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Uncertainty for Publishers: Liability for Defamation under New York Law - Weiner v. Doubleday & (and) Company

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UNCERTAINTY FOR PUBLISHERS: LIABILITY FOR DEFAMATION UNDER NEW YORK LAW — WEINER v. DOUBLEDAY & COMPANY

I. INTRODUCTION

No matter how many precautions a publisher takes prior to releasing a non-fiction book, there is always the possibility that someone mentioned in the book will take offense at the reference and sue for defamation. Being subject to such a suit is simply a chance publishers must take. One might assume, however, that the judicial system provides some sort of checklist for publishers which, if followed, will at least come close to guaranteeing victory in the event that a defamation suit is brought. Unfortunately, no foolproof guidelines appear to have been provided by state courts in this country. The result is that publishers must continue to take their chances whenever they release a new book. They can never be completely certain that the preventative measures they follow will be sufficient to protect them.

In *Weiner v. Doubleday & Company,*[1] (*"Weiner"*) the New York Supreme Court, Appellate Division ruled in favor of the publisher, Doubleday, in a defamation action brought by a private individual.[2] While the case provides interesting insight into the issues surrounding allegedly defamatory statements in a non-fiction book, the court did little to create clear guidelines for other publishers hoping to learn from the decision.

This casenote summarizes current New York law in the area of defamation and applies it to the facts of *Weiner.* The note concludes that while the Appellate Division's holding was correct under state law, there is a need for New York courts to clearly define steps which publishers can take to protect themselves from defamation actions. Of course, it is not possible for courts to absolutely guarantee that any given conduct will work in all cases. It does seem, however, that courts could provide concrete, objective examples of factors which would be more likely than not to swing the scales in a publisher's favor.

1. 142 A.D.2d 100, 535 N.Y.S.2d 597 (1988). This casenote will refer the reader only to cites in the New York Supplement 2d case reporter.

2. *Id.* 535 N.Y.S.2d at 604.

II. STATEMENT OF FACTS

The highly publicized 1978 murder of multimillionaire Franklin Bradshaw is chronicled by Shana Alexander in her 1985 book, *"Nutcracker: Money, Madness, Murder: A Family Album."*[3] The book explores in detail the personality and emotional problems of Bradshaw's daughter, Frances Schreuder, who was convicted for ordering her son to commit the murder.[4] Much of the material obtained for the book came by way of personal interviews with family members and friends of Schreuder.[5]

Amid the four hundred and forty-four pages which examine the events that ultimately led to the murder, two paragraphs mention one of Schreuder's psychiatrists, Dr. Herman Weiner, the plaintiff in this case.[6] Weiner has been intensely disliked by members of the Bradshaw family since the mid-1960s, when, during a divorce-related custody battle, Weiner testified as Schreuder's witness that he felt she was a fit mother.[7] Several members of the Bradshaw family, on the other hand, were convinced that she was not in fact a fit mother.[8] The Bradshaw family felt much animosity toward Weiner because of his testimony, and these same family members were the source of much of Alexander's material for her book.[9] References to Weiner in the two paragraphs include Bradshaw's widow characterizing him as "Weenie, the big, fat, ugly Jew."[10] In addition, another family member recalls him testifying in the divorce proceedings while "eccentrically costumed in bright red slacks and a loud plaid jacket."[11] Finally, family members allude to the possibility that Weiner not only overcharged Schreuder for his services but also may have slept with her.[12]

A. Findings of the New York Courts

As a result of the statements about Weiner in the book, Weiner sued both the author, Alexander, and her publisher, Doubleday, for libel.[13]

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3. S. ALEXANDER, NUTCRACKER: MONEY, MADNESS, MURDER: A FAMILY ALBUM (1985).
4. *Weiner*, 535 N.Y.S.2d at 598.
5. *Id.* at 599.
6. *Id.*
7. *Id.* at 598-99.
8. *Id.* at 598.
9. *Weiner*, 535 N.Y.S.2d at 598-99.
10. *Id.* at 599.
11. *Id.*
12. *Id.*
13. *Id.*

The Supreme Court, New York County, granted Weiner's motion for summary judgment, but the Supreme Court, Appellate Division unanimously reversed, and instead granted the defendants' summary judgment motion.[14]

The Appellate Division noted the extensive experience of both Alexander and the researcher who helped her with the book,[15] as well as the careful reviewing of the entire process by Doubleday.[16] The Appellate Division then held that all of the statements were opinions, which do not constitute libel and are protected by the first amendment.[17] Moreover, the court found that the opinions were sufficiently substantiated for publication.[18]

While evidently unnecessary based on the court's reasoning, the New York test for liability was also applied to determine whether Doubleday "acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties."[19] The Appellate Division found that based on all the facts of the case, Doubleday had no reason to question the accuracy of Alexander's material about Weiner.[20] In particular, the suggestion that Frances Schreuder may have slept with her psychiatrist was based on adequate research, and Doubleday requested substantiation for much of Alexander's material.[21] Moreover, throughout the book there are warnings and disclaimers to the effect that the perceptions of interviewees should not be considered entirely factual.[22] Weiner's claim was dismissed, and his motion for leave to appeal was granted by the New York Court of Appeals, which ultimately affirmed the Appellate Division decision.[23]

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14. *Weiner*, 535 N.Y.S.2d at 604.

15. *Id.* at 599.

16. *Id.* at 601.

17. *Id.* at 602.

18. *Id.*

19. *Weiner*, 535 N.Y.S.2d at 601, *quoting* Chapadeau v. Utica Observer-Dispatch, Inc., 38 N.Y.2d 196, 199, 341 N.E.2d 569, 571, 379 N.Y.S.2d 61, 64 (1975). The test seems unnecessary because since the court found all statements at issue to be protected opinion, an analysis of Doubleday's conduct was technically irrelevant. *See infra* notes 32-33 and 53 and accompanying text.

20. *Weiner*, 535 N.Y.S.2d at 601.

21. *Id.* at 601-02.

22. *Id.* at 602.

23. Weiner v. Doubleday & Co., 74 N.Y.2d 607, 543 N.E.2d 85, 544 N.Y.S.2d 820 (1989). The Court of Appeals is the highest state court in New York. It affirmed the Appellate Division holding based solely on the finding that Doubleday had not acted in a grossly irresponsible manner. No. 257, slip. op. at 4 (N.Y. Dec. 14, 1989).

III. DEFAMATION LAW IN THE UNITED STATES

In order to understand the legal principles at issue between plaintiff Weiner and defendant Doubleday, an overview of defamation law in the context of publisher liability may be helpful. Defamation is generally defined as "an invasion of the interest in reputation and good name,"[24] with reputation involving the way others in the community view the plaintiff.[25] Consequently, in order to be defamatory, the statement at issue must be communicated to some third person.[26] If the statement is one of personal opinion rather than fact, it cannot be defamatory.[27] Even if a statement is defamatory fact, however, a publisher may still escape liability if its conduct is not culpable.[28] The defendant's conduct in publishing a defamatory statement is measured against various court-developed tests, in order to determine whether or not liability should be imposed.[29] It is difficult to predict what the outcome will be of the tests used by courts to determine both when statements are defamatory and when defendants are liable. This unpredictability leaves publishers in the position of not knowing in advance if their preventative steps will protect them later in the event that a defamation suit is initiated against them.

A. Opinion vs. Fact

Defamation involves a false statement of *fact,* as opposed to an *opinion.*[30] The United States Supreme Court has ruled on this issue, reasoning that "there is no such thing as a false idea."[31] Therefore, in contrast to factual statements, "[e]xpression of . . . an opinion, even in the most

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24. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 111, at 771 (5th ed. 1984) [hereinafter PROSSER AND KEETON].

25. *Id.*

26. *Id.* Note that although Shana Alexander was the author of the book, *Nutcracker,* her publisher, Doubleday, was also potentially liable for defamation. This does not mean, however, that Doubleday was vicariously liable for any tortious conduct on the part of Alexander. Like authors, publishers are simply liable, upon proof of fault of an authorized agent, for acting culpably under the applicable rules of defamation law. *See* PROSSER AND KEETON, *supra* note 24, § 113, at 810. *See also* Cianci v. New Times Publishing Co., 639 F.2d 54, 60 (2d Cir. 1980) (A publisher is liable for publishing its writer's defamatory statements and also for *republishing* defamatory statements made by others).

27. Old Dominion Branch No. 496, National Assoc. of Letter Carriers, AFL-CIO v. Austin, 418 U.S. 264, 284 (1973).

28. Karaduman v. Newsday Inc., 51 N.Y.2d 531, 539, 416 N.E.2d 557, 560, 435 N.Y.S.2d 556, 559 (1980).

29. *See infra* notes 53-89 and accompanying text.

30. Hotchner v. Castillo-Puche, 551 F.2d 910, 913 (2d Cir. 1977). The term "false" has been defined as "substantially inaccurate." *See, e.g.,* Bindrim v. Mitchell, 92 Cal. App. 3d 61, 77, 155 Cal. Rptr. 29 (1979).

31. Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974).

pejorative terms, is protected . . . ."[32] One commentator has suggested that this means the privilege of publishing pure opinion is absolute.[33] In other words, a publisher remains free from liability when it publishes pure opinion, even if the statement might otherwise be defamatory. Since pure opinion is a protected form of speech, the distinction is crucial from a publisher's viewpoint. "[W]hen a statement is quite unmistakably opinion rather than fact, the reward will be not only an exemption for liability for libel but, often, some writing that is caustic, colorful and perhaps downright provocative."[34]

1. Opinion vs. Fact: The Law in New York

The Court of Appeals for the Second Circuit provides guidelines in an attempt to clarify the distinction between statements of fact and opinion.[35] The Second Circuit test for determining whether a statement is protected opinion or unprotected fact has several parts. First, "both the context in which the statements are made and the circumstances surrounding the statements"[36] should be considered. In other words, the overall context of language used in a book can indicate whether an average reader would interpret it as fact or opinion. The court should therefore focus on the "impression" with which the reader is left, based on the work's "style, organization, and tone . . . ."[37]

Second, the court should "look at the language itself to determine if it is used in a precise, literal manner or in a loose, figurative or hyperbolic sense."[38] The United States Supreme Court provides an example of this literal-figurative distinction. In *Greenbelt Cooperative Publishing Assn., Inc. v. Bresler,*[39] the plaintiff's position during a heated debate with public officials was characterized as "blackmail."[40] Defendant newspaper published reports of the debate as well as the characterization. The Court found that no "ordinary reader" would have interpreted the statement to mean that the plaintiff was being charged with the commission of

32. *Old Dominion,* 418 U.S. at 284.

33. B. SANFORD, LIBEL AND PRIVACY: THE PREVENTION AND DEFENSE OF LITIGATION 114 (1987) [hereinafter B. SANFORD, LIBEL AND PRIVACY]. "The implication is that even a showing of malice . . . cannot defeat the privilege that pure opinion enjoys."

34. *Id.* at 107.

35. New York is in the Second Circuit.

36. Mr. Chow of New York v. Ste. Jour Azur S.A., 759 F.2d 219, 226 (2d Cir. 1985).

37. Janklow v. Newsweek, Inc., 759 F.2d 644, 651 (8th Cir. 1985), *cert. denied,* 479 U.S. 883 (1986).

38. *Mr. Chow,* 759 F.2d at 226.

39. 398 U.S. 6 (1970).

40. *Greenbelt Cooperative,* 398 U.S. at 7.

a crime.[41] On the contrary, the term as used was considered to be merely "a vigorous epithet used by those who considered [plaintiff's] negotiating position extremely unreasonable."[42] Because the term "blackmail" was used loosely or figuratively, it was treated by the Court as a statement of opinion rather than one of fact.[43]

The third prong in the Second Circuit test requires the court to determine if the statements are "objectively capable of being proved true or false."[44] Whether or not a statement can be proved true or false in effect determines its status as an opinion, because "[a]n assertion that cannot be proved false cannot be held libelous."[45] Therefore, if a statement is not capable of being proven true or false, it is likely to be seen as an opinion rather than a fact.

If the statement appears to be one of opinion, the Second Circuit requires one last step: The court must determine if the statement "implies the allegation of undisclosed defamatory facts as the basis for the opinion."[46] An opinion with some basis in disclosed fact will generally be protected.[47] "When [the facts] are true, and when they are stated, the first amendment shields from liability an opinion that arises from them."[48] Moreover, an opinion which does not carry with it a specific factual basis is still protected "if it does not imply that it is based on undisclosed facts."[49] The result will be different, however, if the opinion is couched in terms which lead the reader to believe that it is somehow factual. Thus, "[l]iability for libel may attach . . . when a negative characterization of a person is coupled with a clear but false implication that the author is privy to facts about the person that are unknown to the general reader."[50]

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41. *Id.* at 14.

42. *Id.*

43. *Id.* at 13.

44. *Mr. Chow,* 759 F.2d at 226.

45. *Hotchner,* 551 F.2d at 913.

46. *Mr. Chow,* 759 F.2d at 226. The Second Circuit test originated with the Court of Appeals for the District of Columbia Circuit. *See* Ollman v. Evans, 750 F.2d 970, 983 (D.C. Cir. 1984).

47. Parks v. Steinbrenner, 131 A.D.2d 60, 520 N.Y.S.2d 374, 375 (1987).

48. Lewis v. Time Inc., 710 F.2d 549, 556 (9th Cir. 1983).

49. Steinhilber v. Alphonse, 68 N.Y.2d 283, 289, 501 N.E.2d 550, 552, 508 N.Y.S.2d 901, 903 (1986). In *Steinhilber,* the Court of Appeals of New York found defendant's comments that plaintiff "looks like a million, every year of it," and, "She lacks only three things to get ahead, talent, ambition, and initiative," were not intended, based on the overall context, to be understood as opinions based on undisclosed facts. *Id.* at 293, 501 N.E.2d at 555, 508 N.Y.S.2d at 906.

50. *Hotchner,* 551 F.2d at 913. *See also* Steinhilber v. Alphonse, *supra* note 49, where the New York Court of Appeals referred to opinions based on undisclosed fact as actionable

It is difficult for a publisher to be certain of the status of given language because the distinction between fact and opinion is often far from clear. The matter is a question of law for the court to decide,[51] and generally the viewpoint of an "ordinary reader" must be taken in order to determine if a statement should be viewed as one of fact or one of opinion.[52] While courts are supposed to apply an objective, "ordinary reader" test, outcomes will not necessarily be consistent due to the subjective elements involved in that test. For example, courts may interpret the perceptions of an "ordinary reader" differently, or have different notions of the import of the language itself. The subjective elements of defamation law make it unlikely for a publisher to be absolutely certain in advance when a defamation claim might arise and how it might be resolved.

B. The Various Tests Applied for Determining Liability

Assuming a statement at issue is not pure opinion and thus is unprotected, a court must determine if a defendant publisher nevertheless is not liable because its conduct was not culpable.[53] The test applied to a publisher's conduct will vary from case to case because the law of defamation has evolved into three distinct categories which are identified both by the status of the plaintiff and by the subject matter of the language at issue.[54]

Plaintiffs who are public figures or officials must show that the defendant printed a knowing or reckless falsehood, the requisite state of mind being termed "actual malice" by the United States Supreme Court.[55] A private plaintiff suing over language containing public concern content[56] must show some degree of fault, but this showing need not

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"mixed opinions." 68 N.Y.2d at 289, 501 N.E.2d at 553, 508 N.Y.S.2d at 904. "The actionable element of a 'mixed opinion' is not the false opinion itself — it is the implication that the speaker knows certain facts, unknown to his audience, which support his opinion and are detrimental to the person about whom he is speaking." *Id.* at 290, 501 N.E.2d at 553, 508 N.Y.S.2d at 904.

51. *Mr. Chow,* 759 F.2d at 224.

52. *Id. citing* Buckley v. Littell, 539 F.2d 882, 894 (2d Cir. 1976).

53. *Karaduman,* 51 N.Y.2d at 539, 416 N.E.2d at 560, 435 N.Y.S.2d at 559.

54. PROSSER AND KEETON, *supra* note 24, § 111 (Supp. at 108-09).

55. New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964). The Court has defined a public plaintiff as one who has "achieved . . . general fame or notoriety in the community." *Gertz,* 418 U.S. at 351-52.

56. The United States Supreme Court has defined speech of a public concern as "speech that matters," such as speech concerning "the legitimacy of the political process." Philadelphia Newspapers, Inc., v. Hepps, 475 U.S. 767, 778 (1986). However, the term is not limited to political expression or comment upon public affairs. *See, e.g.,* Time, Inc. v. Hill, 385 U.S. 374, 388 (1967), where the Court noted that no distinction should be made between informa-

necessarily rise to the level of actual malice. Instead, when the plaintiff is a private individual, each state may determine the requisite showing of fault for itself.[57] Moreover, in these cases a court will not follow common law by presuming damage to reputation; the plaintiff must plead special damages.[58] Finally, the common law prevails when a private plaintiff sues over language which contains no public concern content; the plaintiff may recover damages even without a showing of actual loss, and damage to reputation may be presumed.[59]

1. Public Figure Plaintiffs

The test for cases involving public figure plaintiffs was set out in 1964 by the United States Supreme Court in *New York Times Co. v. Sullivan*[60] (*"New York Times"*). The Court held there that public plaintiffs must prove "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."[61] The Court has distinguished the term "malice" used in its constitutional sense in *New York Times* from the common law meaning of the term.[62] Common law "hatred" or "personal spite" toward the plaintiff is insufficient to show actual malice in the context of a defamation suit.[63] Actual malice is thus a term of art; in order to be liable, the defendant must have published a knowing or reckless falsehood.[64] More specifically, "[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of [the] publication. Publishing with such doubts shows reck-

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tion and entertainment when a matter of public interest is involved. In New York, editors are deemed to have discretion to determine for themselves what comprises legitimate public interest and concern. *See, e.g.*, Gaeta v. New York News Inc., 62 N.Y.2d 340, 465 N.E.2d 802, 477 N.Y.S.2d 82 (1984). "While not conclusive, '. . . editorial determination of what is newsworthy, may be powerful evidence of the hold those subjects have on the public's attention.' " *Id.*, 62 N.Y.2d at 349, 465 N.E.2d at 805, 477 N.Y.S.2d at 85, *quoting* Cottom v. Meredith Corp., 65 A.D.2d 165, 170, 411 N.Y.S.2d 53, 57 (1978) (public content concerns any matters that are "newsworthy," and not directed only at a limited audience, such as the topics of bus safety, quality of restaurant food, and the arrest of a private citizen).

57. *Gertz*, 418 U.S. at 347.

58. PROSSER AND KEETON, *supra* note 24, § 111 (Supp. at 108-09). Special, or actual, damages include, e.g., proof of injury to reputation. *See* Dalbec v. Gentleman's Companion, Inc., 828 F.2d 921, 927 (2d Cir. 1987).

59. *Id.*

60. 376 U.S. 254 (1964). While *New York Times* dealt specifically with public *officials*, its holding was later extended to all public figures in Curtis Publishing Co. v. Butts, 388 U.S. 130, 164 (1967).

61. 376 U.S. at 279-80.

62. *Old Dominion*, 418 U.S. at 281.

63. *Id.*

64. Greenbelt Cooperative Publishing Association v. Bresler, 398 U.S. 6, 10 (1970).

less disregard for the truth or falsity and demonstrates actual malice."[65] As an example, actual malice would be found if an author, who is in a position to have specific knowledge of true facts, portrays those facts differently.[66]

The Supreme Court has acknowledged that the actual malice test is a difficult hurdle for public plaintiffs: It is "an extremely powerful antidote to the inducement to media self-censorship . . . . [a]nd it exacts a correspondingly high price from the victims of defamatory falsehood. Plainly many deserving plaintiffs, including some intentionally subjected to injury, will be unable to surmount the barrier of the *New York Times* test."[67] This tougher standard for public figure plaintiffs is based in part on the assumption that they "must accept certain necessary consequences of . . . involvement in public affairs."[68] Moreover, public figures are usually in their positions voluntarily and thus "thrust themselves" into the public eye.[69] They "invite attention and comment," and "the communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them."[70]

2. Private Plaintiffs - Public Content

Herman Weiner was not required to surmount the barrier of the actual malice test because of the United States Supreme Court decision in *Gertz v. Robert Welch, Inc.*[71] (*"Gertz"*). In *Gertz,* the Court held that the

65. St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

66. *See, e.g.,* DiLorenzo v. New York News, Inc., 78 A.D.2d 669, 432 N.Y.S.2d 483 (1981) (evidence of a reporter's prior knowledge of facts permits a jury to find that the reporter was less than candid when he claimed the facts weren't "clear in my mind" at the time the article was written). *See also* Bindrim v. Mitchell, 92 Cal. App. 3d 61, 72-73, 155 Cal. Rptr. 29 (1979), where the court interpreted the *New York Times* actual malice test as requiring a case by case consideration of "defendant's attitude toward the truth or falsity of the material published." In *Bindrim,* defendant author was permitted to attend plaintiff's nude marathon group therapy sessions only after agreeing in writing not to disclose what happened in the sessions. Defendant later published a book containing a description of sessions similar to those of plaintiff's. Plaintiff was depicted as using obscene and unprofessional language which he did not actually use. Held: Defendant acted with actual malice. Since defendant was in a position to know the truth or falsity of her material, her publication was in reckless disregard of the truth or with actual knowledge of falsity. *Id.* at 73.

67. *Gertz,* 418 U.S. at 342.

68. *Id.* at 344.

69. *Id.* at 345.

70. *Id.*

71. 418 U.S. 323. *Gertz* put to rest state court interpretation of Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 44 (1971), in which the plurality proposed that the *New York Times* actual malice test be extended to private individuals who claim that they have been defamed.

actual malice test does not automatically apply when the plaintiff is a private individual.[72] Instead, "the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."[73] The *Gertz* court specifically permitted states to set up a less stringent standard for private defamation plaintiffs than that required by *New York Times.*[74]

The Court's rationale for *Gertz* was based on the substantive differences between the public and private plaintiff[75] as well as on the differing state interest in each instance.[76] Writing for the Court, Justice Powell stated,

> [p]ublic officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.[77]

The *Gertz* decision also took into account the fact that state interests vary, depending upon who the plaintiff is. As opposed to "the limited state interest present in the context of libel actions brought by public persons . . . the state interest in compensating injury to the reputation of private individuals requires that a different rule" should apply.[78]

The states are not, however, without ground rules under *Gertz.* The common law rule allowing recovery of presumed or punitive damages may not be applied unless liability is based on a showing of actual malice.[79] In short, states may not impose liability without fault.[80] Thus, when a plaintiff seeking compensatory damages is a private individual, and something less than actual malice is shown, the plaintiff must plead actual damages.[81] Furthermore, if punitive damages are sought, actual

72. 418 U.S. at 347. Because Herman Weiner was found by the *Weiner* court to be a private individual, the *Gertz* test was applied. *Weiner,* 535 N.Y.S.2d at 601.

73. *Gertz,* 418 U.S. at 347.

74. *Id.* at 348.

75. *Id.* at 344.

76. *Id.* at 343.

77. *Id.* at 344.

78. *Gertz,* 418 U.S. at 343.

79. *Id.* at 349. The Court limited the common law doctrine in order to "reconcile state law with a competing interest grounded in the constitutional command of the First Amendment." *Id.*

80. *Id.* at 347.

81. *Id.* at 349. The requirement of actual or "special" damages compels the plaintiff to "do more than allege that injury suffered was the natural result of the alleged libel." Special damages must be explicitly shown. Spelson v. C.B.S., Inc., 581 F. Supp. 1195, 1201 (N.D. Ill. 1984).

malice *must* be shown even by a private plaintiff.[82]

In a more recent Supreme Court decision, the Court placed an additional burden on private plaintiffs.[83] In addition to the fault requirement imposed by *Gertz,* where the statements at issue are "of public concern, a private-figure plaintiff cannot recover damages without also showing that the statements at issue are false."[84] Noting that the burden of proof of falsity could be placed on either the plaintiff's or defendant's side, the Court explained that "where the scales are in such an uncertain balance . . . the Constitution requires us to tip them in favor of protecting true speech."[85]

3. Private Plaintiffs - Private Content

In 1985, the United States Supreme Court limited the *Gertz* holding to those cases where the language involves matters of public concern.[86] The Court noted that "speech . . . of purely private concern is of less First Amendment concern" than is public content material.[87] The state interest in protecting a private plaintiff in these cases "adequately supports awards of presumed and punitive damages — even absent a showing of 'actual malice.' "[88]

4. Summary of Tests

The Supreme Court provides a summary of the various tests used to measure a defendant's conduct in *Philadelphia Newspapers, Inc. v. Hepps.*[89]

> When the speech is of a public concern and the plaintiff is a public official or public figure, the Constitution clearly requires the plaintiff to surmount a much higher barrier before recovering damages from a media defendant than is raised by the common law [i.e., the actual malice test must be applied]. When the speech is of public concern but the plaintiff is a private figure . . ., the Constitution still supplants the standards of the common law, but the constitutional requirements are . . . less

82. *Gertz,* 418 U.S. at 349.

83. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 768-69 (1986).

84. *Id.*

85. *Id.* at 776.

86. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 763 (1985). *See supra* note 56 for discussion of public concern content.

87. *Dun & Bradstreet,* 472 U.S. at 759.

88. *Id.* at 761 (in context of false and grossly misrepresented credit report sent to five of the credit agency's subscribers).

89. 475 U.S. 767 (1986).

> forbidding [i.e., as long as they include some fault requirement, states can create their own tests]. When the speech is of exclusively private concern and the plaintiff is a private figure . . ., the constitutional requirements do not necessarily force any change in . . . the common-law landscape [i.e., damages may be presumed without a showing of actual damages].[90]

C. *The First Amendment*

It should be evident that defamation is far from being a clear-cut area of law. But there is one more factor which makes it even less predictable. The first amendment plays an important role in defamation cases because personal expression is implicated. Tension is thus created between competing interests. On the one hand, "[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters."[91] In practice this means that "[b]ecause the threat or actual imposition of pecuniary liability for alleged defamation may impair the unfettered exercise of . . . First Amendment freedoms, the Constitution imposes stringent limitations upon the permissible scope of such liability."[92] On the other hand, there is the legitimate state interest in compensating individuals harmed by defamatory statements.[93]

The law of defamation can thus be confusing and unpredictable due at least in part to the fact that "our traditional notions of freedom of expression have collided violently with sympathy for the victim . . . ."[94] The outcome of the balancing of these two interests, which is done on a case-by-case basis, obviously cannot be predicted in advance by publishers. One commentator has noted that ambiguity in the law such as that created by subjective balancing of competing interests "provokes litigation."[95] Neither party in a defamation action can be sure in advance what a court will determine as to the statement's status as fact or opinion, the plaintiff's status as a private or public individual, or the defendant's conduct.

IV. APPLYING NEW YORK LAW TO THE FACTS OF *WEINER*

A. *The Statements as Fact or Opinion*

As noted, expressions of pure opinion are protected under the first

90. *Philadelphia Newspapers,* 475 U.S. at 775.
91. *Gertz,* 418 U.S. at 341.
92. *Greenbelt Cooperative,* 398 U.S. at 12.
93. *Gertz,* 418 U.S. at 341.
94. PROSSER AND KEETON, *supra* note 24, § 111, at 772.
95. L. FORER, A CHILLING EFFECT 169 (1987).

amendment and thus cannot be the basis for a defamation claim.[96] The starting point in analyzing *Weiner* is therefore the determination of whether the statements involving Herman Weiner in "*Nutcracker*" are opinions or factual assertions.

There were essentially four statements concerning Herman Weiner in "*Nutcracker*": Bradshaw's widow's reference to him as "Weenie, the big, fat, ugly Jew"; another family member's reference to his being "eccentrically costumed in bright red slacks and a loud plaid jacket"; a reference by another family member to unusually large bills for psychiatric services; and suspicions of "hanky panky" between Weiner and Frances Schreuder since "Frances always slept with her shrinks."[97]

Under the Second Circuit test,[98] the epithet used by Bradshaw's widow is a form of protected opinion. Due to its context, it is difficult to view the phrase, "Weenie, the big, fat, ugly Jew" as a factual characterization of Weiner. As discussed earlier, the entire Bradshaw family, including his widow, were honest about their dislike for Weiner, and the epithet, albeit lacking in taste, merely expressed this feeling.[99] The statement is not intended to be factually specific, but is instead obviously subjective. A term which is "broad, unfocused, [and] wholly subjective [is] not the kind of factual expression for which the Constitution permits liability to be imposed."[100] Moreover, the United States Supreme Court has labelled epithets as a form of opinion, therefore rendering them protected under the first amendment.[101]

The description of Weiner's dress when he testified in court on behalf of Schreuder is similarly an opinion under the Second Circuit test. Application of the third prong of that test to the facts of *Weiner* is especially appropriate:[102] "An assertion that cannot be proved false cannot be held libellous."[103] More specifically, it simply is not possible to deter-

96. *See supra* notes 30-33 and accompanying text. *See also Old Dominion,* 418 U.S. 264.

97. *Weiner,* 535 N.Y.S.2d at 599.

98. *See supra* notes 35-50 and accompanying text.

99. *Weiner,* 535 N.Y.S.2d at 598-99. In fact, the two paragraphs which refer to Weiner appear to be included solely for the purpose of exploring the Bradshaw family's dislike for Weiner.

100. Lewis v. Time Inc., 710 F.2d at 554.

101. *See, e.g., Greenbelt Cooperative,* 398 U.S. at 14 (characterizing plaintiff's negotiating position as "blackmail" is a "vigorous epithet" and not defamatory); *See also Old Dominion,* 418 U.S. at 282-83 (reference to plaintiff as "scab" is "literally and factually true" and thus not defamatory even when the term is most often used as an insult or epithet).

102. *See Mr. Chow,* 759 F.2d at 226. *See supra* notes 44-45 and accompanying text regarding the ability to prove a statement either true or false as being determinative of its status as opinion or fact.

103. *Hotchner,* 551 F.2d at 913.

mine whether Weiner's dress was in fact "eccentric" or whether his jacket was "loud." How his suit looked was a matter of personal taste, i.e., an opinion.

The text of "*Nutcracker*" which explains one family member's belief that Weiner may have been overcharging Frances Schreuder reads as follows: "Marilyn Reagan remembers the size of one of his bills: Frances owed her psychiatrist $3,000. 'My understanding was that her problem was inability facing reality,' says Marilyn. The huge unpaid bill made her sister think it might be the psychiatrist who had this problem, not his patient."[104] As with the statements regarding Weiner's dress, the reasonableness of his bills was a matter of personal opinion. Further, the use of metaphors and hyperbole does not turn statements of opinion into facts.[105] To illustrate, Marilyn Reagan's comment about Weiner's "ability to face reality" could be translated to mean, "In my opinion, Dr. Weiner was charging Frances too much."[106] The language used, while clearly disparaging, was nonetheless a way to express that opinion.

As with the first three references to Weiner, the last reference, which suggests the possibility that Weiner may have been sleeping with Frances Schreuder, was found by the Appellate Division also to be a statement of opinion.[107] However, the court did not analyze this particular reference under the Second Circuit test for determining when statements are opinions, but instead seemed to rely solely on the propriety of Doubleday's conduct in order to find Doubleday not liable.[108]

It is not clear under the Second Circuit test that the statement is an opinion. The statement, "Frances always slept with her shrinks," can obviously be construed as inferring that she slept with Weiner too. The comment is arguably one capable of being proven true or false and could therefore be characterized as one of fact.[109] In addition, even if it were

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104. *Weiner,* 535 N.Y.S.2d at 599.

105. *See Mr. Chow,* 759 F.2d at 229. An author's attempts to express opinions through the use of metaphors and hyperbole are understood by the average reader to be an opinion; the statements are thus "entitled to the same constitutional protection as a straightforward expression of opinion would receive." *Id.*

106. *See Mr. Chow,* 759 F.2d at 228. In *Mr. Chow,* a specific comment in a restaurant review, "It is impossible to have the basic condiments . . . on the table," was translated by the court into, "I found it difficult to get the basic seasonings on my table." *Id.* The statement was held to be protected opinion.

107. *Weiner,* 535 N.Y.S.2d at 602 ("[W]e find that the disparaging references to the plaintiff in those paragraphs are presented as pure opinions and not as facts.").

108. *Id.* at 600-01. *See supra* notes 35-50 and accompanying text.

109. For example, unlike the tastefulness of Weiner's suit, which is clearly a matter of opinion, the statement about possible sexual relations between Weiner and his patient is capable of objective confirmation. Either Weiner slept with Frances Schreuder or he did not; the issue is

purely an opinion, it would seem to the average reader to suggest the allegation of undisclosed defamatory facts as the basis for the opinion.[110]

Under the Second Circuit test, therefore, at least the first three references to Weiner in the paragraphs at issue are opinions, and as such could not form the basis for Weiner's defamation suit. Moreover, the facts underlying the opinions were set forth by Alexander, including the disclosed animosity felt by family members toward Weiner.[111] The overall context of the passage confirms that the statements were not specific allegations of fact.[112] Finally, there are numerous disclaimers in the book wherein Alexander warns readers about the biases of her sources.[113] On the other hand, the fourth reference, which points to a possible sexual relationship between Weiner and Schreuder, is not clearly an opinion. Nevertheless, this fact alone does not make Doubleday automatically liable, since the propriety of its conduct must also be considered.[114]

B. Private Plaintiff - Public Content: The Law in New York after Gertz

When a statement is not protected as pure opinion, the publisher's conduct must be scrutinized to determine if there is defamation liability for the publication.[115] In *Weiner,* the Appellate Division specifically found Herman Weiner to be a private plaintiff.[116] It further found the book to be "within the sphere of legitimate public concern . . . since the book dealt with the emotional turmoil in the family of a well publicized murder victim . . . ."[117] The case therefore falls within the United States Supreme Court's *Gertz* decision.[118] As noted earlier, *Gertz* allows the

not one of personal opinion. *See* discussion of third prong in the Second Circuit test *supra* notes 44-45 and accompanying text.

110. *See* discussion of the fourth prong in the Second Circuit test *supra* notes 46-50 and accompanying text.

111. *See supra* notes 7-9 and accompanying text.

112. The Appellate Division in *Weiner* noted that rather than attempting to substantiate or refute all facts surrounding Frances Schreuder's life, the book "endeavored to expose the internecine rivalries and animosities that led to her downfall." 535 N.Y.S.2d at 602.

113. *Weiner,* 535 N.Y.S.2d at 602. Alexander introduces the section of the book in which the statements at issue are found with a disclaimer. She warns that her sources, including Frances' children, ex-husbands, and ex-servants are "[n]ot the best of sources in any circumstances . . . ." *Id.* The Appellate Division found that this and numerous other disclaimers throughout the book "explicitly disclaimed the factual nature" of the perceptions of her sources. *Id.*

114. *Karaduman,* 51 N.Y.2d at 539, 416 N.E.2d at 560, 435 N.Y.S.2d at 559.

115. *See infra* notes 123-125 and accompanying text.

116. *Weiner,* 535 N.Y.S.2d at 601.

117. *Id. citing Karaduman,* 51 N.Y.2d at 539, 416 N.E.2d at 560, 435 N.Y.S.2d at 559. *See also supra* note 56 for discussion of public concern content.

118. *Weiner,* 535 N.Y.S.2d at 601.

states to determine for themselves what the requisite standard of fault must be in defamation cases involving private plaintiffs and public content.[119] The issue of Doubleday's conduct is thus governed largely by state rather than federal law.

The standard which New York courts must follow was set out by the highest state court in New York in 1975, just one year after *Gertz*.[120] In *Chapadeau v. Utica Observer-Dispatch, Inc.*,[121] the Court of Appeals of New York noted that the United States Supreme Court, "sensing that the balance between free speech and private reputation had tipped too far in the direction of free speech," left the states " 'substantial latitude' in fashioning a remedy based on fault."[122] The New York court further held that

> where the content of the article is arguably within the sphere of legitimate public concern, which is reasonably related to matter warranting public exposition, the party defamed may recover; however, to warrant such recovery he must establish, by a preponderance of the evidence, that the publisher acted in a grossly irresponsible manner without due consideration of the standards of information gathering and dissemination ordinarily followed by responsible parties.[123]

This standard of "gross irresponsibility," which has also been called the qualified privilege of journalists,[124] means that a published statement, even if defamatory and false, cannot lead to liability unless the publisher is proven by a preponderance of the evidence to have acted in a grossly negligent manner.[125]

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119. *See supra* note 73 and accompanying text.

120. 418 U.S. 323.

121. 38 N.Y.2d 196, 341 N.E.2d 569, 379 N.Y.S.2d 61 (1975).

122. *Chapadeau*, 38 N.Y.2d at 199, 341 N.E.2d at 571, 379 N.Y.S.2d at 63-64, *citing Gertz*, 418 U.S. at 345.

123. *Chapadeau*, 38 N.Y.2d at 199, 341 N.E.2d at 571, 379 N.Y.S.2d at 64.

124. *Karaduman*, 51 N.Y.2d at 537, 416 N.E.2d at 559, 435 N.Y.S.2d at 558.

125. *Id.* at 539, 416 N.E.2d at 560, 435 N.Y.S. 2d at 559. Recall that *Gertz* permits states to set their own standards for liability when publishers print defamatory falsehoods. State responses to this invitation have varied. For example, some states, including Colorado, Indiana and California, continue to apply the actual malice standard of *New York Times*. *See, e.g.*, Walker v. The Colorado Springs Sun, Inc., 188 Col. 86, 538 P.2d 450, 457, *cert. denied*, 432 U.S. 1025 (1975); AAFCO Heating and Air Conditioning Co. v. Northwest Publications, Inc., 162 Ind. App. 671, 321 N.E.2d 580, 586 (1974), *cert. denied*, 424 U.S. 913 (1975); and Rollenhagen v. City of Orange, 116 Cal. App. 3d 414, 422-23, 172 Cal. Rptr. 49 (1981). Other states, including Arizona, Massachusetts, Ohio and Illinois, have eased the plaintiff's burden by requiring only a showing of ordinary negligence. *See* Peagler v. Phoenix Newspapers, Inc., 114 Ariz. 309, 560 P.2d 1216, 1222 (1977); Stone v. Essex County Newspapers, Inc., 367 Mass. 849, 330 N.E.2d 161, 164 (1975); Embers Supper Club, Inc. v. Scripps-Howard Broad-

Under New York law, the plaintiff must show that a publisher "knew or had reason to know that [its] sources were unreliable or subject to question."[126] In addition, gross irresponsibility may be shown by evidence that the publisher's procedures are generally "slipshod or careless."[127] In explaining the difference between the actual malice[128] and gross irresponsibility standards, the Court of Appeals of New York has stated that in order to show actual malice, the plaintiff "is required to demonstrate the subjective state of mind of the defendant . . . ."[129] In contrast, the court noted that in the case of gross irresponsibility, "this standard is capable of being met by wholly objective proof, without the need to resort to an exploration of the defendant's subjective mental state . . . ."[130] In short, under New York law, the gross irresponsibility standard requires only that a publisher use verification methods "reasonably calculated to produce accurate copy."[131]

The plaintiff in a New York defamation case will be awarded compensatory damages only by showing proof of injury to reputation or actual malice on the part of the defendant.[132] In other words, the plaintiff must normally plead special damages; damage to the plaintiff's reputation will be inferred or presumed only when the defendant is shown to have acted with actual malice.[133] Finally, New York requires a showing of actual malice before the plaintiff can collect punitive damages.[134]

Regarding state procedural rules, whether or not a defendant has acted with gross irresponsibility is generally a question for the jury in New York.[135] The burden of proof is on the plaintiff.[136] Since normal discovery procedures are considered sufficient to obtain evidentiary facts pointing to gross irresponsibility, New York courts require "specific proof of . . . 'grossly irresponsible' conduct."[137] In *Weiner,* therefore, the

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casting Co., 9 Ohio St. 3d 22, 457 N.E.2d 1164, 1167 (1984); and Troman v. Wood, 62 Ill. 2d 183, 340 N.E.2d 292, 299 (1975).

126. *Karaduman,* 51 N.Y.2d at 543, 416 N.E.2d at 562, 435 N.Y.S.2d at 561.

127. *Id.* at 543, 416 N.E.2d at 562, 435 N.Y.S.2d at 562.

128. Recall that this is the showing which must be made by public plaintiffs. *See supra* notes 61-66 and accompanying text for discussion of the actual malice standard.

129. *Karaduman,* 51 N.Y.2d at 544, 416 N.E.2d at 563, 435 N.Y.S.2d at 562.

130. *Id.* at 545, 416 N.E.2d at 563, 435 N.Y.S.2d at 562.

131. *Id.* at 549, 416 N.E.2d at 566, 435 N.Y.S.2d at 565.

132. Dalbec v. Gentleman's Companion, Inc., 828 F.2d 921, 926-27 (2d Cir. 1987).

133. *Id.* at 927.

134. *Id.* at 928.

135. Hawks v. Record Printing and Publishing Co., 109 A.D.2d 972, 486 N.Y.S.2d 463, 466 (1985).

136. Ortiz v. Valdescastilla, 102 A.D.2d 513, 478 N.Y.S.2d 895, 901 (1984).

137. *Karaduman,* 51 N.Y.2d at 543-44, 416 N.E.2d at 562, 435 N.Y.S.2d at 562. New

burden was on Herman Weiner to prove that Doubleday failed to use reasonable methods of verification when it published "*Nutcracker.*"

1. The Facts of Weiner under New York law

Although the Appellate Division in *Weiner* specifically found all of the statements at issue to be opinions, and therefore protected under the first amendment,[138] it also applied the New York gross irresponsibility rule to Doubleday's conduct.[139] As noted earlier, three of the statements do appear to be pure opinion.[140] However, the inference that Weiner may have been sleeping with Frances Schreuder is not so clearly an expression of opinion.[141] Assuming that the inference is not protected as pure opinion, the application of the gross irresponsibility standard to that reference is necessary because even if the statement is false, Doubleday would not be liable unless the plaintiff could prove by a preponderance of the evidence that Doubleday was grossly irresponsible in publishing it.[142] In short, there can be no defamation liability if Doubleday "exercised reasonable methods to insure accuracy."[143] Under New York law, Herman Weiner thus had the burden of proving that Doubleday acted in a "grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties."[144]

Factors negating a charge of grossly irresponsible conduct include the use of authoritative sources and editing by persons other than the author.[145] In *Weiner,* Shana Alexander relied on appropriate sources for the allegation that Weiner may have been sleeping with Frances Schreuder.[146] In addition to Bradshaw family members, the allegation was made by two close friends of Frances Schreuder, who both noted that "Frances always slept with her shrinks."[147] Similar suspicions were held by family members, who independently recounted them to Alexander and to Alex Dubro, a professional researcher who worked with Alex-

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York courts will not "accept bare speculations or inferences . . . as substitutes for specific proof of . . . 'grossly irresponsible' conduct." *Id.* at 544, 416 N.E.2d at 562, 435 N.Y.S.2d at 562.

138. *Weiner,* 535 N.Y.S.2d at 602.

139. *Id.* at 601.

140. *See supra* notes 98-106 and accompanying text.

141. *See supra* notes 107-110 and accompanying text for a discussion of the fourth reference about Herman Weiner.

142. *Karaduman,* 51 N.Y.2d at 539, 416 N.E.2d at 560, 435 N.Y.S.2d at 559.

143. *Chapadeau,* 38 N.Y.2d at 200, 341 N.E.2d at 572, 379 N.Y.S.2d at 65.

144. *Id.* at 199, 341 N.E.2d at 571, 379 N.Y.S.2d at 64.

145. *Id.* at 200, 341 N.E.2d at 571-72, 379 N.Y.S.2d at 65.

146. *Weiner,* 535 N.Y.S.2d at 601.

147. *Id.*

ander on the book.[148] Due to the biases held by the Bradshaw family against Herman Weiner, the family members would have been inadequate as the sole sources for the suspicion. It was thus the independent corroboration from friends outside the family which lent credence to the suspicion. In light of these independent reports, Doubleday had "no reason to doubt the accuracy of the statement as published" that "hanky panky" between Weiner and Schreuder was suspected.[149]

Other factors in the case also tend to show that Doubleday did not act in a grossly irresponsible manner. The Appellate Division in a previous case identified factors which serve as guidelines for determining gross irresponsibility.[150] A court should look at whether:

> sound journalistic practices were followed in preparing the defamatory article . . ., whether normal procedures were followed and whether an editor reviewed the copy . . ., whether there was any reason to doubt the accuracy of the source relied upon so as to produce a duty to make further inquiry to verify the information . . ., and whether the truth was easily accessible . . . .[151]

In *Weiner,* the information for Alexander's book was obtained mostly from personal interviews with individuals who knew Schreuder well.[152] In addition, the Appellate Division found Doubleday to have "carefully reviewed the book before its publication."[153] Doubleday was in regular contact with Alexander and was actively involved in monitoring and editing all statements believed "problematic from a legal standpoint."[154] Doubleday also allegedly sought and followed advice from outside counsel specializing in libel, who suggested that Doubleday obtain substantiation from Alexander for some of her material.[155]

The backgrounds of both Alexander and her researcher, Alex

148. *Id.*

149. *Id.* at 601, 599. *Compare Dalbec,* 828 F.2d 921, where defendant publisher published a "swinger's ad" containing a lewd description of plaintiff which wrongly suggested that she was promiscuous. The ad, which was forged by a stranger, identified the plaintiff by her full maiden name and the small town where she was born and still resided. "The magazine admittedly did nothing to verify the statement." *Id.* at 925. In a later issue, the magazine called plaintiff a "fraud," although it knew at that time that she was not responsible for placing the ad. *Id.* at 927.

150. *See Hawks,* 109 A.D.2d 974, 486 N.Y.S.2d at 466.

151. *Id.*

152. *Weiner,* 535 N.Y.S.2d at 601. Alexander claims that in total, approximately 250 people were interviewed. *Id.* at 599.

153. *Id.* at 601.

154. *Id.* quoting affidavit of James Moser, who edited *Nutcracker* as an employee of Doubleday.

155. *Weiner,* 535 N.Y.S.2d at 602.

Dubro, are significant as to Doubleday's reliance on them. A publisher's "reliance upon the integrity of a reputable author bars, as a matter of law, a finding of actionable fault against [it] under New York libel law."[156] Alexander had almost forty years' experience as an investigative journalist and author when she began writing "*Nutcracker.*"[157] Her researcher, Alex Dubro, was also an experienced journalist whose resume included work for the President's Commission on Organized Crime and the United States Senate Permanent Subcommittee on Investigations.[158] Under such circumstances, a book publisher can rely on its knowledge of the good reputation of the author.[159] Doubleday was thus under no obligation to re-research the material submitted by Alexander.[160]

In sum, in the absence of specific proof that Doubleday's reliance on Alexander and Dubro's work was substantially improper, "the mere fact that the published information might later be proven false" was insufficient to justify granting Weiner's motion for summary judgment.[161] Therefore, even if one were to assume that the fourth reference to Weiner in the book is a defamatory statement of fact,[162] under New York law, the Appellate Division holding was correct because Doubleday did not act in a grossly irresponsible manner.

V. CONCLUSION

Although the outcome in *Weiner* was correct under New York law, the Appellate Division decision does little to create a clear, preventative checklist for publishers to follow when they publish books like "*Nutcracker.*" The ambiguity surrounding the law of defamation can be illustrated by the differing opinions in *Weiner:* The assessments of the case by the trial court and the Appellate Division were so completely disparate that each granted summary judgment for the opposing parties.[163] Subjective balancing by courts of the competing interests in free speech and reputation creates more ambiguity in defamation law, leaving publishers uncertain about whether they are leaving themselves open to a

156. *Ortiz,* 102 A.D.2d 513, 478 N.Y.S.2d at 898. In *Ortiz,* the author was considered to be an experienced professional; his researcher was "a highly reliable and trustworthy source." *Id.* at 897.

157. *Weiner,* 535 N.Y.S.2d at 599.

158. *Id.*

159. *See New York Times,* 376 U.S. at 287.

160. *Weiner,* 535 N.Y.S.2d at 602. *See also* Bindrim v. Mitchell, 92 Cal. App. 3d at 73-74, 155 Cal. Rptr. 29.

161. *Ortiz,* 102 A.D.2d 513, 478 N.Y.S.2d at 899.

162. *See supra* notes 109-10 and accompanying text.

163. *Weiner,* 535 N.Y.S.2d at 604.

successful defamation suit. Finally, the unpredictable nature of court decisions regarding the culpability of a publisher's conduct adds to the doubt.

All this uncertainty leaves publishers in a vulnerable position.[164] Few cases have clearly outlined for publishers "predictable standards of journalistic 'safe conduct.' "[165] One commentator has pointed out that "[c]ase law gives little guidance as to preferable procedures for pre-publication review in book publishing . . . . No methods have been declared 'safe harbors' for establishing per se the exercise of due care . . . ."[166] A need exists for state courts to formulate general guidelines in this area. The possibility that some publishers are refusing to release written works out of fear of defamation liability must be avoided.

Beth Yule Brotz

164. The vulnerability for publishers is arguably increased when authors negotiate for protection from defamation suits as part of their contracts. During the last ten years, there has been an increase in the number of publishers who include authors under their insurance policies to cover expenses incurred by authors in defamation litigation. Gail Appleson, "Authors Get Coverage on Publishers' Insurance" 68 A.B.A.J. 904 (August, 1982).

165. B.SANFORD, LIBEL AND PRIVACY, *supra* note 33, at 286.

166. *Id.* at 51.