media defendant remained open in Arkansas. *Hogue v. Ameron, Inc.*, 286 Ark. 481, 695 S.W.2d 373, 374 (1985). The Arkansas court never mentioned *Greenmoss* in the opinion.

But cf. *Garcia v. Board of Educ.*, 777 F.2d 1403 (10th Cir. 1985) (per curiam) (public official defendant counterclaiming against non-media plaintiff). The *Garcia* court stated: “five members of the [*Greenmoss*] Court expressly rejected a distinction between media and nonmedia defendants.” *Id.* at 1409 (emphasis added). The court also noted that Chief Justice Burger “implicitly . . . rejected the media/nonmedia distinction.” *Id.* at 1410 n.5.

133. See RESTATEMENT (SECOND) OF TORTS § 580B comment e (1977); Robertson, *supra* note 68, at 215 & n.113; Shiffrin, *supra* note 19, at 928; Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1, 29 (1983); Note, *supra* note 19, at 1877 n.9.

Professor Shiffrin distinguishes the Court’s use of the word “publisher” with its use as a term of art. Shiffrin, *supra* note 19, at 928 n.104. For the use of the word “publisher” as a term of art, see *supra* note 11.

134. See *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 777, 782, 797-802 (1978); *Pell v. Procunier*, 417 U.S. 817, 834-35 (1974); *Branzburg v. Hayes*, 408 U.S. 665 (1972).

135. See Shiffrin, *supra* note 19, at 929; Note, *supra* note 19, at 1885.

136. *Davis v. Schuchat*, 510 F.2d 731, 734 (D.C. Cir. 1975); *Jacron Sales Co. v. Sindorf*, 276 Md. 580, 592, 350 A.2d 688, 695 (1976).

137. See *supra* note 99.

138. *Greenmoss*, 105 S. Ct. at 2957 n.6, 2958 n.7 (Brennan, J., dissenting).

139. See *Jacron Sales Co. v. Sindorf*, 276 Md. 580, 593, 350 A.2d 688, 695 (1976); *Matherson v. Marchello*, 100 A.D.2d 233, 240, 473 N.Y.S.2d 998, 1004 (1984); *Gazette, Inc. v. Harris*, 229 Va. 1, 18, 325 S.E.2d 713, 726-27, *cert. denied*, 105 S. Ct. 3513-14, 105 S. Ct. 3528-29 (1985); see also

mation, self-help may be easier and more effective.¹⁴⁰ Finally, an audience may be more skeptical of a non-media statement than one made in the media.

Three arguments have been advanced for special media protection. First, the media performs a public function by informing the public about public officials, the government, and events of public concern.¹⁴¹ Second, in performing this function, the media takes a greater risk of defaming someone and without special protection will likely engage in self-censorship.¹⁴² Third, some commentators have argued that since a free press and free speech are mentioned separately in the first amendment, they qualify for different levels of protection.¹⁴³ Courts that have balanced these justifications against the argument for no media/non-media distinction have rejected special protection for the media.¹⁴⁴

The Future of Defamation After Greenmoss

While *Greenmoss* answered some questions raised by *Gertz*, other questions remain. Because the plurality's decision only covered presumed and punitive damages,¹⁴⁵ the question of whether the fault requirement of *Gertz* remains in place after *Greenmoss* was never answered by the majority of the Court.¹⁴⁶ Only Justice White discussed this issue

Shiffrin, *supra* note 19, at 934; *cf. Avins v. White*, 627 F.2d 637, 649 (3d Cir.), *cert. denied*, 449 U.S. 982 (1980).

Professor Tribe recently stated: "It would be difficult to justify creating a special institutional privilege for the large media . . . without giving a functionally analogous privilege to people with less resources and far more vulnerability to the chilling effect of large defamation suits." N.Y. Times, *supra* note 99, at col. 3.

140. See Shiffrin, *supra* note 19, at 934 n.140; *cf. Schuchat*, 510 F.2d at 734 n.3.

141. See Shiffrin, *supra* note 19, at 932-33; Note, *supra* note 19, at 1884.

142. Shiffrin, *supra* note 19, at 933-34; Note, *supra* note 19, at 1884.

143. See Stewart, *supra* note 19, at 633, 635.

144. *Sindorf*, 276 Md. at 592, 350 A.2d at 695 ("[W]e [do not] discern any persuasive basis for distinguishing media and non-media cases."); *Gazette, Inc. v. Harris*, 229 Va. 1, 18, 325 S.E.2d 713, 726-27 ("Neither policy nor reason supports different treatment of the respective types of defendants."), *cert. denied*, 105 S. Ct. 3513-14, 105 S. Ct. 3528-29 (1985).

145. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939, 2948 (1985).

146. A very close reading of the *Gertz* Court's criticism of *Rosenbloom* as inadequately protecting publishers for statements deemed not to involve issues of "public or general interest" may indicate that the Court intended the fault standard as opposed to the damage issue, to apply to all private plaintiff cases. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346 (1974). This interpretation would allow the Court to reinstate a *Rosenbloom* type test for presumed and punitive damages without totally contradicting the criticism of such a test in *Gertz*. *Cf. TRIBE, supra* note 82, at § 12-13, at 641 ("common law's strict liability for defamation was entirely displaced, at least with respect to media defendants, by the application of *Gertz*'s 'fault' requirement without regard to whether the statement concerned a matter of 'public interest'").

The majority of the Court might not have discussed the fault question for three reasons. First, the case did not present the question and the Court could have been reluctant to discuss the issue. Second, the Court could have been divided on the issue and simply chose to resolve this issue at another time. Professor Shiffrin makes a similar suggestion for the Court's unwillingness to discuss

and he stated that the fault requirement must also be restricted to cases involving public importance.¹⁴⁷ Justice White would thus return to the common law rules of strict liability for statements involving private issues whether published by a media or non-media defendant.¹⁴⁸ Thus far, state courts have shown no inclination to adopt Justice White's view.¹⁴⁹ This issue ultimately will have to be resolved by the Court in the future.¹⁵⁰

The other major question left by *Greenmoss* is what may become of the *New York Times* standard? Justice White made several suggestions to change the constitutional protection given defamation defendants. Chief Justice Burger generally agreed.¹⁵¹ *New York Times* has been good law for over twenty years and it would be inconceivable to reduce protection to defendants. Recent cases have resulted in large awards of punitive damages against media defendants¹⁵² and there have been arguments to increase, not decrease protection.¹⁵³

Justice White's suggestion to allow plaintiffs to obtain a judgment just on the truth or falsity issue has some merit.¹⁵⁴ This should remove some of the "chilling effect" which concerned the Court in *New York Times*. If Justice White's proposal came to fruition, the threat of large awards would disappear. However, there remains a question of whether such a proposal would stand first amendment scrutiny.¹⁵⁵ Requiring defendants to go to court to prove the truth, or disprove the falsity of each statement, can itself have a chilling effect.¹⁵⁶

the non-media question in *Gertz*. Shiffrin, *supra* note 19, at 928 n.109. Justice Powell, furthermore, may not have discussed the issue to preserve his plurality.

147. *Greenmoss*, 105 S. Ct. at 2953 (White, J., concurring).

148. *Id.*

149. *New England Tractor-Trailer v. Globe Newspaper Co.*, 395 Mass. 471, 477 n.4, 480 N.E.2d 1005, 1009 n.4 (1985) (dictum); *see also* *Great Coastal Express, Inc. v. Ellington*, 230 Va. 142, 334 S.E.2d 846, 853 (1985) (maintaining a negligence standard without discussing Justice White's dictum).

150. *See* 54 U.S.L.W. 2204 (Oct. 15, 1985) (comments by Professor Tribe at Law Week's Constitutional Law Conference).

151. *See supra* notes 66, 71; *see also* Abrams, *Why We Should Change The Libel Law*, N.Y. Times, Sept. 29, 1985, § 6 (Magazine), at 34, 93 (another view of suggested changes to defamation laws); Ingber, *supra* note 83, at 832-39 (revised system of remedies).

152. *See* *Tavoulares v. Piro*, 759 F.2d 90, 137 (D.C. Cir.) (\$1.8 million punitive damage award against the Washington Post), *vacated*, 763 F.2d 1472, 1481 (1985) (denying rehearing and granting rehearing en banc); Smolla, *supra* note 133, at 12 n.72 (discussing \$2.5 million punitive damage award against the Alton (Illinois) Telegraph).

153. *See* Ingber, *supra* note 83, at 834 (elimination of punitive damages); Note, *supra* note 122, at 847 (public figures should be required to show common law malice as well as actual malice).

154. *Greenmoss*, 105 S. Ct. at 2950 n.2 (White, J., concurring); *see also* ELDREDGE, *supra* note 1 § 55.

155. *See* *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 368 n.3 (1974) (Brennan, J., dissenting).

156. A noted expert in defamation law suggests that such proposals, although they may lower

CONCLUSIONS

In *Greenmoss*, a plurality of the Court concluded that presumed and punitive damages may be awarded without proof of actual malice to a private plaintiff involved in matters not of public concern. The plurality held *Gertz* to its facts and allowed common law doctrines to cover private speech. The plurality, however, did not define "public concern" and *Greenmoss* may lead to a great deal of confusion as the lower courts try to decide which are issues of "public concern." *Greenmoss* reinstates a content based inquiry that was rejected by the *Gertz* majority and therefore will require courts to decide which statements implicate issues of "public concern." If a court finds the defamation concerned private matters, defendants must rely on common law protections to limit excessive damage awards. Additionally, a majority of the Court agreed that private individuals are entitled to the same degree of first amendment protection in defamation actions as are the media. Finally, since *Greenmoss* was a plurality opinion, the issues may be relitigated soon in the same way *Rosenbloom* was revisited three years later in *Gertz*, especially if the composition of the Court changes.

damage awards in individual cases, could lead to an increase in the total number of cases. *Abrams*, *supra* note 151, at 93.

In a recent case, Israeli General Sharon sued Time Magazine for fifty million dollars. *Sharon v. Time, Inc.*, 599 F. Supp. 538 (S.D.N.Y. 1984). General Sharon claimed the primary purpose of his lawsuit was to prove Time's statements were false. *N.Y. Times*, Jan. 19, 1985, at 26, col. 4. A jury found the statements were false. *Id.* at 1, col. 4. The jury, however, did not find actual malice on the part of Time. *N.Y. Times*, Jan. 25, 1985, at A1, col. 2.

Time's costs were estimated above one million dollars. *Id.* at B4, col. 1. An organization with less financial resources could easily be subjected to self-censorship, even if the trial was only to establish the truth or falsity of the issue.

The Sharon trial was also decided with a special verdict. *N.Y. Times*, Jan. 19, 1985, at 1, col. 5, 26, col. 1. This may answer some of Justice White's concerns. See *Greenmoss*, 105 S. Ct. at 2950 n.2 (White, J., concurring).