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THE COLORADO SUPREME COURT'S DEVELOPING DEFAMATION GUIDELINES: COLORADO ENTERS THE QUAGMIRE

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INTRODUCTION

In 1964 the United States Supreme Court abolished the common law principle that "whatever a man publishes he publishes at his peril"[1] and imposed constitutional limitations, based upon the first amendment guarantees of freedom of speech and of the press,[2] on state libel laws. The Court's attempt to establish a workable set of guidelines in the defamation area cannot be classified as a model of clarity, and this lack of adequate guidance prompted Colorado Supreme Court Justice Erickson to note that "the quagmire of confusion that has been created by the intervention of the Supreme Court of the United States into the law of libel and slander on a constitutional plane is regrettable."[3] The difficulty of reconciling the constitutional guarantees of freedom of speech and of the press with the individual's interest in protecting his reputation has not been confined to the Supreme Court, however, and almost every state court that has tried to balance the two competing interests has expressed some difficulty.[4]

Since 1975, the Colorado Supreme Court has attempted to develop its own guidelines to be used in defamation cases involving media defendants. Colorado has attempted to define "actual malice"[5] and has grappled with the classifications of "public official," "public figure,"[6] and "matters of public interest."[7] In addition, Colorado has promulgated jury instructions to be applied to defamation issues in civil cases.[8] Unfortunately, the regrettable "quagmire of confusion" that Justice Erickson complained of in *Walker v. Colorado Springs Sun, Inc.*[9] has not been confined to the United States Supreme Court. A review of Colorado case law indicates inconsistencies in

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1. King v. Woodfall, 20 Howell's State Trials 895, 902 (1770).

2. New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

3. Walker v. Colorado Springs Sun, Inc., 188 Colo. 86, 104, 538 P.2d 450, 460 (Erickson, J., dissenting), *cert. denied*, 423 U.S. 1025 (1975).

4. *See, e.g.*, La Rue, *Living with* Gertz: *A Practical Look at Constitutional Libel Standards*, 67 W. VA. L. REV. 287 (1981).

5. DiLeo v. Koltnow, 613 P.2d 318 (Colo. 1980); Walker v. Colorado Springs Sun, Inc., 188 Colo. 86, 538 P.2d 450, *cert. denied*, 423 U.S. 1025 (1975); Manuel v. Ft. Collins Newspapers, Inc., 42 Colo. App. 324, 599 P.2d 931 (1979), *rev'd on other grounds*, 631 P.2d 114 (Colo. 1981).

6. DiLeo v. Koltnow, 613 P.2d 318 (Colo. 1980).

7. Walker v. Colorado Springs Sun, Inc., 188 Colo. 86, 538 P.2d 450, *cert. denied*, 423 U.S. 1025 (1975).

8. COLO. JURY INSTR. CIV. 2d, 22:1 to 22:26 (1980).

9. 188 Colo. 86, 538 P.2d 450 (1975).

the area when media defendants are involved. These inconsistencies were most recently highlighted in *Kuhn v. Tribune Republican Publishing Co.*,[10] a case in which the Colorado Supreme Court misinterpreted "actual malice" and disregarded the defamation standards recently adopted in the Colorado Jury Instructions.

This article will briefly review the defamation standards applied to media defendants since *New York Times Co. v. Sullivan*[11] and their application in Colorado when media defendants are involved. It will be argued that as a result of *Kuhn* and the inconsistencies among the decisions of the Colorado Court of Appeals, the Colorado Supreme Court, and the Colorado Jury Instructions, it is almost impossible for a publisher or practitioner to accurately predict the constitutional standard that will be required in media-related defamation cases. It will be suggested that any decisions similar to *Kuhn* could be reversed on appeal to the United States Supreme Court and that as a result of *Kuhn* other areas of the Colorado defamation law are now questionable.

I. ABROGATION OF COMMON LAW STRICT LIABILITY AND THE EMERGENCE OF THE CONSTITUTIONAL PRIVILEGE

Beginning with the landmark case of *New York Times Co. v. Sullivan*, the United States Supreme Court began to impose constitutional limitations on state libel laws. In *New York Times*, the Court abrogated the common law libel standard of strict liability and held that false statements or unjustified comments published by the media regarding public officials were constitutionally protected unless the material was published with "actual malice;"[12] that is, with actual knowledge of the falsity or with a reckless disregard for the truth or falsity of the material.[13]

In 1967, the *New York Times* standard was expanded to include "public figures," as well as "public officials."[14] The Court reasoned that because public figures commanded a substantial amount of independent public interest, similar to that commanded by public officials, they were required to show that their defamers had acted with known falsity or reckless disregard of the truth.[15] Three years later, in *Rosenbloom v. Metromedia, Inc.*,[16] the Court determined that the constitutional privilege should also be applied to situations in which the media was reporting matters of public or general interest, even if a private individual was involved.[17]

During this period the United States Supreme Court also attempted to define "actual malice." In *New York Times Co. v. Sullivan*, the Supreme Court stated that actual malice could be proven by a showing of actual knowledge

10. 637 P.2d 315 (Colo. 1981).
11. 376 U.S. 254 (1964).
12. *Id.* at 279-80.
13. *Id.*
14. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).
15. *Id.* at 155.
16. 403 U.S. 29 (1970). *Rosenbloom* was disapproved in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).
17. *Id.* at 52.

of the falsity, or with a reckless disregard for the truth.[18] The definition of actual knowledge was fairly clear. Reckless disregard, however, was subject to a number of interpretations and made a case-by-case review of lower court decisions necessary.

Decisions following *New York Times* noted that there was a great distinction between "*New York Times* malice" and common law malice. The Supreme Court noted that *New York Times* actual malice was "a term of art, created to provide a convenient shorthand expression for the standard of liability that must be established before a state may constitutionally permit public officials to recover for libel in actions brought against publishers."[19] In dealing with "reckless disregard" the Supreme Court first stated that reckless disregard could be found where the publisher possessed a "high degree of awareness of . . . probable falsity."[20] The Court attempted to define reckless disregard further and, in *Curtis Publishing Co. v. Butts*,[21] noted that reckless disregard was "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."[22] In *St. Amant v. Thompson*,[23] the Court held that in order to find reckless disregard, "[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication."[24] The Court then gave examples of reckless disregard: A story based on an unverified anonymous phone call, or a situation in which the reporter had obvious reasons to doubt the veracity of the informant or the accuracy of his reports.[25] Finally, in *Gertz v. Robert Welch, Inc.*,[26] the Court reemphasized the definitions set forth in *Curtis Publishing Co.* and *St. Amant* and added that reckless disregard requires more than mere proof of failure to investigate.[27]

As one writer has noted, *Gertz* ended the Supreme Court's dominant role in the establishment of the doctrine of constitutional privilege.[28] After *Gertz*, however, certain generalizations can be made. It is recognized that a media publisher is immune from liability for libel based upon pure comment or opinion.[29] Further, public officials and public figures must prove actual knowledge of falsity or reckless disregard of truth or probable falsity for lia-

18. 376 U.S. at 280.
19. Cantrell v. Forest City Publishing Co., 419 U.S. 245, 251-52 (1974).
20. Garrison v. Louisiana, 379 U.S. 64, 74 (1964).
21. 388 U.S. 130 (1967).
22. *Id.* at 155.
23. 390 U.S. 727 (1968).
24. *Id.* at 731.
25. *Id.* at 732.
26. 418 U.S. 323 (1974).
27. *Id.* at 332.
28. "In *Rosenbloom*, the pendulum reached its outer limit in its swing away from the common law libel standard of strict liability." NINTH ANNUAL COMMUNICATIONS LAW INSTITUTE 24 (1981). "In Gertz v. Robert Welch, . . . the Supreme Court, 'sensing that the balance between free speech and private reputation had tipped too far in the direction of free speech' retreated to a limited extent from the enveloping protection of *Rosenbloom*, and extended an invitation (not a command) to the states to fashion a similar limited retreat, if so advised." *Id.* (quoting Chapadeau v. Utica Observer Dispatch, Inc., 38 N.Y.2d 196, 199, 379 N.Y.S.2d 61 (1975)).
29. Gertz v. Robert Welch, Inc., 418 U.S. at 339-40.

bility to be imposed on the media.[30] If a media publisher makes false statements of fact regarding a private individual and such statements are published with fault and pose a substantial danger to reputation, the publisher may be held liable for defamation.[31] In cases involving purely private plaintiffs, the states may define the appropriate standard of liability so long as the media is not held strictly liable for defamatory statements.[32] Finally, in an action against the media, both presumed and punitive damages can be recovered only upon a showing of actual malice.[33]

II. CONSTITUTIONAL PRIVILEGE IN COLORADO

In *Walker v. Colorado Springs Sun, Inc.*,[34] the Colorado Supreme Court, in its first post-*Gertz* defamation opinion, addressed the issue of what standard applies to a publisher or broadcaster of defamatory material that injured a private individual and that related to a matter of public concern. The court specifically adopted the rule of the plurality in *Rosenbloom v. Metromedia, Inc.*[35] and held that in matters involving public concern, a media publisher would be liable to the person defamed if he knew the statement was false or if the statement was made with reckless disregard for the truth.[36] Significantly, the court adopted the rule of *Rosenbloom*, but did not adopt the definition of "reckless disregard" enunciated in *St. Amant* and reaffirmed in *Rosenbloom*.[37] The *Walker* court, in interpreting *St. Amant*, stated that to find reckless disregard under *St. Amant* there had to be sufficient evidence to permit the conclusion that the defendant had, in fact, entertained serious doubts as to the truth of the publication.[38] This subjective standard was rejected as a corollary or amendment to the *Rosenbloom* definition.[39] The *Walker* court did state that the *St. Amant* test of subjective serious doubt, taken in conjunction with the definition of reckless disregard, had merit, because it provided more concrete guidelines to a jury, but that by consensus the court felt that it would not approve the *St. Amant* definition "at this time" because the term "reckless disregard" had already been applied in the tort field in Colorado.[40]

It is important to note, however, that the *Walker* case dealt with the definition of "actual malice" in the context of a private individual suing a media defendant. Under *Gertz*, the Colorado Supreme Court was free to adopt any standard it wished so long as strict liability was not imposed. The court rejected the simple negligence test proposed by Justice Harlan in *Rosenbloom*[41] and adopted by many states,[42] because a "simple negligence rule

30. St. Amant v. Thompson, 390 U.S. at 731.
31. Gertz v. Robert Welch, Inc., 418 U.S. at 347-48.
32. *Id.* at 347.
33. *Id.* at 349.
34. 188 Colo. 86, 538 P.2d 450, *cert. denied*, 423 U.S. 1025 (1975).
35. 402 U.S. 29 (1971).
36. 188 Colo. at 98-99, 538 P.2d at 457.
37. *Id.* at 98, 538 P.2d at 457.
38. *Id.*
39. *Id.*
40. *Id.* at 99, 538 P.2d at 457.
41. 403 U.S. at 62. (Harlan, J., dissenting).
42. *See, e.g.*, Brewer v. Memphis Publishing Co., 626 F.2d 1238 (5th Cir. 1980), *cert. denied*, 452 U.S. 962 (1981); Mills v. Kingsport Time News, 475 F. Supp. 1005 (W.D. Va. 1979);

would cast such a chilling effect upon the news media that it would print insufficient facts in order to protect against libel actions; and this . . . insufficiency would be more harmful to the public interest than the possibility of lack of adequate compensation to a defamation-injured private individual."[43] The standard of proof adopted by the court in *Walker* can be classified as one of gross negligence. Although the court rejected *St. Amant*, as it was free to do in this context under *Gertz*, it also interpreted *St. Amant*.[44] This interpretation was to form the basis for the standard to be applied to public persons in later cases and in the Colorado Jury Instructions.

In *Manuel v. Ft. Collins Newspapers, Inc.*,[45] the question of what standard should apply when a media publisher is sued by a public official or a public figure was addressed for the first time in Colorado by the court of appeals. In dealing with the issue of whether Ft. Collins Newspapers, Inc. published defamatory remarks, the court of appeals applied *St. Amant* and held that because the newspaper did not entertain serious doubts as to the truth of the publication there could be no showing of actual malice.[46] In addition, the court noted that a failure to investigate or mere negligence on the part of a reporter or publisher was insufficient to show reckless disregard.[47] Thus, Judge Van Cise ruled that summary judgment should have been entered for the defendants.[48] The Colorado Supreme Court, however, reversed the lower court's decision on other grounds, holding that in public official defamation actions, the denial of a summary judgment motion may not be considered on an appeal from a final judgment entered after a trial on the merits.[49] The Colorado Supreme Court did not, however, discuss the lower court's application of the *St. Amant* definition of reckless conduct.

One year after the court of appeals' decision in *Manuel*, the Colorado Supreme Court had an opportunity to consider the standard to be applied when a public official or public figure institutes a defamation action against a media defendant. In *DiLeo v. Koltnow*[50] the court noted that "a public

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Mathis v. Philadelphia Newspapers, 455 F. Supp. 406 (E.D. Pa. 1978); Peagler v. Phoenix Newspapers, 144 Ariz. 304, 560 P.2d 1216 (1977); Bodrill v. Arkansas Democrat, 265 Ark. 628, 590 S.W.2d 840 (1979), *cert. denied*, 444 U.S. 1076 (1980); Widener v. Pac. Gas & Elec. Corp., 75 Cal. App. 3d 415, 142 Cal. Rptr. 304 (1977), *cert. denied*, 436 U.S. 918 (1978); Phillips v. Evening Star Newspaper Co., 424 A.2d 78 (D.C. 1980); Cahill v. Hawaiian Paradise Park Corp., 56 Hawaii 522, 543 P.2d 1356 (1975); Truman v. Wood, 62 Ill. 2d 184, 340 N.E.2d 292 (1975); Gobin v. Globe Publishing Co., 216 Kan. 223, 531 P.2d 76 (1975); E.W. Scripps Co. v. Cholomondelay, 569 S.W.2d 700 (Ky. 1978); Jacron Sales v. Sindorf, 276 Md. 580, 350 A.2d 688 (1976); Stone v. Essex County Newspapers, 367 Mass. 849, 330 N.E.2d 161 (1975); Thomas H. Malony & Sons v. E.W. Scripps Co., 43 Ohio App. 2d 105, 334 N.E.2d 494 (1974), *cert. denied*, 423 U.S. 883 (1975); Martin v. Griffin Television, 549 P.2d 85 (Okla. 1976); Memphis Publishing Co. v. Nichols, 569 S.W.2d 412 (Tenn. 1978); Foster v. Laredo Newspapers, 541 S.W.2d 809 (Tex. 1976), *cert. denied*, 429 U.S. 1123 (1977); Seegmiller v. KSL, 626 P.2d 968 (Utah 1981); Taskett v. KING Broadcasting Co., 86 Wash. 2d 439, 546 P.2d 81 (1976).

43. 188 Colo. at 99, 538 P.2d at 458.

44. *Id.* at 98-99, 538 P.2d at 457.

45. 42 Colo. App. 324, 599 P.2d 931 (1979), *rev'd on other grounds*, 631 P.2d 1114 (Colo. 1981).

46. *Id.* at 327, 599 P.2d at 933.

47. *Id.*

48. *Id.* at 329, 599 P.2d at 935.

49. 631 P.2d 1114 (Colo. 1981).

50. 613 P.2d 318 (Colo. 1980).

official can only recover damages for a defamatory statement concerning his official conduct by presenting clear and convincing proof that the statement was made with actual malice."[51] According to Chief Justice Hodges, *New York Times* actual malice meant "that the defamatory statement was known to be false or was made with reckless disregard of whether it was true or false."[52] In defining reckless disregard the court gave the accepted definition: "Reckless disregard has subsequently been explained as requiring sufficient evidence that the defendant in fact entertained serious doubts as to the truth of the published statement."[53] The court appears to have approved the *St. Amant* definition of reckless disregard in its finding that "the defendants did not publish the article . . . with actual malice as above-defined."[54]

The subjective test has been applied many times by lower courts since the *St. Amant* decision. The Fifth Circuit Court of Appeals stated unequivocally that "[w]hile verification of the facts remains an important reporting standard, a reporter, without a high degree of awareness of their probable falsity, may rely on statements made by a single source even though they reflect only one side of the story without fear of libel prosecution. . . ."[55]

Although the courts frown on a failure to verify factual assertions, liability is not generally imposed unless there is evidence of calculated falsehood. In *Gallman v. Carnes*,[56] the Supreme Court of Arkansas held that a substandard investigation, in which the reporter failed to contact all of the parties involved, "does not in itself establish bad faith."[57] The United States Supreme Court has itself noted that "mere proof of failure to investigate, without more, cannot establish reckless disregard for the truth."[58]

The issue, then, is not whether prudence requires a reporter to verify his assumptions before distributing a story. Rather, it is whether the reporter "in fact seriously doubted the accuracy of his assumption."[59] Thus, as the Sixth Circuit Court of Appeals noted, "the constitutional definition of malice is more concerned with showing the publisher's subjective reckless disregard for accuracy."[60]

The United States Supreme Court recently emphasized the absolute necessity of the reporter's subjective state of mind in *Herbert v. Lando*.[61] In *Herbert*, the issue was whether, under the Federal Rules of Civil Procedure,[62] a plaintiff could, through the use of depositions, discover the author's state of mind at the time of publication. The Supreme Court held that because proof of actual malice would be impossible if the editorial process were not subject to discovery, the media could not claim editorial privilege in a defa-

51. *Id.* at 321.
52. *Id.*
53. *Id.* at 321, n.4.
54. *Id.* at 321.
55. New York Times Co. v. Conner, 365 F.2d 567, 576 (5th Cir. 1966).
56. 254 Ark. 987, 497 S.W.2d 47 (1973).
57. *Id.* at 994, 497 S.W.2d at 51 (quoting St. Amant v. Thompson, 390 U.S. at 733).
58. Gertz v. Robert Welch, Inc., 418 U.S. at 332.
59. Waskow v. Associated Press, 462 F.2d 1173, 1176 (D.C. Cir. 1972).
60. Orr v. Argos-Press, 586 F.2d 1108, 1116 (6th Cir. 1978), *cert. denied*, 440 U.S. 960 (1979).
61. 441 U.S. 153 (1979).
62. FED. R. CIV. P. 26(b).

mation action.[63] The Court noted that "in every or almost every case, the plaintiff must focus on the editorial process and prove a false publication attended by some degree of culpability on the part of the publisher."[64] This degree of culpability would be found, according to the Court, in circumstances of knowing falsity or in which the "defendant in fact entertained serious doubts as to the truth of his publication."[65] Quoting *Gertz* and *St. Amant*, the Court added that "such subjective awareness of probable falsity . . . may be found if 'there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.' "[66]

Inquiry into the subjective state of mind of a media defendant, then, is an essential element of any media defamation case. And, as a result of the Colorado decisions of *Walker*, *Manuel*, and *DiLeo*, an assumption could be made that Colorado has accepted the above definition of reckless disregard. This assumption is strengthened by the second edition of the Colorado Jury Instructions.

Colorado Jury Instruction 22:3 defines reckless disregard where the plaintiff is a public official or public person. The instruction states:

> A statement is published with reckless disregard when, at the time of publication, the person publishing it has knowledge of facts that indicate to him that the statement is probably false and he has serious doubts as to its truth, but nevertheless publishes it.
>
> The failure to exercise reasonable care before publication to discover the truth or falsity of information does not alone constitute a reckless disregard of whether the statement was false or not.[67]

The commentary to the Jury Instructions traces the history of the first amendment privilege from *New York Times* to *Walker* and their rejection of the simple negligence standard.[68] The commentary deals directly with the role of *St. Amant* and adopts the *St. Amant* definition of reckless disregard.[69] The requirement that the publisher have subjective knowledge of falsity or serious doubts as to the truth is limited to cases in which the plaintiff is a public figure.[70]

Where the plaintiff is a private person, Instruction 22:4 applies:

> A statement is published with reckless disregard when, at the time of publication, the person publishing it has knowledge of facts that indicate to him that the statement is probably false but nevertheless publishes it with indifference to the consequences.
>
> The failure to exercise reasonable care before publication to discover the truth or falsity of information does not alone constitute reckless disregard of whether the statement is false or not.[71]

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63. 441 U.S. at 170.
64. *Id.* at 176.
65. *Id.* at 156.
66. *Id.* at 156-57.
67. COLO. JURY INSTR. CIV. 2d 22:3 (1980).
68. *Id.*, Commentary at 144-45.
69. *Id.*
70. *Id.*, Commentary at 144.
71. *Id.* at 22:4.

The Jury Instructions, then, make a distinction between reckless disregard in defamation cases involving public figures and those involving private individuals. The instructions specifically adopt the *St. Amant* standard where public officials are involved. The failure to exercise reasonable care in publication or the failure to discover the truth or falsity of the information does not lead to liability in this context. Rather, clear and convincing evidence must be presented that the defendant had serious doubts as to the truth of the statement and also knew that the statement was probably false. Where a private person sues a media defendant, however, there is a requirement of knowledge of facts that the statement was probably false, but no requirement as to serious doubt on behalf of the defendant.

Until October 2, 1981, Colorado defamation law in this area could be summarized as follows: In matters of public or general concern a private individual alleging defamatory remarks by the media must show knowing falsity or gross negligence on the part of the media in the publication of the defamatory material. In situations in which a public figure or public official sues the media for defamatory remarks, proof of actual malice is more difficult, because reckless disregard in cases involving public individuals requires that the defendant have had serious doubts as to the truth of the published statements. However, with the Colorado Supreme Court's decision in *Kuhn v. Tribune-Republican Publishing Co.*,[72] the above generalizations are no longer valid.

III. *KUHN V. TRIBUNE-REPUBLICAN PUBLISHING CO.*: COLORADO ENTERS THE QUAGMIRE

On January 8, 1976, the Greeley Tribune published an article concerning the Greeley Recreation Department's ski program. The article reported that two ski areas sent complimentary season lift passes to the Recreation Department and implied that the two areas were included in the city's ski program because they provided ski passes for the personal use of the Director of the Recreation Department, the City Manager, and the Director of the ski program.[73]

The reporter of the article, John Seelmeyer, spent approximately two hours investigating the story and thirty minutes writing it. The investigation consisted of telephone calls to various officials involved with the ski program, the City Manager, two ski shops, Colorado Ski Country-U.S.A., the two ski areas in question, and the owner of the Shark Tooth Ski Area.[74] It does not appear that Seelmeyer knew that any of the information was false.[75] Thus, the key issue at trial was whether the Tribune published with reckless disregard. A jury found that the newspaper had in fact published with reckless disregard of the truth or falsity of the story and awarded a verdict against the newspaper.

72. 637 P.2d 315 (Colo. 1981).
73. *Id.* at 316.
74. *Id.* at 317-18.
75. Kuhn v. Tribune-Republican Publishing Co., 637 P.2d 395, 396 (Colo. App.), *rev'd*, 637 P.2d 315 (Colo. 1981).

After reviewing the record, however, the court of appeals noted that "the article was substantially accurate, and, aside from some estimated dollar figures which proved to be somewhat high but still sizeable, there were no factual errors of any consequence."[76] Further, the court held that "[t]here was no showing of knowledge of falsity or serious doubts as to the truth. At most, plaintiffs' case was that the reporter did not ask enough questions or go far enough in his investigation. That does not, however, constitute the 'reckless disregard' that the First Amendment requires."[77] The court concluded that the plaintiffs failed to meet their constitutional burden and that summary judgment or a directed verdict should have been entered in favor of the newspaper.[78]

The decision by the court of appeals was reversed by the Colorado Supreme Court.[79] Justice Dubofsky, writing for the majority, held that Seelmeyer's failure to attempt to verify or refute the information previously obtained evidenced a reckless disregard for the truth.[80] Justice Dubofsky equated a failure to verify statements with fabrication and noted that when one acts as Seelmeyer had, he "knowingly risks the likelihood that the statements and inferences are false and thereby forfeits First Amendment protections."[81] Thus, the majority concluded that the article was not entitled to constitutional protection, and reinstated the jury verdict.[82]

As the dissent makes clear, however, the majority, by failing to deal with the subjective knowledge requirement of *St. Amant*, incorrectly defined reckless disregard.[83] Relying on *St. Amant* and *Herbert*, the dissent correctly focused on "the defendant's conduct and state of mind at the time of publication."[84] Justice Rovira noted that although the publication contained some inaccurate and misleading statements, "the publication of false facts is not actionable against a defendant who had no knowledge of the falsity or probable falsity of the underlying facts at the time of publication."[85] Because the dissent found no showing of a conscious awareness of probable falsity as required by *St. Amant*, the dissent would have affirmed the judgment of the court of appeals.[86]

IV. EFFECTS OF THE *KUHN* DECISION

The *Kuhn* decision has significantly muddied the doctrine of constitutional privilege in Colorado and could create a number of problems for both publishers and practitioners. By its failure to apply the *St. Amant* subjective knowledge test, the Colorado Supreme Court has created a different definition of reckless disregard than that mandated by decisions of the United

76. 637 P.2d at 396.
77. *Id.*
78. *Id.*
79. 637 P.2d 315.
80. *Id.* at 319.
81. *Id.*
82. *Id.*
83. *Id.* at 324 (Rovira, J., dissenting).
84. *Id.* at 323.
85. *Id.*
86. *Id.* at 324.

States Supreme Court. Any similarly decided cases are therefore appealable and reversible at the United States Supreme Court level. Because the Colorado Court of Appeals and the Colorado Jury Instructions have correctly interpreted reckless disregard,[87] it is possible that Colorado district courts and the court of appeals will continue to apply the *St. Amant* standard and will continue to be incorrectly reversed by the Colorado Supreme Court. If the lower courts attempt to follow *Kuhn*, however, it is submitted that because of the Colorado Jury Instructions and prior case law, both of which apply the *St. Amant* subjective standard, nothing but confusion will result. Finally, the *Kuhn* decision casts doubts on whether the gross negligence standard which was held to apply to private plaintiffs in *Walker v. Colorado Springs Sun, Inc.* is still viable.

A. *Possible Appeal and Reversal of Similar Decisions*

In dealing with public figures or public officials, the states are still controlled by the constitutional privilege that demands knowledge of falsity or reckless disregard. The very specific issue, when dealing with a potential challenge to the *Kuhn*-Colorado defamation standard, is whether reckless disregard demands proof of the media's knowledge of falsity or serious doubts as to the truth of the publication. The court of appeals and the Colorado Jury Instructions adopt the *Gertz* and *St. Amant* standard and, as the embodiment of Colorado and United States constitutional law, appear to be correct.

The Colorado Supreme Court in *Kuhn*, believed that the jury clearly could have been convinced that the defendant evidenced a reckless disregard for the truth or falsity of the publication.[88] The court specifically held that the publication failed to meet the standard set down by *New York Times* and its progeny:

> Here, a jury could reasonably find that the publication failed even to meet this generous standard. [The reporter] admitted that he had no bases for most of his erroneous statements, and that he failed to take the time to corroborate allegations made in the article, even though no particular urgency existed as to the time of publication. Actual malice may be inferred by a finder of fact if an investigation is grossly inadequate.[89]

It is interesting to note that the constitutional standard was set out and that immediately thereafter the reference by the Colorado Supreme Court was in regard to the failure to corroborate allegations. The issue of the subjective knowledge of the reporter, however, was not dealt with. The court also dealt with the reporter's failure to pursue obvious available sources and concluded that this type of evidence can establish reckless disregard for the truth.[90]

The requirement of *St. Amant*, that the reporter or publisher entertained serious doubts as to the truth of the statements, is not considered in the *Kuhn*

87. *See supra* text accompanying notes 34-71.
88. 637 P.2d at 319.
89. *Id.*
90. *Id.*

decision. The focus upon reporting inadequacies or the mere negligence of the reporter or publisher is "constitutionally insufficient to show the recklessness that is required. . . ."[91] The dissent recognized that there was no showing that the reporter had knowledge of the falsity or serious doubts about the article's truth before publication, and specifically noted that reckless disregard is not measured by whether a reasonably prudent person would have published, or would have investigated before publishing, but that reckless disregard must reflect a conscious awareness of probable falsity.[92] In addition, the dissent correctly pointed out that the test of actual malice is whether the defendant knew or had reason to suspect that his publication was false.[93] Any inquiry, then, must focus on the defendant's conduct and state of mind at the time of publication.

This constitutional standard is not adopted by the majority opinion and, as such, *Kuhn* would raise a specific and narrow appealable issue to the United States Supreme Court. The majority opinion in *Kuhn* focuses on reporting procedures and not on the actual knowledge of the reporter or publisher. A review of the Colorado Supreme Court's summary of facts considered to be germane to the constitutional issue arguably leads to the conclusion that the reporter acted with subjective knowledge of falsity. Reference is made by the majority to the fact that the story itself was worded to imply that recreational officials had personally accepted the passes when, at the same time, the reporter knew that the passes were given to the Recreation Department.[94] This testimony goes to the heart of the defamation asserted in *Kuhn*, but without the supreme court's specific review of the reporter's knowledge of falsity, it is difficult to know if in fact the *St. Amant* standard could have been applied to find liability against the *Kuhn* defendants. At the very least, the Colorado Supreme Court chose either not to recognize the *St. Amant* requirement or not to deal with the requirement as it relates to *Kuhn*. Because a finding of subjective knowledge of probable falsity is required where a public person sues a media defendant, the court's failure to deal with the issue is appealable and reversible at the United States Supreme Court level.

B. *Interpretation of Reckless Disregard in the Colorado Court of Appeals and the Colorado Supreme Court*

It is obvious that a significant difference of opinion regarding the definition of reckless disregard exists between the Colorado Court of Appeals and the Colorado Supreme Court. This difference of opinion is highlighted in *Kuhn*, where the two courts, reviewing the same record, came to conclusions which were entirely opposite. Although it is not unusual for appellate courts to disagree, in this situation a problem arises because the court of appeals appears to be correct in its interpretation of reckless disregard.

91. COLO. JURY INSTR. CIV. 2d 22:3 (1980) (citing New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Garrison v. Louisiana, 379 U.S. 64 (1964); Walker v. Colorado Springs Sun, Inc., 188 Colo. 86, 538 P.2d 450, *cert. denied*, 423 U.S. 1025 (1975)).

92. 637 P.2d at 322-23 (Rovira, J., dissenting).

93. *Id.* at 323.

94. *Id.* at 318.

Because a case-by-case determination must be made in this area of defamation law, it is entirely possible that each reckless disregard case decided by the Colorado Court of Appeals, correctly applying United States Supreme Court standards, will be overruled by the Colorado Supreme Court. If, like *Kuhn*, the case is not appealed to the United States Supreme Court for a clarification of the term "reckless disregard," the cycle could continue, resulting in a waste of time, money, and a further misapplication of the law.

The Colorado Jury Instructions, recently adopted by the Colorado Supreme Court, support the position of the court of appeals. Thus, the *Kuhn* decision will also create problems in the application of these jury instructions at the trial court level.

C. *Continued Viability of* Walker v. Colorado Springs Sun, Inc.

As a result of the *Kuhn* decision, Colorado's future treatment of private plaintiffs in media defamation cases must also be questioned. In *Walker v. Colorado Springs Sun, Inc.*, the court rejected a simple negligence test and instead adopted the rule of *Rosenbloom v. Metromedia* without the subjective qualification of *St. Amant*.[95] This standard is one of gross negligence. The Colorado Jury Instructions point out that in this situation, reckless disregard is knowledge that the statement is probably false, but has been published with indifference to the consequences. There is no requirement that the defendant have serious doubts as to the truth.[96] This standard is in reality no different than the one applied by the Colorado Supreme Court in *Kuhn*. In *Kuhn*, the court inferred reckless disregard from inadequate investigation without dealing with the reporter's subjective statement of mind. In so doing, it applied the test supposedly reserved for private persons.

Aside from constitutional questions, *Kuhn* raises the issue of what standard will be applied in cases involving private individuals. The rationale behind the different standards is clear. Private individuals are not in the public eye and do not willingly expose themselves to public scrutiny. Because private individuals do not command the attention of the media, they have little chance to correct false statements. Finally, the courts recognize the role played by the media as a public "watchdog" where government officials are concerned. As a result, the courts have afforded the media greater protection against suits by public persons and have made it easier for a private individual to recover for libel.[97] The decision has been basically one of public policy. The courts have concluded that because of their position in our society, public persons are afforded less protection from media defamation.[98]

As a result of *Kuhn*, however, it can be argued that in Colorado there is no difference between suits brought by private individuals and those brought by public persons. One could speculate that the *Walker* gross negli-

95. 188 Colo. at 98, 538 P.2d at 457.

96. COLO. JURY INSTR. CIV. 2d 22:4; *see also* St. Amant v. Thompson, 390 U.S. 727; *supra* text accompanying notes 31-44.

97. *See supra* text accompanying notes 12-17, 30-32.

98. *See, e.g.*, Gertz v. Robert Welch Inc., 418 U.S. 323 (1974).

gence standard is no longer valid and that a simple negligence test such as that proposed by Justice Erickson but rejected by the majority in *Walker* will be applied in the future.

CONCLUSION

In *Kuhn v. Tribune Republican Publishing Co.*, the Colorado Supreme Court seriously confused the law of defamation in Colorado. From the standpoint of a practitioner, publisher, or trial judge it is unclear what standards will apply to a media defendant in defamation cases.

In *Walker v. Colorado Springs Sun, Inc.*, the Colorado Supreme Court's first media defamation decision after the establishment of constitutional privilege, Justice Groves expressed concern over a decision that would "cast such a chilling effect upon the news media that it would print insufficient facts in order to protect itself against libel actions. . . ."[99] The court in *Walker* rejected a simple negligence standard and observed that "the vagueness of the negligence standard itself, would create a strong impetus toward self censorship, which the First Amendment cannot tolerate."[100] It is hoped that the "regrettable quagmire of confusion" created by the court by its decision in *Kuhn* has not significantly impaired first amendment rights in Colorado.

99. 188 Colo. at 100, 538 P.2d at 458 (quoting Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 50).

100. *Id.* (quoting Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 50).