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TORTS—DEFAMATION—ACTUAL RELIANCE ON OFFICIAL RECORDS IS NEEDED FOR APPLICATION OF FAIR AND ACCURATE REPORT PRIVILEGE—IDENTIFICATION OF PLAINTIFF AS A PUBLIC OFFICIAL IS NEEDED FOR APPLICATION OF THE *NEW YORK TIMES* ACTUAL MALICE STANDARD

Bufalino v. Associated Press (2d Cir. 1982)

On December 7, 1978, Pennsylvania Governor-elect Richard L. Thornburgh released a list of contributors to his election campaign.[1] Associated Press (AP) newsman Paul Carpenter reviewed this list and recognized the name Charles Bufalino from his reporting experience in the area of law enforcement and organized crime.[2] Carpenter proceeded to conduct checks into Bufalino's possible association with members of organized crime.[3] He was informed by two employees of the Pennsylvania Crime Commission[4] that Bufalino was related to Russell Bufalino, a reputed Mafia boss.[5] Car-

1. Bufalino v. Associated Press, 692 F.2d 266, 267-68 (2d Cir. 1982), *cert. denied*, 103 S. Ct. 2463 (1983).

2. *Id.* at 268. For a discussion of the source of the notoriety of the name Bufalino in the law enforcement area, see note 5 *infra*.

3. 692 F.2d at 268. Carpenter examined reports released by the Pennsylvania Crime Commission, AP files and his own working files. *Id.* The Pennsylvania Crime Commission is a public investigatory body without enforcement power. *Id.* Carpenter also contacted two fellow reporters he believed to be knowledgeable in the area of organized crime, who corroborated his suspicion that a familial relationship existed between Bufalino and Russell Bufalino, a reported Mafia boss. *Id.* Further, he reviewed newspaper articles which reported that a Detroit lawyer named William E. Bufalino was a cousin and criminal companion of Russell Bufalino, a reputed Mafia leader. *Id.*

4. *Id.* at 268. Carpenter has refused to reveal the identities of these Crime Commission personnel. *Id.* Carpenter had agreed with the Crime Commission personnel not to reveal their identities. *Id.* The Second Circuit noted that this confidentiality was protected by the Pennsylvania "Shield Law." *Id.* at 271-72 (citing 42 PA. CONS. STAT. ANN. § 5942(a) (Purdon 1982)). This statute provides:

> No person engaged on, connected with, or employed by a newspaper of general circulation or any press association or any radio or television station, or any magazine of public circulation, for the purpose of gathering, procuring, compiling, editing or publishing news, shall be required to disclose the source of any information procured or obtained by such person, in any legal proceeding, trial or investigation before any governmental unit.

42 PA. CONS. STAT. ANN. § 5942(a) (Purdon 1982).

5. 692 F.2d at 268. In 1960, the Second Circuit reversed Russell Bufalino's conviction for conspiracy to commit perjury and obstruct justice for lack of sufficient evidence. *See* United States v. Bufalino, 285 F.2d 408 (2d Cir. 1960), *rev'g* 177 F. Supp. 106 (S.D.N.Y. 1959). In 1978, the Second Circuit upheld Bufalino's conviction for extortion and conspiracy. *See* United States v. Bufalino, 576 F.2d 446 (2d Cir.), *cert. denied*, 439 U.S. 928 (1978). In 1982, Bufalino's conviction for conspiracy to violate the civil rights of a U.S. citizen and obstruction of justice was upheld by the Second Circuit. *See* United States v. Bufalino, 683 F.2d 639 (2d Cir. 1982).

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penter prepared a story on the Thornburgh campaign fund disclosures[6] which was printed the following two days in two Pennsylvania newspapers.[7] The story described Bufalino as "an attorney who is related to Russell Bufalino, described by the Crime Commission as a Mafia boss."[8] The story did not mention that Bufalino was serving as the Borough Solicitor of West Pittston, Pennsylvania.[9] On the basis of these two stories, Bufalino filed a defamation action against AP in the United States District Court for the Southern District of New York.[10] The district court, applying the law of Pennsylvania, granted defendant's motion for summary judgment.[11] The grant of summary judgment was based on two grounds. First, Carpenter's story was entitled to the "fair and accurate report" privilege since actual reliance on official records was not required.[12] Second, as a public official,

6. 692 F.2d at 268. On December 7, 1978, Carpenter's superior at the Harrisburg AP office reviewed the story and inquired into Carpenter's sources of information before the story was transmitted over the wire service. *Id.*

7. *Id.* at 268. The article was printed in the *Scranton Times* on December 8, 1978 and in the *Wilkes-Barre Times-Leader Evening Post* on December 9, 1978. *Id.*

8. *Id.* at 268. The story stated that Thornburgh had "accepted political contributions from several individuals with alleged mob ties." *Id.* In a follow-up story prepared by Carpenter's editor and appearing in the same newspapers, AP reported that Thornburgh planned to return contributions from three of the contributors with alleged mob ties, but that Bufalino's "mere family ties" did not warrant return of his $120 contribution. *Id.* at 268-69.

9. *Id.* at 273. The stories described appellant merely as "an attorney." *Id.* Appellant Bufalino is a member of the Pennsylvania bar and resides and practices law in the Borough of West Pittston, Pennsylvania. *Id.* at 267. Appellant also serves part-time as the Borough Solicitor of West Pittston, a position which carries an annual salary of $3,500. *Id.* For a discussion of the importance of AP's failure to state that Bufalino was a local public official, see notes 87-94 and accompanying text *infra*.

10. 692 F.2d at 267. Bufalino claimed that the stories defamed him and injured him in both his private and professional lives. *Id.*

11. Federal jurisdiction was based on diversity of citizenship. *See* 28 U.S.C. § 1332 (1982). The plaintiff, Bufalino, is a citizen of Pennsylvania and AP is a New York corporation. 692 F.2d at 267.

The substantive law applied in diversity actions is governed by the conflict of law rules of the state where the federal court sits. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941). Traditionally, New York conflict of law rules applied the *lex loci delicti*—the law of the place of the wrong. *See, e.g.*, Selles v. Smith, 4 N.Y.2d 412, 151 N.E.2d 838, 176 N.Y.S.2d 267 (1958); Coster v. Coster, 289 N.Y. 438, 46 N.E.2d 509, *reh'g denied*, 290 N.Y. 662, 49 N.E.2d 621 (1943). A new "center of gravity" rule has also been applied in New York conflict cases. Under this rule, the law of the state having the greatest interest in the tort litigation is applied. *See, e.g.*, Miller v. Miller, 22 N.Y.2d 12, 237 N.E.2d 877, 290 N.Y.S.2d 734 (1968); Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963). The court in *Bufalino* did not state the theory under which it deemed Pennsylvania law to be applicable. *See* 692 F.2d at 269. For an analysis of the use of summary judgment in defamation suits, see Comment, *The Propriety of Granting Summary Judgment for Defendants in Defamation Suits Involving Actual Malice*, 26 VILL. L. REV. 470 (1980).

12. 692 F.2d at 270. The district court judge ruled that the statement that the plaintiff was related to Russell Bufalino was adequately supported by an FBI memorandum identifying him as a cousin of Russell Bufalino; the statement by Pennsylvania Crime Commission officials that Bufalino was so related; and several other documents, including a U.S. Senate report and testimony from deportation proceed-

Bufalino had failed to demonstrate the *New York Times* standard of "actual malice" required to state a claim for defamation.[13] On appeal, the United States Court of Appeals for the Second Circuit reversed and remanded, *holding* that since AP did not actually rely on official records, it was not entitled to invoke the "fair and accurate report" privilege, and since AP did not identify Bufalino as a public official in its story, the *New York Times* actual malice rule was not applicable. *Bufalino v. Associated Press*, 692 F.2d 266 (2d Cir. 1982).

In order for a communication to be actionable under Pennsylvania defamation law,[14] the statement must be untrue,[15] it must be published[16] and it

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ings. *Id.* The court also ruled that the statement alleging that Bufalino had ties to organized crime was supported by both official documents and by the statements of Crime Commission officials. *Id.*

13. 692 F.2d at 272.

14. For a discussion of the applicability of Pennsylvania law in *Bufalino*, see note 11 *supra*.

The term defamation "is made up of the twin torts of libel and slander—the one being, in general, written, while the other in general is oral. . . . In either form, defamation is an invasion of the interest in reputation and good name." W. PROSSER, LAW OF TORTS 737 (4th ed. 1971).

See, e.g., Thomas Merton Center v. Rockwell Int'l, 497 Pa. 460, 464, 442 A.2d 213, 215 (1981), *cert. denied*, 457 U.S. 1134 (1982) (quoting Birl v. Philadelphia Elec. Co., 402 Pa. 297, 303, 167 A.2d 472, 475 (1960) (quoting RESTATEMENT OF TORTS § 559 (1938))). *Rockwell* involved a defamation suit brought by the Thomas Merton Center, a group actively opposed to the B-1 bomber, against Rockwell, the prime contractor for the B-1 bomber project. *Id.* at 462, 442 A.2d at 214. An agent of Rockwell was quoted in a *Pittsburgh Post-Gazette* newspaper article as saying that the opponents of the B-1 bomber were being funded by the Soviet Union. *Id.* at 463, 442 A.2d at 214. The Supreme Court of Pennsylvania concluded not only that the accusations made by Rockwell's agent focused on the actions of the Soviet Union and not those of the plaintiff-appellee, but also, that nothing in the article indicated that plaintiff had knowledge of the alleged Soviet funding. *Id.* at 465-66, 442 A.2d at 216. The court concluded that the story was therefore "not defamatory as a matter of law." *Id.* at 467, 442 A.2d at 217.

In *Birl*, the defendant, through its agent, had made allegedly libelous statements about Birl to the effect that he would no longer have any contact with, or do business with Birl, since Birl had earlier left his employ without giving written notice. Birl v. Philadelphia Elec. Co., 402 Pa. 297, 299, 167 A.2d 472, 473-74 (1960). The Supreme Court of Pennsylvania stated that the likelihood that such a statement deterred third persons from associating with Birl was "too obvious for words," and that the plaintiff had therefore sufficiently proved the defamatory character of the statement. *Id.* at 304, 167 A.2d at 476.

15. 42 PA. CONS. STAT. ANN. § 8342 (Purdon 1982). Under the provisions of § 8342, truth is an "adequate and complete defense" in a defamation suit. *Id. See, e.g.*, Fram v. Yellow Cab Co., 380 F. Supp. 1314, 1328 (W.D. Pa. 1974) (under Pennsylvania law, statements by defendant that plaintiff was actively seeking support in campaign against cab rate hikes accurately reflected plaintiff's activities, and thus could not be defamatory); Schonek v. WJAC, Inc., 436 Pa. 78, 84, 258 A.2d 504 (1969) (plaintiff's claim that defendant "doctored" certain documents was true and thus not defamatory where evidence shows deletions, underlinings and tampering with such documents). *But cf.* Dunlap v. Philadelphia Newspapers, Inc., 448 A.2d 6, 15 (Pa. Super. Ct. 1982) (literal accuracy of separate statements within an article will not render the article true where implication of the article as a whole was false). The burden of proving the truth of a defamatory communication is on the defendant. 42

must be injurious to the reputation of the plaintiff.[17] The plaintiff has the burden of proving both the defamatory character of the alleged wrongful communication[18] and the understanding by the recipient of the communication's defamatory meaning.[19] While the court determines whether the statement is capable of such a defamatory meaning, it is the jury which

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PA. CONS. STAT. ANN. § 8843(b) (Purdon 1982). *See, e.g.*, Kilian v. Doubleday & Co., 367 Pa. 117, 124, 79 A.2d 657, 660 (1951) (where there was no evidence that events described by defendant actually occurred, it was error for trial court to submit to jury question of truth of the communication).

The constitutional validity of placing the burden of showing truth upon the defendant had been questioned. *See* Steaks Unlimited, Inc. v. Deaner, 623 F.2d 264, 274-45 n.49 (3d Cir. 1980) (applying Pennsylvania law). The court in *Steaks Unlimited* recognized that the United States Supreme Court forbids liability for defamation without proof of fault. *Id.* (citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 n.10 (1974)). By placing the burden on the defendant to prove truth, the Third Circuit implied that Pennsylvania law allowed liability without proof of fault in cases in which defendant could not prove truth. *See id.* However, the Third Circuit did not decide on the constitutionality of Pennsylvania law. *Id.* Recently, the Pennsylvania Superior court, in *Dunlap v. Philadelphia Newspapers*, held that placing the burden on the defendant to show truth was contrary to *Gertz*, and that "[as] a matter of First Amendment law, the burden must be placed on the plaintiff to show falsity." Dunlap v. Philadelphia Newspapers, Inc., 448 A.2d 6, 14 (Pa. Super. Ct. 1982). The Supreme Court of Pennsylvania has not ruled on this change in Pennsylvania law, so the status of § 8343(b) is uncertain.

For an overview of the truth defense in defamation suits, see W. PROSSER, *supra* note 14, at 769-99. Prosser states that the defense of truth "has been given the technical name of justification." *Id.* at 796. Apparently, that denomination is the source of the title of the relevant section of the Pennsylvania Code. *See* 42 PA. CONST. STAT. ANN. § 8343 (Purdon 1982) (justification a defense).

16. 42 PA. CONS. STAT. ANN. § 8343(a)(2) (Purdon 1982). "Publication" in the law of defamation is a term of art which refers to the "communication [of a defamatory statement] intentionally or by a negligent act to one other than the person defamed." Gaetano v. Sharon Herald Co., 426 Pa. 179, 182, 231 A.2d 753, 755 (1967). For an overview of the publication requirement, see W. PROSSER, *supra* note 14, at 766-71. For examination of particularized methods of publication, see Smith, *Liability of a Telegraph Company for Transmitting a Defamatory Message*, 20 COLUM. L. REV. 369 (1920) (transmission from one telegraph operator to another held to be sufficient to meet publication requirement); Note, *Libel and Slander—Television Broadcasts Without a Script*, 2 VILL. L. REV. 575 (1957) (publication by television broadcast); Note, *Communications Between Employees of Company Concerning Company Business Held Sufficient Publications to Subject Company to Liability*, 38 VA. L. REV. 400 (1952) (communication to one's own agent held to be sufficient publication to meet requirement); Note, *Libel—Is an Unsealed Letter Publication?*, 64 U. PA. L. REV. 193 (1916) (mailing of postcard held to be sufficient to meet publication requirement).

17. *See* Corabi v. Curtis Publishing Co., 441 Pa. 432, 442, 273 A.2d 899, 904 (1971). A communication with a defamatory meaning is one which tends to "harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Id.*

18. 42 PA. CONS. STAT. ANN. § 8343(a)(1)&(4) (Purdon 1982). Plaintiff also has the burden of proving the following elements: publication by defendant; the communication's application to defendant; understanding by recipient of the communication's intended application to plaintiff; special law resulting from publication; and abuse of a conditionally privileged occasion. *Id.*

19. *Id.*

determines whether the recipient understood the defamatory meaning.[20]

Defamatory communications are not actionable if they are protected by privilege.[21] Pennsylvania recognized both absolute and qualified privilege in the area of defamation law.[22] The qualified "fair and accurate report" privilege applies in the public journalism context. This privilege, which derives from the common law, allows publication of a fair and accurate account or abridgment of official proceedings or reports, even if the account or

20. *See* Corabi v. Curtis Publishing Co., 441 Pa. 432, 442, 273 A.2d 899, 904 (1971). The procedural history of *Corabi* was very complex. *See id.* at 439-41, 273 A.2d at 902. The relevant issue before the court was whether the trial court had erred in concluding that certain passages of an article published by the defendant were "capable of a defamatory meaning." *Id.* at 442, 273 A.2d at 904. These passages included, *inter alia*, the following: "For Lillian, an itinerant dancer who has been kicking her way through chorus lines since the age of 13, stardom of a sort arrived with her arrest and trial"; " 'Oh sure,' he says about Lillian, 'She used to be a beautiful girl, but now she's over the hump. The mileage has got her.' " *Id.* at 443-45 n.1, 273 A.2d at 904-05, n.1. The court upheld the trial court's finding, since some passages of the article were "capable of conveying to the average reader imputations of involvement in or actual guilt of crimes involving moral turpitude and of immorality on the part of the plaintiff. . . ." *Id.* at 447, 273 A.2d at 907. For other cases which delineate the respective roles of the court and the jury in defamation cases, see note 19 *supra*.

21. *See, e.g.*, Biggans v. Foglietta, 403 Pa. 510, 170 A.2d 345 (1961). The court in *Biggans* stated that "[i]n order to be privileged, a 'communication . . . must be made upon a proper occasion, from a proper motive and must be based upon a reasonable and proper cause.' " *Id.* at 511, 170 A.2d at 346 (quoting Briggs v. Garrett, 111 Pa. 404, 2 A. 513 (1886); Gray v. Pentland, 2 Serg. & Rawle 23 (1815)). The rationale behind allowing defamatory communications to go unpunished is that in certain situations "it is better that an individual be harmed than that the public go uninformed about the public business." *Biggins*, 403 Pa. at 511, 170 A.2d at 346 (citing Montgomery v. City of Philadelphia, 392 Pa. 178, 140 A.2d 100 (1958)).

There are two classes of privilege: absolute and qualified. *See, e.g.*, Matson v. Margiotti, 371 Pa. 188, 88 A.2d 892 (1952); Berg v. Consolidated Freightways, Inc., 280 Pa. Super. 445, 421 A.2d 831 (1980). For an overview of the distinction between absolute and conditional privilege in defamation actions, see Comment, *Libel and Slander—Absolute Privilege Before Administrative Agencies*, 5 VILL. L. REV. 121 (1959); Note, *Absolute Privilege in Defamation: The Extension*, 21 U. PITT. L. REV. 41 (1959).

Perhaps the most basic distinction between an absolute and a qualified privilege is that a qualified privilege can be lost through abuse, while an absolute privilege exists irrespective of a defendant's motive or actions. *See, e.g.*, Greenberg v. Aetna Ins. Co., 427 Pa. 511, 235 A.2d 576 (1967), *cert. denied*, 392 U.S. 907 (1968); Sciandra v. Lynett, 409 Pa. 595, 187 A.2d 586 (1963).

22. For cases dealing with the absolute privileges recognized under Pennsylvania law, see Binder v. Triangle Publications, Inc., 442 Pa. 319, 275 A.2d 53 (1971) (judicial proceedings accorded absolute privilege); Montgomery v. City of Philadelphia, 392 Pa. 178, 140 A.2d 100 (1958) (communications made by a public officer in course of official duties absolutely privileged). For cases dealing with qualified privileges under Pennsylvania law, see Corabi v. Curtis Publishing Co., 441 Pa. 432, 273 A.2d 899 (1971) (if communication is actuated by malice, privilege is vitiated); Boyer v. Pittsburgh Publishing Co., 324 Pa. 154, 188 A. 203 (1936) (privilege lost when privileged report accompanied by unfair and unwarranted comment).

The "fair and accurate" report privilege is found in the Second Restatement of Torts. *See* RESTATEMENT (SECOND) OF TORTS § 611 (1977). The Restatement provides that the publication of defamatory matter is "privileged if the report is accurate and complete or a fair abridgement of the occurrence reported." *Id.*

abridgement contains defamatory matter.[23] The theoretical basis for this privilege is a public policy which places the interest of free dissemination of information of public concern above the interest of protecting an individual from potential harm to his reputation.[24]

Whether a defendant claiming the fair and accurate report privilege under Pennsylvania law must actually have relied on official records in order to invoke the privilege is a matter of some debate.[25] In *Binder v. Triangle*

23. The fair and accurate report privilege developed in response to the common law rule that when a newspaper publishes a defamatory remark made by another, it is charged with publication of the defamation. *See* Medico v. Time, Inc., 643 F.2d 134, 137 (3d Cir. 1981). For Pennsylvania cases applying this common law "re-publication" rule, see Curran v. Philadelphia Newspapers, Inc., 497 Pa. 163, 178 n.5, 439 A.2d 652, 659 n.5 (1981) (quoting RESTATEMENT (SECOND) OF TORTS § 581A comment e (1977)); Smith v. Stewart, 5 Pa. 372 (1847); Oles v. Pittsburgh Times, 2 Pa. Super. 130 (1896).

Under Pennsylvania law, a single edition of a newspaper or magazine gives rise to only one cause of action, regardless of the number of copies actually printed. 42 PA. CONS. STAT. ANN. § 8341(b) (Purdon 1982). *See, e.g.*, Dominiak v. National Enquirer, 439 Pa. 222, 266 A.2d 626 (1970); Gaetano v. Sharon Herald Co., 426 Pa. 179, 231 A.2d 753 (1967).

Under Pennsylvania law, a plaintiff has the burden of proving abuse of privilege. 42 PA. CONS. STAT. ANN. § 8343(a)(7) (Purdon 1982). Under the original Restatement, the fair and accurate report privilege was lost if a story was published "solely for the purpose of causing harm to the person defamed." RESTATEMENT OF TORTS § 611(b) (1938). *Accord* Binder v. Triangle Publications, Inc., 442 Pa. 319, 324, 275 A.2d 53, 56 (1971); Corabi v. Curtis Publishing Co., 441 Pa. 432, 453, 273 A.2d 899, 909 (1971); Sciandra v. Lynett, 409 Pa. 595, 600, 187 A.2d 586, 589 (1963). Under the Second Restatement, the privilege is lost "when the publisher does not give a fair and accurate report of the proceeding." RESTATEMENT (SECOND) OF TORTS § 611 comment a (1977). *Accord* Mathis v. Philadelphia Newspapers, Inc., 455 F. Supp. 406, 417 (E.D. Pa. 1978). In discussing the privilege under Pennsylvania law the Third Circuit has applied the provisions of the original Restatement concerning abuse of the privilege. *See* Medico v. Time, Inc., 643 F.2d 134, 138 (3d Cir.), *cert. denied*, 454 U.S. 836 (1981).

24. *See, e.g.*, Sciandra v. Lynett, 409 Pa. 595, 187 A.2d 586 (1963). In *Sciandra* the Pennsylvania Supreme Court characterized the fair and accurate report privilege as follows: "Upon the theory that it is in the public interest that information be made available as to what takes place in public affairs, a newspaper has the privilege to report the acts of the executive or administration officials of government." *Id.* at 600, 187 A.2d at 586. A comment to the Restatement provides that "the basis of this privilege is the interest of the public in having information made available to it as to what occurs in official proceedings and public meetings." RESTATEMENT (SECOND) OF TORTS § 611 comment a (1977).

The United States Supreme Court has commented on the basic policy considerations which underly the fair and accurate report privilege in the closely analogous context of an invasion of privacy suit. *See* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 495 (1975). The Court stated that "[p]ublic records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media." *Id.*

For an overview of the history and applications of privilege in the law of defamation, see Sowle, *Defamation and the First Amendment: The Case for Constitutional Privilege of Fair Report*, 54 N.Y.U. L. REV. 469 (1979); Note, *Privilege to Republish Defamation*, 64 COLUM. L. REV. 1102 (1964).

25. Both the First and Second Restatements are silent as to whether actual reli-

Publications, Inc.,[26] a reporter employed by Triangle Publications prepared a defamatory story based on information gained through telephone communications with the prosecutor in a murder trial.[27] The Pennsylvania Supreme Court ruled that the reporter, who did not witness the judicial proceedings which became the subject of his written publication, was entitled to the fair and accurate report privilege.[28] The court stated that the reporter's lack of first-hand observation of the trial was "immaterial provided his story [was] a fair and substantially accurate portrayal of the events in question."[29]

In *Medico v. Time, Inc.*[30] the plaintiff brought in federal court a defamation suit against Time. Medico alleged that an article which had appeared in a March, 1978 issue of Time Magazine[31] had depicted him as being a high-ranking organized crime figure.[32] The district court granted Time's motion for summary judgment on the grounds that the published story was a fair and accurate account of FBI files.[33] On appeal, the United States Court

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ance is a prerequisite to invocation of the privilege. *See* RESTATEMENT OF TORTS § 611 (1938); RESTATEMENT (SECOND) OF TORTS § 611 (1977). For a discussion of the source and nature of the conflict concerning the requirement of reliance, see notes 33-38 and accompanying text *infra*.

26. 442 Pa. 319, 275 A.2d 53 (1971).

27. *Id.* The defamatory story in *Binder* concerned the trial of William McClerg for the murder of James McClure. *Id.* at 320, 275 A.2d 54. One of the prosecution's witnesses testified that both the victim and the accused had romantic relations with twenty-four year old Carolyn Binder. *Id.* at 321 n.2, 275 A.2d at 55 n.2. Further evidence was adduced that the victim had lived with Binder and her husband before his death, and that after the killing Binder had left town with McClerg. *Id.* at 322 n.2, 275 A.2d at 55 n.2. The newspaper article, which appeared in the Philadelphia Daily News the day following these in-court revelations, was headlined "Slay Trial Bares Story of Bizarre Love Triangle." *Id.* at 321 n.2, 275 A.2d at 55 n.2.

28. *Id.* at 320-21, 275 A.2d at 58. The reporter assigned to the trial did not remain in the courtroom for the first day of the trial. *Id.* at 321, 275 A.2d at 54. At the reporter's request the prosecuting attorney phoned the reporter with a summary of the prosecution's opening statement and the testimony of the prosecution's first witness. *Id.* at 321, 275 A.2d at 54.

29. *Id.* at 327, 275 A.2d at 58. In affirming the lower court's application of the fair and accurate report privilege, the court stated that the only language in the story which arguably abused the fair and accurate report privilege was the expression "bizarre love triangle." *Id.* at 326, 275 A.2d at 57. Justice Roberts stated that since the "love triangle" involved a married woman and two or three paramours, and since one of the alleged lovers had lived with Binder and her husband, the characterization of the relationship as "bizarre" had a sufficient factual foundation. *Id.* at 327, 275 A.2d at 58.

30. 643 F.2d 134 (3d Cir. 1981), *aff'g* 509 F. Supp. 268 (E.D. Pa. 1980).

31. *Id.* at 135. In *Medico*, the article in question was based primarily on the alleged criminal activities of then-United States Congressman Daniel J. Flood. *Id.* The defamatory aspect of the article depicted Medico's connection with Russell Bufalino, alleging that Medico had served as a link between Flood and Bufalino in criminal activities. *Id.*

32. 643 F.2d at 135. In *Medico*, the defamatory article alleged that Congressman Flood had steered government contracts to Medico in exchange for cash, with Russell Bufalino serving as the middleman. *Id.*

33. *Id.* at 135. The district court was faced with an issue of first impression under Pennsylvania law—whether the fair and accurate report privilege should be

of Appeals for the Third Circuit affirmed, rejecting Medico's argument that actual reliance on the FBI files was required for the fair and accurate report privilege to apply.[34] Relying on *Binder*, the Third Circuit held that it was irrelevant how the publisher obtained knowledge of the FBI files since Pennsylvania law squarely contradicted the actual reliance argument.[35]

The application of defamation law to the press and other media necessarily involves some infringement upon the constitutionally guaranteed rights of free speech and a free press.[36] Cognizant of the constitutional implications of defamation law, the Supreme Court of the United States has constructed a limitation on the defamation right of action, based on policy considerations closely analogous to those which underly Pennsylvania's fair and accurate report privilege.[37] This limitation requires that in certain defamation cases a plaintiff must prove a higher degree of fault on the part of the defendant than would otherwise be required.[38]

In *New York Times v. Sullivan*[39] the Supreme Court resolved a split among the states as to the liability of one who publishes false statements which relate to the office held by a public official.[40] In this case, the Com-

extended to publications based on reports not available to the public. *Id.* The Pennsylvania courts only had applied the privilege to publications based on reports which were open to the public. *Id.* The district court concluded that Pennsylvania courts would extend the privilege at least this far, and granted summary judgment for defendant Time. *Id.*

Time based its motion for summary judgment on the grounds that the publication was substantially true. *Id.* at 135. In support of its motion, Time submitted FBI documents and affidavits of two FBI agents. *Id.* The district court rejected the truth rationale for the motion, reasoning that although the FBI affidavits had established the authenticity of the FBI documents, they had not established the factual basis of the assertion that Medico was a Mafia boss. Therefore, there remained a material factual issue to be resolved; that is, whether the FBI documents reported true information. *Id.* at 136. However, the district court granted the motion on the grounds of the fair and accurate report privilege. *Id.*

34. *Id.* at 146. Medico argued on appeal that if the published story reflected the contents of the official reports by mere coincidence, the fair and accurate report privilege should not attach. *Id.*

35. *Id.* at 146-47 (quoting *Binder*, 442 Pa. at 319, 275 A.2d at 53). The Third Circuit did not acknowledge any factual distinction between *Binder* and *Medico*. *See* 643 F.2d at 146-47.

36. *See* U.S. Const. amend. I. For a detailed discussion of the constitutional implications of the law of defamation being applied to the press, see New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

37. *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964). For a discussion of the decision in *New York Times*, see notes 40-43 and accompanying text *infra*.

38. New York Times Co. v. Sullivan, 376 U.S. 254, 279-280. For a discussion of the traditional burden of proof under Pennsylvania defamation law, see notes 18-20 and accompanying text *supra*.

39. 376 U.S. 254 (1964).

40. *See id. See also* Note, *Defamation of Public Officers and Candidates*, 49 COLUM. L. REV. 875, 896-97 (1949). The Kansas Supreme Court's opinion in *Coleman v. MacLennan*, which pre-dated *New York Times*, closely anticipated the Supreme Court's actual malice rule. *See* Coleman v. MacLennan, 78 Kan. 711, 98 P. 281 (1908). *Coleman* involved a defamation suit brought by the Attorney General of the State of Kansas who was running for re-election. *Id.* at 712, 98 P. at 281. Defendants in the action

missioner of Public Affairs of Montgomery, Alabama brought a defamation action which arose out of an advertisement appearing in a local newspaper.[41] Reversing a judgment for the plaintiff,[42] the Supreme Court held that the first amendment provided a conditional privilege to publications concerning public officials. The Court held that a public official defamation plaintiff would be unable to recover for communications "relat[ing] to his official conduct unless he prove[d] that the statement was made with 'actual malice' that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[43]

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were the owner and publisher of the Topeka State Journal, a newspaper. *Id.* 98 P. at 281. The article at issue in *Coleman* was based on plaintiff's activities respecting a school fund transaction. *Id.* at 712, 98 P. at 281. In setting forth the law to be applied, the court said that "any one claiming to be defamed by the communication must show *actual malice*, or go remediless. This privilege extends to a great variety of subjects and includes matters of public concern, public men, and candidates for office." *Id.* at 723, 98 P. at 285 (emphasis added).

41. 376 U.S. at 256-58. Respondent argued that the publication at issue was a commercial advertisement and therefore, under *Valentine v. Chrestensen*, was not protected by the first amendment. *Id.* at 265 (citing Valentine v. Chrestensen, 316 U.S. 52 (1942)). In *Chrestensen*, the Supreme Court held that a city ordinance barring street distribution of handbills was constitutional as applied to the distribution of a handbill which contained commercial advertisement on one side and a protest message on the other. Valentine v. Chrestensen, 316 U.S. 52, 55 (1942). In *New York Times*, the Court stated that its decision in *Chrestensen* was "based upon the factual conclusions that the handbill there was 'purely commercial advertising' and that the protest . . . had been added only to evade the ordinance." 376 U.S. at 266.

The Court stated that the publication at issue in *New York Times* did not constitute " 'commercial' advertisement in the sense in which the word was used in *Chrestensen*." *Id.* The fact that the publication was paid for as an advertisement was "immaterial," since it "communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are of the highest public interest and concern." *Id.* (citing NAACP v. Button, 371 U.S. 415, 435 (1963)).

For Supreme Court cases decided after *Chrestensen* dealing with the constitutional protection of commercial speech, see Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 442 U.S. 557 (1980) (applying a four-part analysis to the commercial speech problem); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (invalidating state law prohibiting pharmacists from advertising prices of prescription drugs).

42. 376 U.S. at 292. The Supreme Court reversed and remanded the case, holding that public officials are barred from recovery of damages for a defamatory statement unless the official proves actual malice on the part of the defendant. *Id.* at 279-80. "Actual malice" was defined by the Court as a statement made "with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 280.

43. *Id.* at 279-80. The Court stated that the Alabama decision had to be viewed "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. . . ." *Id.* at 270 (citing Terminiello v. Chicago, 337 U.S. 1, 4 (1949); DeJonge v. Oregon, 299 U.S. 353, 356 (1937)). The public official privilege, the *New York Times* Court reasoned, was necessary since "the threat of damage suits would otherwise 'inhibit the fearless, vigorous, and effective administration of policies of government' and 'dampen the ardor of all but the most resolute, or the most irresponsible, in the un-

In *Rosenblatt v. Baer*,[44] the Supreme Court addressed the issue of whether the supervisor of a county recreational area was a public official within the meaning of *New York Times*.[45] Though the Court refused to draw "precise lines" categorizing persons who would or would not be included,[46] it held that "public officials" include "at the very least . . . those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs."[47] One year later, in *Curtis Publishing Co. v. Butts*,[48] the Supreme

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flinching discharge of their duties'. . . . It is as much the duty to criticize as it is the official's duty to administer." *Id.* at 282 (citations omitted).

Justice Brennan wrote the opinion for the court. Concurring opinions were filed by Justices Black, Douglas and Goldberg. Justice Black, joined by Justice Douglas, apparently felt that the Court did not go far enough in its reversal, and stated that the defendants "had an *absolute*, unconditional constitutional right to publish in the Times advertisement their criticisms of the Montgomery agencies and officials." 376 U.S. at 254 (Black, J., concurring) (emphasis added). Justice Goldberg, joined by Justice Douglas, also believed the majority did not go far enough in providing the conditional privilege. *See id.* at 298 (Goldberg, J., concurring). Justice Goldberg stated that "the First and Fourteenth Amendments to the Constitution afford to the citizen and to the press an absolute, unconditional privilege to criticize official conduct despite the harm which may flow from excesses and abuses." *Id.*

44. 383 U.S. 75 (1966).

45. *Id.* at 77. In *Rosenblatt*, the plaintiff-respondent was in charge of a recreational area owned by Belknap County, New Hampshire. *Id.* As a result of a public controversy surrounding the development of the area, respondent was discharged from his position. *Id.* at 77-78. Petitioner published an article, which, on its face, seemed simply to praise the current administrator of the area. It did, however, contain the phrase, "What happened to all the money last year and every other year?" *Id.* at 78. Respondent was unable to successfully offer extrinsic proof of the article's defamatory meaning. *Id.* at 79. However, a jury awarded damages to respondent, and the New Hampshire Supreme Court affirmed. *Id.* at 77.

46. *See id.* at 85. The trial in *Rosenblatt* was conducted before *New York Times* was decided, and respondent did not frame his case on the basis of the *New York Times* rule. *Id.* at 87. For this reason, the Court remanded the case to give respondent a chance to "bring his claim outside the *New York Times* rule." *Id.* In a dissenting opinion, Justice Fortas stated that he would not have granted certiorari since the factual record was not shaped on the basis of *New York Times* and that, therefore, there was not a sufficient factual record on which the Court could base its decision. *Id.* at 100-01 (Fortas, J., dissenting).

47. 383 U.S. at 85. The Court stated that "it is for the trial judge in the first instance to determine whether the proofs show respondent to be a 'public official.'" *Id.* at 88. The reason for this rule is that "[s]uch a course will both lessen the possibility that a jury will use the cloak of a general verdict to punish unpopular ideas or speakers, and assure an appellate court the record and findings required for review of constitutional decisions. *Id.* at 88 n.15 (citations omitted).

Dean Prosser characterized *Rosenblatt* as having extended *New York Times* "to all public employees, no matter how inferior and lowly their station." W. PROSSER, *supra*, note 14, at 821.

For a discussion of other cases that hold that lower level public officials fall under the rule of *Rosenblatt*, see Time Inc. v. Pape, 401 U.S. 279 (1971) (Deputy Chief of Chicago Police Department held to be a public official); Tague v. Citizens for Law & Order, Inc., 75 Cal. App. 3d Supp. 16, 142 Cal. Rptr. 683 (Cal. App. Dep't. Super. Ct. 1977) (assistant public defender held to be a public official); Finkel v. Sun Tattler Co., 348 So. 2d 51 (Fla. Dist. Ct. App. 1977) (former city attorney held to be a public

Court extended the *New York Times* rule as applied in *Rosenblatt* to persons who were *public figures* but who were not *public officials*.[49]

In *Rosenbloom v. Metromedia, Inc.*,[50] a plurality of the Supreme Court held that the *New York Times* actual malice rule extended to private individuals who are defamed in the context of a discussion of a matter of public concern.[51] In *Rosenbloom*, the plaintiff alleged that a radio station had broadcast allegedly defamatory stories about his arrest on obscenity charges.[52] A fed-

official); Dattner v. Pokock, 81 A.D.2d 572, 437 N.Y.S.2d 425 (N.Y. App. Div., 2d Dep't 1981) (building inspector for the Village of Ocean Beach held to be a public official).

48. 388 U.S. 130 (1967), *reh'g denied*, 389 U.S. 889 (1968).

49. *Id.* at 155. Butts was the athletic director and former head football coach at the University of Georgia. *Id.* at 135. The Saturday Evening Post ran a story which described how Butts had thrown a game against the University of Alabama. *Id.* at 136.

A companion case to *Curtis Publishing Co.* was *Associated Press v. Walker*. Associated Press v. Walker, 388 U.S. 140 (1968). Walker had brought a defamation action based on a newspaper article which alleged that he had both encouraged rioting and taught rioters how to combat the effects of tear gas. *Id.* The Court stated that Butts was a public figure through the "status of his position alone," whereas Walker had gained that status through the "thrusting of his personality into the 'vortex' of an important public controversy." *Id.* at 155. *See also* Rebozo v. Washington Post Co., 637 F.2d 375 (5th Cir. 1981) (friend of President Nixon held to be a public figure). *But see* Avins v. White, 627 F.2d 637 (3d Cir. 1980), *cert. denied*, 449 U.S. 982 (1981) (dean of law school held not to be a public figure); Martin v. Municipal Publications, 510 F. Supp. 255 (E.D. Pa. 1981) (costumed marcher in New Year's Day parade held not to be a public figure); Hanish v. Westinghouse Broadcasting Co., 487 F. Supp. 397 (E.D. Pa. 1980) (member of charity fund-raising campaign held not to be a public figure).

50. 403 U.S. 29 (1971) (plurality opinion), *aff'g* 415 F.2d 892 (3d Cir. 1969).

51. *Id.* at 43-44 (plurality opinion). Justice Brennan wrote the plurality opinion, joined by Justice Blackmun and Chief Justice Burger. *Id.* at 30 (plurality opinion). Justice Douglas took no part in the decision. *Id.* at 57. Justice Black filed a concurring opinion, asserting that the press should be allotted an unconditional privilege to report on matters of public concern, and that the "actual malice" test did not provide adequate first amendment protection to the press. *Id.* at 57 (Black, J., concurring). Justice White also filed a concurring opinion, stating that the plurality's opinion went too far afield and that he would hold simply that "the First Amendment gives the press and the broadcast media a privilege to report and comment upon the official actions of public servants in full detail." *Id.* at 62 (White, J., concurring).

The public concern involved in *Rosenbloom* was described by Justice Brennan as follows:

> The community has a vital interest in the proper enforcement of its criminal laws, particularly in an area such as obscenity where a number of highly important values are potentially in conflict: the public has an interest both in seeing that the criminal law is adequately enforced and in assuring that the law is not used unconstitutionally to suppress free expression. Whether the person involved is a famous large-scale magazine distributor or a "private" businessman running a corner newsstand has no relevance in ascertaining whether the public has an interest in the issue.

Id. at 43 (plurality opinion).

52. Rosenbloom v. Metromedia, Inc., 415 F.2d 892, 893-94 (3d Cir. 1969). Plaintiff Rosenbloom was a distributor of nudist magazines in the Philadelphia area. *Id.* at 893. Police raided Rosenbloom's home and warehouse, confiscated his

eral court jury awarded the plaintiff damages.[53] On appeal, the Third Circuit, applying *New York Times*, reversed the verdict.[54] The Supreme Court affirmed the decision of the court of appeals, holding that the *New York Times* rule provided the proper standard since "the public focus was on the conduct of the participant and the content, effect, and significance of the conduct, not the participant's prior anonymity or notoriety."[55] After *Rosenbloom*, many lower courts adopted this "public interest" test, thereby eliminating the need to make the difficult determination of whether a plaintiff was or was not a public official or public figure.[56]

The Supreme Court subsequently rejected the *Rosenbloom* public interest test in *Gertz v. Robert Welch, Inc.*[57] Gertz, an attorney in private practice, brought a defamation action against the publisher of a story which had accused him of complicity in a Communist campaign to undermine law enforcement agencies.[58] The Court reasoned that the *Rosenbloom* rule did not

magazines, and arrested him. *Id.* A series of radio broadcasts followed, identifying Rosenbloom as a "smut merchant," a "distributor of obscene material" and a "girlie-book peddler." *Id.* at 893-94.

53. *Id.* at 893. Metromedia's primary argument before the Third Circuit was that the trial court should have applied the *New York Times* standard to the case. *Id.* at 894. Defendant further argued that if the rule were properly applied, there was insufficient evidence of actual malice to submit the case to the jury. *Id.*

54. *Id.* at 896. The Third Circuit stated that since the raid took place as a result of widespread public complaint about the dissemination of obscene literature, the matter was one of public interest. *Id.* at 895. The court noted the importance of broadcasting "hot" news, remarking that such news would be lost if broadcasters had to verify the accuracy of every story. *Id.* The court stated that the fact that Rosenbloom was not a public figure could not be "accorded decisive importance if the recognized important guarantees of the First Amendment are to be adequately implemented." *Id.* at 896.

55. 403 U.S. at 43 (plurality opinion). The plurality in *Rosenbloom* clearly placed the interest in the free dissemination of information above the interest of the individual in his reputation. *Id.* The plurality stated that "[i]f a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not 'voluntarily' choose to become involved. The public's primary interest is in the event." *Id.* For a discussion of similar policy considerations underlying the fair and accurate report privilege, see notes 22-24 and accompanying text *supra*.

56. *See* Banberger, *Public Figures and the Law of Libel: A Concept in Search of a Definition*, 33 BUS. LAW. 709, 711 (1977). In 1971, Pennsylvania adopted the *Rosenbloom* rule. *See* Matus v. Triangle Publications, Inc., 445 Pa. 384, 286 A.2d 357 (1971), *cert. denied*, 408 U.S. 930 (1972). In *Matus*, the Pennsylvania Supreme Court determined that a radio broadcast concerning the plaintiff's exorbitant price for plowing a driveway was not a matter of public concern and thus was not constitutionally insulated. *Id.* at 398-99, 286 A.2d at 365. The court instead applied the same negligence standard which applied to purely private defamation suits. *Id.* at 399, 286 A.2d at 365 (citing Purcell v. Westinghouse Broadcasting Co., 411 Pa. 167, 191 A.2d 662 (1963)).

57. 428 U.S. 323 (1974).

58. *Id.* at 325-26. The plaintiff in *Gertz* was an attorney who had represented the family of a murder victim in a civil suit against a police officer charged with the murder. *Id.* at 325. The article, which appeared in a monthly John Birch Society publication, stated that the civil suit against the police officer was part of a Communist plot. *Id.* at 325-26. The article further alleged not only that the plaintiff was the architect of a frame-up, but also that the plaintiff had a long criminal record. *Id.*

provide adequate protection for private individuals who had less access to the channels of communication than did public officials and therefore were less able to counteract false statements made against them.[59] The Court opined that since private individuals were more vulnerable to injury than public individuals, the government interest in protecting them was correspondingly greater.[60] *Gertz* went on to hold that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual" regardless of the public interest in the published matter.[61]

Although the Pennsylvania Supreme Court has adopted and applied the *Rosenbloom* public interest test,[62] it has not had the opportunity to reassess that rule in light of *Gertz*.[63] Therefore, it has been uncertain whether "pub-

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The trial court, applying *Rosenbloom*, found for the defendant on the grounds that the plaintiff had failed to prove malice. Gertz v. Robert Welch, Inc., 322 F. Supp. 997 (N.D. Ill. 1970), *aff'd*, 471 F.2d 801 (7th Cir. 1972), *rev'd*, 418 U.S. 323 (1974).

59. *Gertz*, 418 U.S. at 344. The Court in *Gertz* acknowledged that, while some "public figures" gain that status involuntarily, "[m]ore commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Id.* at 345. Because of this conclusion, the Court stated that the media "are entitled to act on the assumption that the public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehoods concerning them." *Id.*

60. *Id.* at 344. The Court stated that, unlike a public figure, a private individual

> has relinquished no part of his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood. Thus, private individuals are not only more vulnerable to injury than public officials and public figures, they are more deserving of recovery.

Id. at 345.

In order to further the interest in protecting the "good name" of private individuals, the Court asserted that states deserved "substantial latitude" in determining when a private individual was entitled to legal redress for the publication of defamatory matter concerning him. *Id.* at 345-46. The *Rosenbloom* rule "abridge[d] this legitimate state interest to a degree that [the Court found] unacceptable." *Id.* at 346.

61. *Id.* at 347. In his dissenting opinion, Justice White stated that the majority's prohibition of "liability without fault" would adversely affect the traditional law of defamation which allowed recovery upon a showing that a libel was defamatory on its face or that a slander was defamatory *per se*. *Id.* at 375 (White, J., dissenting). The requirement of fault, according to Justice White, would have the effect of preventing an injured plaintiff from recovering damages "regardless of the nature of the defamation and even though it is one of those particularly reprehensible statements that have traditionally made slanderous words actionable without proof of fault." *Id.* at 376 (White, J., dissenting).

62. *See* Matus v. Triangle Publications, Inc., 445 Pa. 384, 286 A.2d 357 (1971), *cert. denied*, 408 U.S. 930 (1972). For a brief discussion of *Matus*, see note 56 *supra*.

63. *See* Steaks Unlimited, Inc. v. Deaner, 623 F.2d 264, 272 (3d Cir. 1980). Although the Third Circuit noted the unsettled state of Pennsylvania law concerning "public interest" defamation suits, it did not have to predict how the Pennsylvania Supreme Court would resolve the question since it had concluded that the plaintiff in *Steaks Unlimited* was a public figure and therefore, the actual malice standard applied. *Id.* at 272. *See* Note, *Public Figure Rule Applies to Sellers Who Use Extensive Adver-*

lic interest" cases in Pennsylvania will require actual malice or merely negligence.[64] However, in 1978 in *Mathis v. Philadelphia Newspapers, Inc.*,[65] the United States District Court for the Eastern District of Pennsylvania emphatically held that if faced with this issue, the Pennsylvania Supreme Court would choose to abandon the actual malice standard in favor of a negligence standard.[66]

An analogous issue concerns whether a defamatory publication must identify the plaintiff in a defamation action as a public official for the *New York Times* actual malice standard to apply.[67] The courts which have decided the issue are split.[68] The Supreme Court has acknowledged this issue,[69] but has not expressly ruled on whether identification of a plaintiff as

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tising to Solicit the Public's Attention and Seek to Influence Consumer Choice, 26 VILL. L. REV. 914 (1980).

64. *See* Steaks Unlimited, Inc. v. Deaner, 623 F.2d 264, 272 (3d Cir. 1980); Note, *supra* note 63, at 920.

65. 455 F. Supp. 406 (E.D. Pa. 1978). In *Mathis*, the plaintiff was not only incorrectly identified in a photograph printed in a newspaper, but also was referred to as a suspect in a combined kidnap-bank robbery. *Id.* at 409. Plaintiff brought a defamation suit seeking compensatory and punitive damages. *Id.* The district court proceeded upon the assumption that the plaintiff was a "private individual" under Pennsylvania law. *See id.* at 410.

66. *Id.* at 412. In rejecting the defendant's argument that the Pennsylvania Supreme Court would choose to adhere to *Matus* and apply the actual malice test, the district court stated that the Pennsylvania Supreme Court showed "no enthusiasm at all for the *Rosenbloom* standard in *Matus*." *Id.* at 411-12. The court concluded that "the *Matus* decision is no longer good law, and that a 'private figure' defamation plaintiff may recover under Pennsylvania law upon a showing of negligence." *Id.* at 412 (footnote omitted).

In dictum, the district court in *Medico v. Time, Inc.*, stated that it endorsed the result and reasoning in *Mathis*. *See* Medico v. Time, Inc., 509 F. Supp. 268, 277 n.7 (E.D. Pa. 1980), *aff'd*, 643 F.2d 134 (3d Cir.), *cert. denied*, 454 U.S. 836 (1981). *Accord* Marcone v. Penthouse Int'l, Ltd., 533 F. Supp. 353, 360-61 (E.D. Pa. 1982). *But see* Lorentz v. Westinghouse Elec. Corp., 472 F. Supp. 946, 952-53 (W.D. Pa. 1979) (applying *Matus* to a private individual defamation action).

In addition, a majority of states to face this issue after *Gertz* have adopted the negligence approach. *See* Collins & Drushall, *The Reaction of the State Courts to* Gertz v. Robert Welch, Inc., 28 CASE W. RES. L. REV. 306, 313 n.51 (1978).

67. For a discussion of the development of the *New York Times* rule and its status after *Rosenbloom* and *Gertz*, see notes 62-66 and accompanying text *supra*.

68. *See* Ocala Star-Banner Co. v. Damron, 221 So. 2d 459, 460 (Fla. Dist. Ct. App. 1969), *rev'd on other grounds*, 401 U.S. 295 (1971) (actual malice not required where publication did not refer to plaintiff's official position and plaintiff's official conduct was not basis for defamatory publication); Foster v. Loredo Newspapers, Inc., 251 S.W.2d 809, 815-17 (Tex. 1976), *cert. denied*, 429 U.S. 1123 (1977) (summary judgment based on *New York Times* rule reversed since defamatory article did not refer to plaintiff as county surveyor and article did not relate to plaintiff's official conduct). *But see* Goodrick v. Gannett, 500 F. Supp. 125, 126 (D. Del. 1980) (*New York Times* rule applied although defamatory publication was unrelated to plaintiff's official conduct); Stone v. Essex County Newspapers, Inc., 367 Mass. 849, 863, 330 N.E.2d 161, 171 (1975) (failure to identify government employee as a public official in defamatory article held "not crucial").

69. Ocala Star-Banner Co. v. Damron, 401 U.S. 295 (1971). In *Ocala Star-Banner Co.*, an article was published by the defendant in which the plaintiff was falsely ac-

the holder of a public office is a prerequisite to application of the *New York Times* standard.[70]

Against this background, the Second Circuit in *Bufalino* began its analysis by considering the plaintiff's two-part burden of proof imposed under Pennsylvania defamation law.[71] The court concluded that since the allegation that Bufalino had "mob ties" could have a defamatory meaning,[72] Bufalino had satisfied his initial burden of proving the defamatory character of the communication.[73] The court then turned to the question of whether Pennsylvania law recognized the fair and accurate report privilege relied on by the lower court in granting summary judgment for AP.[74] Relying on

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cused of having been convicted of perjury. *Id.* at 296. The plaintiff at the time of publication was the mayor of Crystal River, Florida and a candidate for the office of tax assessor of Citrus County, Florida. *Id.* The article identified the plaintiff only as a "local garage owner." *Id.* at 269 n.1.

The state court in *Ocala Star-Banner Co.* ruled that the article was "libelous, per se" and therefore took the question of liability away from the jury. *Id.* at 300. The state court also ruled that since the article did not identify the plaintiff as a public official, the *New York Times* rule did not apply. *Id.* at 300 n.4. The Supreme Court reversed the state court ruling, and remanded the case to be tried under the *New York Times* rule. *Id.* Because the Court based its reversal on the state court's finding of libel *per se*, it did not expressly rule on the necessity of identifying the plaintiff as a public official. *Id.*

70. *See Rosenblatt*, 383 U.S. at 75. In *Rosenblatt* a defamatory article was published involving a former public official. *Id.* at 78. The article did not mention the name of the plaintiff or the position he had formerly held. *Id.* at 78-79. The Supreme Court held that the *New York Times* rule nonetheless applied. *Id. See also* Ocala Star-Banner Co. v. Damron, 401 U.S. 295 (1971). For a discussion of *Ocala Star-Banner Co.*, see note 72 *supra*.

71. 692 F.2d at 269. For a discussion of the requirements for a defamation action under Pennsylvania law, see notes 14-20 and accompanying text *supra*.

72. 692 F.2d at 269. The court noted that the Pennsylvania Supreme Court had adopted the defamation criteria set forth in the Restatement of Torts. *Id.* (citing Birl v. Philadelphia Elec. Co., 402 Pa. 297, 167 A.2d 472 (1969); RESTATEMENT OF TORTS § 559 (1938)). For the relevant provisions of this Restatement's definition of defamation, see text accompanying note 17 *supra*.

The Second Circuit concluded that the statement in the Carpenter article was not in and of itself defamatory. 692 F.2d at 269. However, the court went on to state that, when read in conjunction with Governor-elect Thornburgh's prompt return of some of the campaign funds, the statement that Bufalino was related to reputed mobster Russell Bufalino took on a defamatory character. *Id.*

73. *Id.* at 269. For a discussion of the roles of judge and jury under Pennsylvania defamation law, see note 20 and accompanying text *supra*.

The court noted this procedural rule, and concluded only that Bufalino had satisfied the first step of the burden of proof. 692 F.2d at 269. For a discussion of the plaintiff's burden of proof under Pennsylvania defamation law, see notes 18 & 19 and accompanying text *supra*.

74. 692 F.2d at 269. The Second Circuit observed that the district court had applied the fair and accurate report privilege set forth in the Second Restatement of Torts. 692 F.2d at 269 (citing RESTATEMENT (SECOND) OF TORTS § 611 at 297 (1977)). At the time *Bufalino* was before the lower court, the Pennsylvania courts had applied only the language of the original Restatement. 692 F.2d at 269 (citing RESTATEMENT OF TORTS § 611 (1938); Citing also Binder v. Triangle Publications, Inc., 442 Pa. 319, 275 A.2d 662 (1971); Purcell v. Westinghouse Broadcasting Co.,

federal cases that recognized such a privilege under Pennsylvania law,[75] the Second Circuit agreed with the district court that the Pennsylvania Supreme Court would adopt the privilege.[76] However, the Circuit Court reasoned that the lower court had erred in concluding that the facts of *Bufalino* warranted the application of such a privilege.[77] The court concluded that in order to invoke the fair and accurate report privilege, the publisher must have either actually relied on the official reports which support the publication, or relied upon an account of such reports by a reliable intermediary with actual knowledge of the contents of the official reports.[78] The court decided that since AP had refused to identify the sources of its official information under the Pennsylvania Shield Law,[79] it had not proved the requisite reliance necessary to gain the protection of the privilege.[80] In so concluding,

411 Pa. 167, 191 A.2d 662 (1963); Sciadra v. Lynett, 409 Pa. 595, 187 A.2d 586 (1963)).

75. 692 F.2d at 269 (citing Medico v. Time, Inc., 643 F.2d 134 (3d Cir.), *cert. denied*, 454 U.S. 836 (1981); Hanich v. Westinghouse Broadcasting Co., 487 F. Supp. 397 (E.D. Pa. 1980) (applying § 611 of Second Restatement without comment as to its applicability under Pennsylvania law); Mathis v.Philadelphia Newspapers, Inc., 455 F. Supp. 406 (E.D. Pa. 1978)). For a discussion of *Medico*, see notes 30-35 and accompanying text *supra*. For a discussion of *Mathis*, see notes 65 & 66 and accompanying text *supra*.

76. 692 F.2d at 269-70. The *Bufalino* court relied in part on the fact that the Pennsylvania Supreme Court had elected to follow other sections of the Second Restatement where Pennsylvania common law did not previously conform to its provisions. *Id.* at 269 (citing Gilbert v. Korvette, Inc., 475 Pa. 602, 611 n.25, 327 A.2d 94, 100 n.25 (1974)).

77. 692 F.2d at 270. The Second Circuit noted that the district court had expressly stated that actual reliance on public records was not a prerequisite to application of the fair and accurate report privilege. *Id.* The court of appeals further stated that the district court had relied on *Medico v. Time, Inc.*, 692 F.2d at 270-71 (citing Medico v. Time, Inc., 643 F.2d 134 (3d Cir. 1981), *cert. denied*, 454 U.S. 836 (1981)). According to the Second Circuit, the district court's interpretation of the privilege was that "an accurate summary of official reports is privileged even if . . . the accuracy of the summary is mere coincidence." *Id.*

78. *Id.* at 271. For a discussion of the official records upon which the district court concluded that AP had based its story, see note 12 *supra*.

79. For a discussion of the Pennsylvania Shield Law, see note 4 *supra*.

80. 692 F.2d at 270. The court noted that AP had claimed that it had actually relied on statements by members of the Pennsylvania Crime Commission indicating that Bufalino had mob ties. *Id.* at 271. *See* notes 4 & 5 and accompanying text *supra*. The court stated that since AP had invoked the Pennsylvania Shield Law, and refused to reveal the identities of the Crime Commission officials, it could not rely on this official information to invoke the fair and accurate report privilege. 692 F.2d at 271-72. For a discussion of AP's use of the Shield Law, and the provisions of that law, see note 4 *supra*. The court reasoned that the fair and accurate report privilege applied only to official statements and, without knowledge of the identities of the persons who made the statements, the court could not determine whether such statements were within the scope of such privilege. 692 F.2d at 272. The court stated that this holding would not undermine the policies behind the Shield Law since AP was not being compelled to release the identities of its source, and AP could still use the statements in its defense on the merits. *Id.* The court said that this holding amounted to nothing more than a rule that "a proponent cannot rely upon a privilege if he fails to prove all of its necessary elements." *Id.*

the court expressly rejected the Third Circuit's ruling in *Medico*[81] that actual reliance was unnecessary under Pennsylvania's fair and accurate report privilege.[82] The court reasoned that the *Medico* rule did not serve the policy consideration underlying the fair and accurate report privilege—encouraging the reporting of the content of public records.[83]

The court next looked at the district court's application of the *New York Times* actual malice standard.[84] The court explained that Bufalino had failed to challenge the district court's finding that AP had acted without actual malice.[85] Rather, Bufalino had argued that he was not a public official within the meaning of *New York Times*,[86] and therefore, the actual malice

81. For a discussion of *Medico*, see notes 30-35 and accompanying text *supra*. *But see* Factors Etc., Inc. v. Pro Arts, Inc., 652 F.2d 278 (2d Cir. 1981), *cert. denied*, 456 U.S. 927 (1982). In *Factors*, the Second Circuit clearly stated that it would adhere to the policy of the federal courts of appeals to defer to the decisions of other circuit courts of appeals with respect to the law of a state within that circuit, absent a "clear basis that the other circuit's conclusion was *incorrect*." *Id.* at 283 (emphasis added). In *Bufalino*, the court never explicitly identified such a "clear basis" when it rejected the Third Circuit's view of Pennsylvania law. *See* 692 F.2d at 271. For a detailed discussion of *Factors*, see Note, *When a United States Court of Appeals Has Predicted the Course of State Law on a Question of First Impression in a State Within that Circuit the Federal Courts of Other Circuits Should Defer to that Holding*, 27 VILL. L. REV. 393 (1981).

82. 692 F.2d at 270-71. The court stated that the Third Circuit in *Medico* had read *Binder* for more than it was worth. *Id.* at 271 (citing Medico v. Time, Inc., 643 F.2d 134, 136-37 (3d Cir.), *cert. denied*, 454 U.S. 836 (1981); *Binder*, 442 Pa. at 327, 275 A.2d at 58). The Second Circuit raised the factual distinction that, in *Binder*, the reporter had based his story on first-hand information of an eyewitness intermediary. *Id.* The Second Circuit thought it significant that the reporter "believed he was relying on official information." *Id.*

83. 692 F.2d at 271. The Second Circuit opined that under the ruling of *Medico*, defamatory statements which are wholly unsubstantiated when published would be privileged if the reporter could uncover some official record "embodying its statements." *Id.* (quoting Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975)). *Cox* involved an invasion of privacy suit arising from the broadcast of the name of a rape victim. Cox Broadcasting v. Cohn, 420 U.S. 469, 472-74 (1975). In reversing a judgment for the plaintiff, the Court expressed policy considerations favoring the free dissemination of information of public concern. *See id.* at 495. In *Bufalino*, the Second Circuit quoted the following language from the *Cox* decision: "Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media." 692 F.2d at 271 (quoting *Cox*, 420 U.S. at 495).

84. 692 F.2d at 272. For a discussion of *New York Times*, see notes 41-43 and accompanying text *supra*.

85. 692 F.2d at 272. As one of the grounds for its grant of AP's motion in summary judgment, the district court had concluded as a matter of law that, as Borough Solicitor of West Pittston, Bufalino was a public official. For a discussion of the district court's decision, see notes 11-13 and accompanying text *supra*.

86. 692 F.2d at 272. For a discussion of *New York Times*, see notes 41-43 and accompanying text *supra*. Bufalino had asserted that his position did not qualify him as a public official under *Gertz* and further, that the public official doctrine should not apply to him since the article did not involve his activities within that office. *Id.* The court noted that AP had countered Bufalino's arguments with the contention that the office of Borough Solicitor fell within the scope of *Rosenblatt*. The court stated that the article's allegedly defamatory statements "touched on" Bufalino's

standard should not be applied to him.[87] The court concluded, however, that it was unnecessary to reach the issue of whether Bufalino was a public official, because the article had not identified Bufalino as the holder of any public office.[88] Since there was no evidence of Bufalino's name being immediately recognized in the community as the holder of such office,[89] the court held that the public official doctrine and the actual malice standard were not applicable.[90] Rather, the Second Circuit concluded its analysis by stating that under Pennsylvania law, a negligence standard prevails in "private individual" defamation suits.[91]

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fitness for his office, thus bringing the case within the public official doctrine. *Id.* For a discussion of *Rosenblatt*, see note 70 *supra*.

87. 692 F.2d at 274. The court conducted an analysis of the status of Pennsylvania defamation law in light of the Supreme Court's holding in *Gertz*. *Id.* It noted that *Gertz* had held that the *New York Times* malice standard did not necessarily apply in private individual defamation cases. *Id.* For a discussion of *Gertz*, see notes 57-61 and accompanying text *supra*. AP argued that Pennsylvania retained the actual malice standard, while Bufalino argued that if confronted with the issue, the Pennsylvania courts would abandon the malice standard in favor of a negligence standard. 692 F.2d at 274. For a discussion of the unsettled state of the Pennsylvania law on this issue, see notes 67 & 68 and accompanying text *supra*.

88. 692 F.2d at 272-73. The court noted that "[s]ome cases have held that city, village, and municipal attorneys, even those retained part-time . . . are public officials." *Id.* at 273 n.5 (citations omitted). However, the court questioned the wisdom of those cases, contending that the extension of the actual malice standard to "minor town officials" could adversely affect the "continued willingness of such persons to devote their time and efforts to civic affairs." *Id.* at 273 n.5. The court indicated that the interest in preserving the willingness of qualified persons to assume minor municipal offices may outweigh the interest of public access to defamatory information concerning such persons. *See id.*

89. *Id.* at 273. The court stated that a reader of the defamatory article who did not have personal knowledge of Bufalino's position as Borough Solicitor "would most likely, and correctly, assume from the description that appellant is engaged in the private practice of law" and nothing more. *Id.*

The court recognized that in certain situations the public official doctrine would be applicable where the plaintiff was not identified in the publication as the holder of a public office. *See id.* As an example, the court observed that a defamatory statement about the President of the United States or a state governor would fall under the public official doctrine even if the plaintiff were mentioned by name only. *Id.* The court also recognized that the public official doctrine would apply in the case of a lesser public official if the defamatory statements were published in the area of the official's jurisdiction and that person's public status was in turn recognized by a significant portion of the local population. *Id.* at 273-74.

90. *Id.* at 273. The court noted that to extend the public official doctrine to low-level officials not identified as public officials in the defamatory publication would be violative of the public policy underlying the doctrine. *Id.* (citation omitted). According to the court, the policy consideration that the public official doctrine would foster public debate would not be served since "those who read or heard the statements are never informed of the statements' relation to matters of public concern." *Id.* The court reasoned that the adverse affect on the reputation of such minor individuals outweighed any public interest supporting a requirement of proof of actual malice. *Id.*

91. *Id.* at 274. For a discussion of the Second Circuit's analysis of the issue of Pennsylvania law in "private individual" defamation cases, see note 73 *supra*.

The court apparently decided the question concerning Pennsylvania's private

Reviewing the opinion of the court, it is submitted that the Second Circuit was correct in refusing to apply the fair and accurate report privilege to the publication complained of in *Bufalino*.[92] By refusing to reveal the identity of the sources of its allegedly official information under the Pennsylvania Shield Law,[93] it is suggested that AP made it impossible for the court to determine whether that information was in fact official or whether AP's sources actually relied on official records.[94] In this respect it is also submitted that the *Bufalino* court was correct in stating that the Third Circuit in *Medico* had read Pennsylvania's fair and accurate report privilege as espoused in *Binder* "for much more that it's worth."[95] The Supreme Court of Pennsylvania did not contemplate extending the privilege to unsubstantiated stories which are coincidentally supported by official records.[96] Rather, it is submitted that the *Binder* court intended only to extend the privilege to publications based upon reliable accounts provided by one with first-hand knowledge of official records and proceedings.[97] Therefore, because of AP's invocation of the Shield Law, the Second Circuit could not, consistent with Pennsylvania law, extend the privilege to AP's publication.[98]

However, it is submitted that the court ignored one of the basic policy considerations underlying the *New York Times* rule.[99] In *Gertz v. Robert Welch, Inc.*, the Supreme Court identified the opportunity for "self-help" by rebut-

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individual defamation law to avoid the need to argue and litigate the issue on remand. *See* 692 F.2d at 274. The court was also responding to AP's request that the court find that Pennsylvania law required a showing of actual malice. *See id.* For a discussion of the status of Pennsylvania law concerning the plaintiff's burden of proof in "private individual" defamation cases, see note 87 and accompanying text *supra*.

92. *See* 692 F.2d at 271-72. For a discussion of this aspect of the court's holding, see notes 77-80 and accompanying text *supra*.

93. For the provisions of the Pennsylvania Shield Law, see note 4 *supra*. For a discussion of the AP reporter's communications with Pennsylvania Crime Commission personnel, see notes 4 & 5 and accompanying text *supra*.

94. For a discussion of the circuit court's treatment of the reliance issue in *Bufalino*, see notes 78-83 and accompanying text *supra*.

It is suggested that in order to reconcile the inherent conflict in cases where both a shield law and the fair and accurate report privilege are invoked, courts might utilize *in camera* review of the sources of the allegedly official information. It is suggested that this would enable courts to rule on the propriety of the fair and accurate report privilege without causing reporters to choose between revealing their sources publicly and being protected by the privilege.

95. *See* 692 F.2d at 271. It is suggested that the district court in *Bufalino* erred in relying on *Medico*. Further, it was incorrect in holding that the fair and accurate report privilege attached if the publication was a coincidental, accurate summary of official records or proceedings. For a discussion of the circuit court's rejection of *Medico*, see notes 81-83 and accompanying text *supra*.

96. For a discussion of *Binder*, see notes 76-79 and accompanying text *supra*.

97. For a discussion of the facts of *Binder*, see notes 26-28 and accompanying text *supra*.

98. For a discussion of the Second Circuit's treatment of the Shield Law issue in *Bufalino*, see notes 79 & 80 and accompanying text *supra*.

99. For a discussion of *New York Times*, see notes 41-43 and accompanying text *supra*.

tal, which public officials enjoy through their ready access to the media, as one of the primary rationales behind the *New York Times* rule.[100] It is submitted that the Second Circuit failed to consider the fact that a failure to identify a plaintiff as a public official does not affect that person's access to the media; therefore, the rationale behind the limitation on a public official's right to compensation for injury to his reputation remains intact.[101]

In qualifying its requirement that a public official be identified as such in a defamatory publication by not including those officials whose names are "immediately recognized in the community as that of a public official,"[102] it is submitted that the Second Circuit's holding will necessitate the type of *ad hoc* determinations which the Supreme Court expressly sought to avoid in *Gertz*.[103] The court's holding will, in certain cases, require trial courts to determine the degree to which the name of a public official is immediately recognized in the community in which the story is published in a case-by-case basis.[104]

It is additionally submitted that the decisions of the Supreme Court strongly indicate a rule of law contrary to that espoused by the Second Circuit in *Bufalino*. In at least two cases in which the Court has held that the *New York Times* rule was applicable, the publication complained of did not identify the plaintiff as a public official, yet the Court made no reference to the plaintiff's name being immediately recognized in the community.[105] Therefore, the Second Circuit failed to adequately consider the factual background of these Supreme Court cases.[106]

Finally, it is suggested that the court's requirement that a defamatory

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100. *See Gertz*, 418 U.S. at 344. For a discussion of *Gertz*, see notes 57-61 and accompanying text *supra*.

101. *See* 692 F.2d at 272-73. In discussing *Gertz*, the Second Circuit made no mention of the opportunity for rebuttal provided public officials, which the Supreme Court stressed in *Gertz* as a justification for the *New York Times* rule. *See id.*

102. *See id.* at 273. For a discussion of this aspect of the Second Circuit's opinion, see notes 89-91 and accompanying text *supra*.

103. *See Gertz*, 418 U.S. at 346. In *Gertz*, the Supreme Court stated that, in overruling the *Rosenbloom* "public interest" rule, it was eliminating the need for trial judges "to decide on an *ad hoc* basis which publications address issues of 'general or public interest' and which do not. . . ." 418 U.S. at 346 (quoting *Rosenbloom*, 403 U.S. at 79). For a discussion of *Rosenbloom*, see notes 50-55 and accompanying text *supra*.

104. *See* 692 F.2d at 273. It is submitted that basing the constitutional protection of the *New York Times* rule on such an *ad hoc* determination ignores the concerns clearly expressed by the Supreme Court in *Gertz*. It is further submitted that the Supreme Court did not intend that constitutional protections based on the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open" be removed on the basis of editing decisions or oversight by the publisher. *See New York Times*, 376 U.S. at 253.

105. *See Rosenblatt*, 383 U.S. at 78-79; Ocala Star-Banner Co. v. Damron, 401 U.S. 295, 296 n.1 (1971). For a discussion of *Rosenblatt*, see note 70 *supra*. For a discussion of *Ocala Star-Banner Co.*, see note 69 *supra*.

106. For a discussion of the factual background of these cases, see notes 41-61 and accompanying text *supra*.

publication identify the plaintiff as a public official in order to invoke application of the *New York Times* rule constitutes an arbitrary infringement on a constitutional protection which is based upon "the central meaning of the First Amendment."[107]

In conclusion, it is suggested that the impact of the court's holding will be a chilling effect on the publication of information received from confidential sources.[108] The Second Circuit's decision will require publishers to choose between protecting the confidentiality of their sources or invoking the fair and accurate report privilege. Until a means of reconciling these conflicts inherent in situations such as that presented in *Bufalino* is formulated by the courts, such a choice will have to be made by publishers. The result will either be that the protection of the fair and accurate report privilege will be sacrificed, or the willingness of would-be informants to supply publishers with information concerning official records or proceedings will be lost.[109] Further, the court's requirement under *New York Times* that the plaintiff be identified in the defamatory publication as a public official could have a negative effect on criticism of public officials; that is, publishers may fear that *Bufalino* represents a retreat from the broad protection of *New York Times* and its progeny.[110] At a minimum, *Bufalino* will have the effect of promoting forum shopping by parties to defamation cases involving public officials.[111] It is hoped that the Supreme Court will soon reconsider the Second Circuit's limitation of the *New York Times* rule and relegate *Bufalino* to its place in first amendment law as an anomolous infringement of important constitutional protections.[112]

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107. *See New York Times*, 376 U.S. at 273. It is submitted that application of the first amendment was not intended to depend upon the editorial practices of an editor of a periodical. Under the Second Circuit's decision in *Bufalino*, the first amendment may provide less protection solely on the basis of an editor's striking from a manuscript a reference to a public office held by the person who is the subject of an article.

108. Since a reporter being sued for defamation in a situation such as that in *Bufalino* would be faced with a choice of either divulging the confidential sources of information or losing the protection of the *New York Times* rule, the reporter may choose to abstain from printing the story to avoid such a choice.

109. For a discussion of a suggested means of reconciling this conflict, see note 94 *supra*.

110. For a discussion of this aspect of the court's opinion in *Bufalino*, see notes 86-90 and accompanying text *supra*.

111. For a discussion of the Supreme Court's statements on the scope of the public official rule, see notes 48-61 and accompanying text *supra*.

112. For a discussion of the suggested faults in the Second Circuit's utilization of the *New York Times* rule in *Bufalino* see notes 99-112 and accompanying text *supra*.