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# False Light Privacy Actions: Constitutional Constraints and Standards of Proof of Fault, 20 J. Marshall L. Rev. 854 (1987)

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# FALSE LIGHT PRIVACY ACTIONS: CONSTITUTIONAL CONSTRAINTS AND STANDARDS OF PROOF OF FAULT

NO. 86-80
IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

SHORELINE PRESS, INC.,
Defendant-Petitioner,
vs.
BRADLEY STARK,
Plaintiff-Respondent.

## BENCH MEMORANDUM*

George B. Trubow**
Kenneth A. Michaels, Jr.***

This false light action arises from a news item appearing in defendant's newspaper which said that the plaintiff had filed for personal bankruptcy. The United States Supreme Court's grant of Writ of Certiorari ordered the parties to address the following issues:

1. Whether the Constitution requires that a private person prove *Sullivan* malice to recover in a false light action where the injurious falsehood is not a matter of public concern?
2. If a private person in a false light action, not involving a matter of public concern, need not prove deliberate falsity or reckless disregard of the truth, do constitutional constraints require that the plaintiff prove fault?
3. If the plaintiff in a false light action by a private person, not involving a matter of public concern, must prove negligence, does the application of the doctrine of *res ipsa loquitur* satisfy consti-

* This memorandum is based, in part, on materials appearing in Trubow, *The Tort Law of Privacy*, 1 PRIVACY LAW AND PRACTICE (G. Trubow ed. 1987).

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tutional requirements of proof?

## STATEMENT OF THE CASE

Plaintiff-respondent brought this action based upon diversity jurisdiction. Defendant-petitioner did not object to venue in the District of Marshall. The parties agree that the common law of the State of Marshall applies in this cause.

The parties have stipulated to the following facts. Defendant publishes a daily newspaper in the State of Lincoln, where defendant maintains its corporate offices and principal place of business. Copies of newspapers containing the article in question were distributed in the abutting State of Marshall. Plaintiff is an attorney licensed and practicing in the State of Marshall.

On Monday, May 14, 1984, defendant published its weekly column on developments in the legal community which included the following:

> Personal injury lawyer Bradley Stark, with business in the doldrums, filed for bankruptcy last week.

On Tuesday, May 22, 1984, Stark filed this false light action against the defendant. Stark's complaint alleged that defendant publicized an untruthful statement which placed Stark in a false light in a manner highly offensive to a reasonable person. He asked for compensatory and punitive damages. The trial court denied the newspaper's motion to dismiss the complaint for failure to allege deliberate or reckless falsity.

Amy Curtin, a reporter for defendant, regularly prepares items about developments in the legal community for defendant's weekly "Law News" column. On Wednesday, May 9, 1984, she drafted an article for the "Law News" column using a personal computer in her home. Curtin's personal computer is linked by telephone lines to the newspaper's mainframe computer through use of a modem. After entering her personal password, she transmitted the article to defendant's mainframe computer for future processing. Defendant's mainframe and electronic publishing program is similar to state-of-the-art systems used in the industry. Curtin alleges that her article as transmitted did not contain any reference whatsoever to plaintiff. No evidence to the contrary was presented.

Douglas Adams, editor of the newspaper's business section where "Law News" appears, examined Curtin's article on Thursday, May 10. He used the terminal on his desk, having gained access to the mainframe file by using his personal password. Adams edited Curtin's article which he says contained no reference to plaintiff. The next day, Adams electronically formatted all materials for the

"Law News" column in preparation for printing. He confirms there was no reference in the article to plaintiff yet.

As usual, the business section for Monday's paper was printed on Sunday afternoon for distribution early the next morning. Michael Roper, defendant's director of printing, used the computer terminal at his desk to load the formatted and edited Monday business section from the mainframe into the computer which operates the printing presses.

No evidence exists of any computer malfunction. However, one of defendant's employees could have inserted the offensive material without leaving any identifying evidence. Alternatively, a skilled "hacker" could have penetrated defendant's system from the outside through telephone lines.

Plaintiff has never filed for bankruptcy for himself or represented anyone in a bankruptcy matter. Moreover, defendant admits that the "Law News" column never before contained any information about an attorney filing for personal bankruptcy, nor does it assign reporters to check bankruptcy filings at the federal courthouse.

Plaintiff moved for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure. The trial court found that no genuine issue of material fact existed and that plaintiff was entitled, as a matter of law, to judgment on the issue of liability alone.

The district court held that the requirement in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), of knowledge of falsehood or reckless disregard of the truth, was not applicable to this false light action because the speech involved here was about a private person and was not a matter of public interest. The district court also held that this action was one sounding in strict liability because constitutional constraints were not applicable and fault was not a requirement in plaintiff's *prima facie* case. The court noted that even if defendant was required to prove fault, the plaintiff was negligent as a matter of law under the doctrine of *res ipsa loquitur* because it failed to maintain a secure printing system. Finally, the district court held that the order granting summary judgment for plaintiff on the issue of liability involved controlling questions of law as to which there are substantial grounds for difference of opinion and that an immediate appeal would materially advance the ultimate termination of litigation.

The United States Court of Appeals for the Thirteenth Circuit noted jurisdiction and permitted an interlocutory appeal. The Court of Appeals affirmed in part and reversed in part. It affirmed that the plaintiff need not show *Sullivan* malice because this case involves a private person plaintiff and is not a matter of public interest. It re-

versed on the issue of fault and held that *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), requires the plaintiff in a false light action to prove at least negligence on the part of defendant. Holding that *res ipsa loquitur* does not satisfy the constitutional mandate that plaintiff prove fault, and finding that the stipulated facts did not support the negligence of defendant with convincing clarity, the Court of Appeals remanded the case for further proceedings.

## ANALYSIS

### I. BACKGROUND

#### A. *Common Law False Light Actions*

In the State of Marshall, the *prima facie* case for actions sounding in false light invasion of privacy requires that a plaintiff prove that (1) defendant publicized (2) a matter concerning plaintiff (3) placing that plaintiff before the public in a false light (4) in a manner highly offensive to a reasonable person.

Judicial recognition of a right of privacy is a relatively recent phenomenon in the common law. Although the philosophical basis for the development of this right can be found in history, the seminal law review article by Warren and Brandeis was principally responsible for the rise of this tort. Warren and Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890). They thought that a judicially enforceable right of privacy was necessary in an urban culture with enhanced communication abilities.

> The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.

*Id.* at 196.

About three decades later, the first Restatement of Torts recognized an enforceable right of privacy at common law:

> A person who unreasonably and seriously interferes with another's interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other.

Restatement of Torts § 867. By this time, enough case law had developed to support the existence of the new tort. "Modern decisions allow recovery in situations in which it is not possible rationally to use the older bases of recovery, and the interest is now recognized as having an independent existence." *Id.* § 867, comment b.

By 1960, there were more than three hundred decisions discuss-

ing this privacy right. Prosser, *Privacy*, 48 Cal. L. Rev. 383, 388 (1960). In analyzing these cases, Dean Prosser found not one tort but four.

> The law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff, in the phrase coined by Judge Cooley, "to be let alone." Without any attempt to exact definition, these four torts may be described as follows:
>
> 1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
> 2. Public disclosure of embarrassing private facts about the plaintiff.
> 3. Publicity which places the plaintiff in a false light in the public eye.
> 4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

*Id.* at 389 (citations omitted). In analyzing false light actions, Prosser said that "[t]he interest protected is clearly that of reputation, with the same overtones of mental distress as in defamation." *Id.* at 400.

Professor Bloustein disagreed with Prosser and, in a discussion that appears to be consistent with the Warren and Brandeis thesis, concluded that the privacy right protects against affronts to human dignity.

> An intrusion on our privacy threatens our liberty as individuals to do as we will, just as an assault, a battery or imprisonment of our person does. And just as we may regard these latter torts as offenses to the reasonable sense of personal dignity, as offensive to our concept of individualism and the liberty it entails, so too should we regard privacy as a dignitary tort.

Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U.L. Rev. 962, (1964) (citations omitted).

The most recent hornbook bearing Prosser's name but written by other editors, appears to accept Bloustein's approach:

> The action for defamation and the action for invasion of privacy should be carefully distinguished. The former is to protect a person's interest in good reputation . . . . The latter is to protect a person's interest in being let alone. . . .

W.P. Keeton, D. Dobbs, R. Keeton and D. Owen, *Prosser and Keeton on the Law of Torts* § 117, at 864 (5th Ed. 1984).

The Second Restatement of Torts now recognizes these four distinct branches of the privacy tort, including false light. Restatement (Second) of Torts, §§ 652 (1977). There continues to be disagreement in the case law about the nature of the protected interest.

*B. Publicity in False Light Actions*

In false light privacy actions, the plaintiff must prove general publicity of the offensive material. Publicity for false light actions differs from publication in defamation actions.

> Publication, in that sense, is a word of art, which includes any communication by the defendant to a third person. Publicity, on the other hand, means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge. The difference is not one of the means of communication, which may be oral, written or by any other means. It is one of a communication that reaches, or is sure to reach, the public.

Restatement (Second) of Torts § 652D comment a (1977). In the problem case, no question should arise that publication in the newspaper constituted sufficient publicity. Whether the defendant is responsible for the publication is another matter.

Although responsibility for publicity has not arisen in a false light context, it has been held that a proprietor can be liable for defamation published through the proprietor's system, even though the proprietor himself does not know of the publication or had initially caused it.

In *World Publishing Co. v. Minahan*, 70 Okla. 107, 173 P. 815 (1918), the court found the editor of a newspaper liable for the publication of a defamatory article which was published while he was away on vacation. The court stated: "The managing editor of a newspaper is equally liable with the proprietor for the publication of a libelous article, and this whether he knows of the publication or not, as it is his duty to know the contents of all articles published." *Id.* at 110, 173 P. at 817.

In *Paton v. Great Northwestern Telegraph Co.*, 141 Minn. 430, 170 N.W. 511 (1919), the court found the telegraph company liable for the publication of patently defamatory matter that it received and sent over its equipment without making any inquiry as to its truth or falsity. The court stated: "A telegraph company may be required to respond in damages for transmitting and delivering a message libelous on its face, unless the message be privileged or the charge be justified." *Id.* at 433, 170 N.W. at 511. The court added that a communication is "privileged if the operator acted carefully and in good faith, but was not privileged if he was negligent or wanting in good faith, in sending it." *Id.* at 433-34, 170 N.W. at 512.

In *Pettengill v. Booth Newspapers, Inc.*, 88 Mich. App. 587, 278 N.W.2d 682 (1979), plaintiff sued for libel because of an item inserted by an unknown employee in the defendant's classified advertisements.

> In defendant's motion for summary judgment and affidavit it excuses the publication on the basis that the procedure for processing classified advertisements is highly automated and that the libelous matter was inserted by an unknown employee. Defendant did not answer plaintiff's complaint that defendant negligently failed to proofread the newspaper.
> We do not think that defendant can hide behind the theory that a "phantom writer" is responsible for its negligence.

*Id.* at 591, 278 N.W.2d at 684.

On the other hand, the following cases are instances where the courts have *not* found the defendant's duty or participation to be sufficient to establish responsibility for the publication of defamatory matter.

In *Scott v. Hull*, 22 Ohio App. 2d 141, 259 N.E.2d 160 (1970), the court held that the defendants were not liable for defamation where an unknown person inscribed defamatory graffiti on the exterior wall of a building owned and maintained by the defendants. The court said that liability for defamation must be "predicted upon actual publication by the defendant or on the defendant's ratification of a publication by another." *Id.* at 143, 259 N.E.2d at 161. Publication involves "a positive act, or something done by the person sought to be charged, malfeasance in the case of an intentional defamatory publication and misfeasance in the case of a negligent defamatory publication. Nonfeasance, on the other hand, is not a predicate for liability." *Id.* at 144, 259 N.E.2d at 162.

The court in *Folwell v. Miller*, 145 F. 495 (2d Cir. 1906), held that the president of a newspaper was not individually liable for a libel published in his absence. The court said that "when it appears affirmatively that [defendant] was not on duty during any part of the time between the reception of the libelous matter by the newspaper and the publication, and could not have had any actual part in composing or publishing, we think he cannot be held liable without disregarding the settled rule of law by which no man is bound for the tortious act of another over whom he was not a master's power of control." *Id.* at 497.

The court in *Summit Hotel Co. v. National Broadcasting Co.*, 336 Pa. 182, 8 A.2d 302 (1939), did not find the defendant radio station liable for an impromptu defamatory statement extemporaneously spoken by a person hired by a lessee and not in the employ of the defendant. The court concluded that the broadcaster's liability is extinguished through its exercise of due care in the selection of a lessee and the inspection and editing of the script to be broadcast: "[A] broadcasting company that leases its time and facilities to another, whose agents carry on the program, is not liable for an interjected defamatory remark where it appears that it exercised due care in the selection of the lessee, and, having inspected and edited

the script, had no reason to believe an extemporaneous defamatory remark would be made." *Id.* at 204, 8 A.2d at 312.

### C. *The Evolution of Sullivan Malice*

It is well settled that defenses applicable to defamation also apply to the false light privacy tort. Because the privacy tort also involves publication of false speech, constitutional constraints on defamation also may be applicable to false light privacy.

Prior to 1964, defamatory publications were not considered to be within constitutionally protected speech because they were false statements and the constitution was held to protect the truth, not lies. The law of defamation was the sole province of state courts and legislatures. *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952). In *New York Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964), the United States Supreme Court said that even some falsity was protected by the Constitution and held that "the Constitution delineates a State's power to award damages for libel in actions brought by *public officials* against critics of their official conduct." (emphasis added). Subsequent to *Sullivan*, the Court developed the scope of the constitutional limitations on state defamation law in an attempt to reach an accommodation between the states' interests in compensating individuals for harm to reputation and first amendment concerns for free speech. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341-43 (1974).

The plaintiff in *Sullivan* alleged that he had been libeled by statements made in an advertisement published in the defendant's newspaper. 376 U.S. at 256-57. The advertisement concerned widespread, non-violent demonstrations staged by black students at Alabama State College in support of their rights guaranteed by the Constitution. The advertisement claimed that these students were being met by a wave of terror. The plaintiff was the commissioner of police when the incidents occurred. Some of the statements in the advertisement were inaccurate descriptions of the events.

The Court stated that the case must be considered in the context of "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." 376 U.S. at 270. The Court also noted that the advertisement concerned a "movement whose existence and objectives are matters of the highest public interest and concern." *Id.* Thus, the advertisement clearly qualified for constitutional protection.

The *Sullivan* Court further ruled that "neither factual error nor defamatory content suffices to remove the constitutional shield from

criticism of official conduct." *Id.* at 273. The common law rule allowing only truth as a defense to libel actions was held inadequate to protect first amendment rights. *Id.* at 278. Requiring critics of official conduct to guarantee the truth of all factual assertions may deter them "from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. . . . The rule thus dampens the vigor and limits the variety of public debate." *Id.* at 279. Therefore, a public official cannot recover "damages for a defamatory falsehood relating to this official conduct unless he proves 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." *Id.* at 279-80.

The *Sullivan* malice standard was subsequently extended by the Supreme Court to cases in which the plaintiff is a "public figure." *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *Associated Press v. Walker*, 388 U.S. 130 (1967). In *Butts*, an article published in the defendant's magazine accused the plaintiff, the athletic director at the University of Georgia, of conspiring to "fix" a football game. 388 U.S. at 135-36.

In *Walker*, the defendant released a news dispatch giving an account of a riot that erupted because of federal efforts to enforce a court decree ordering the enrollment of a black man as a student in the University of Mississippi. 388 U.S. at 140. The dispatch stated that the plaintiff led a violent crowd in a charge against federal marshalls on the campus. Although the plaintiff was a private citizen at the time of the riot and publication, he "had made a number of strong statements against such action which had received wide publicity" and "could fairly be deemed a man of some political prominence." *Id.* In both cases, the Court held that since the individuals were public figures, they must prove *Sullivan* malice to recover for the defamatory statements.

In *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1970), the defendant's radio station broadcast news reports concerning the plaintiff's arrest for possession of obscene literature. *Id.* at 34-35. The plaintiff filed a libel action for damages after he was acquitted of criminal obscenity charges upon a ruling that the magazines were not obscene. *Id.* at 36.

In affirming the Court of Appeals, which reversed an award of damages for the plaintiff, the Supreme Court applied the *Sullivan* malice standard. The Court ruled that the standard applies "to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous." *Id.* at 43-44. The Court did not define what "an issue of public or general concern" means, but explained that "it

was leaving the definition of the reach of that term to future cases." *Id.* at 44-45.

Four years later, *Rosenbloom* was limited by the Supreme Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346 (1974). The *Gertz* Court held that "the *New York Times* [*Sullivan*] rule states an accommodation between [the first amendment] concern and the limited state interest present in the context of libel actions brought by public persons." *Id.* at 343. The Court said that

> the States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehoods injurious to the reputation of a private individual. The extension of the *New York Times* test proposed by the *Rosenbloom* plurality would abridge this legitimate state interest to a degree that we find unacceptable. And it would occasion that additional difficulty of forcing state and federal judges to decide on an ad hoc basis which publications address issues of 'general or public interest' and which do not — to determine, in the words of Mr. Justice Marshall, 'what information is relevant to self-government.'

*Id.*

As a result, the *Sullivan* malice standard was not required simply because the defamatory statement involved issues of general or public interest.

In *Gertz*, the defendant was publisher of a monthly magazine expressing the views of the John Birch Society. 418 U.S. at 325-26. An article appeared in the magazine in March, 1969, entitled "FRAME-UP: Richard Nuccio and The War On Police." Nuccio was a policeman who was tried for the murder of a youth. The youth's family was represented by Elmer Gertz, who was portrayed in the article as the architect of a "frame-up." The article, which warned of a nationwide communist conspiracy to discredit police, made several false and inaccurate statements about him.

The Court held that the plaintiff was neither a public official nor a public figure, and that the *Sullivan* malice standard did not apply. *Id.* at 345-46. In defining the appropriate standard of liability, the Court stated: "[W]e hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." *Id.* This approach "recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, yet shields the press and broadcast media from the rigors of a strict liability for defamation." *Id.* at 348. Accordingly, a private plaintiff must establish at least negligence to recover in a libel action.

The "strong and legitimate state interest in compensating private individuals" is the basis of the *Gertz* standard. *Id.* at 348-49. However, "this countervailing state interest extends no further than

compensation for actual injury;" therefore, "States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." *Id.* The Court reasoned that the possibility of presumed and punitive damages "compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms." *Id.* at 349-50. Consequently, under *Gertz*, presumed and punitive damages cannot be recovered by a private plaintiff absent a showing of *Sullivan* malice, though actual damages can be recovered for mere negligence alone.

Last year, the Supreme Court addressed the application of *Gertz* in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985). In *Greenmoss Builders*, a contractor brought a defamation action against a credit reporting agency. The defendant had erroneously reported that the plaintiff had filed a voluntary petition for bankruptcy, and defendant grossly misrepresented the plaintiff's assets and liabilities. This report was sent to five of the defendant's subscribers pursuant to an agreement under which the subscribers would not reveal the information to others. *Id.* at 751.

The Supreme Court held that a distinction must be made between "matters of public concern" and "matters of purely private concern." *Id.* at 758-60. In applying the *Gertz* approach of balancing the State's interest against the first amendment interest, the Court held that the State interest was "strong and legitimate." *Id.* at 757. However, the Court found that the first amendment interest involved here was "less important" than that involved in *Gertz*. *Id.* at 758. The Court explained that "[i]t is speech on 'matters of public concern' that is at the heart of the First Amendment's protection." *Id.* On the other hand, "speech on matters of purely private concern is of less First Amendment concern." *Id.* at 759.

Accordingly, the Court held that *Sullivan* malice was not required for punitive damages in an action by a private plaintiff when no matter of public concern was involved. The court reasoned that "[t]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the press." *Id.* at 760.

With the change in the application of *Sullivan* malice in *Greenmoss Builders*, the relation of *Gertz* to actions involving private plaintiffs and speech about matters not of public concern appears to be an open question. Is *Gertz* entirely inapplicable in such cases?

> If *Gertz* is to be distinguished from this case, on the ground that it applies only where the allegedly false publication deals with a matter of general or public importance, then where the false publication does not deal with such a matter, the common-law rules would apply

> whether the defendant is a member of the media or other public disseminator or a non-media individual publishing privately. Although Justice Powell speaks only of the inapplicability of the *Gertz* rule with respect to presumed and punitive damages, it must be that the *Gertz* requirement of some kind of fault on the part of the defendant is also inapplicable in cases such as this.

*Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. at 773-74 (White, J., concurring).

Although the *Greenmoss* Court held that the media/nonmedia distinction was not the basis for determining whether *Gertz* should be applied, that distinction was raised once again in the case of *Philadelphia Newspapers, Inc. v. Hepps*, 106 S. Ct. 1558 (1986). In that case, plaintiff store owners brought an action against the defendant newspaper for publishing five articles in which the plaintiff was linked to organized crime and accused of having improperly influenced the state governmental processes. The trial court, following the *Gertz* case, instructed the jury that the plaintiffs bore the burden of proving the falsity of the allegations. (At common law, a defamatory publication was presumed to be false so that the burden was on the defendant to prove substantial truth as a defense.) The state supreme court reversed, holding that the requirement that the plaintiff prove negligence, as *Gertz* demanded, did not also require proof of falsity. On appeal, in a 5-4 opinion, the Supreme Court reversed, holding that when the case involved a private plaintiff, a media defendant, and a matter of public concern, then falsity as well as fault was a burden on the plaintiff and could not be presumed. Of particular interest in *Hepps* is the following footnote:

> We also have no occasion to consider the quantity of proof of falsity that a private figure plaintiff must present to recover damages. Nor need we consider what standards would apply if the plaintiff sues a nonmedia defendant . . . [cite omitted] or if a State were to provide a plaintiff with the opportunity to obtain a judgment that declared the speech at issue to be false but did not give rise to liability for damages.

*Hepps*, 106 S. Ct. 1558, 1565, n.4 (1986).

Justice Brennan, in a concurring opinion, simply noted that he believed the burden of falsity belonged to every plaintiff, regardless of whether or not a media defendant was involved. *Id.* at 1565-66 (Brennan, J., concurring). Accordingly, only a plurality of the court supports the media/nonmedia distinction in *Hepps*.

It appears, therefore, for the time being, that the court has left open the following issue to be resolved in future cases: Though the plaintiff must prove fault by "clear and convincing" evidence when *Sullivan* malice is required, does a lesser standard apply to negligence by a media defendant?

In summary, then, the principal cases provide as follows:

1. *New York Times v. Sullivan* enunciated the "*Sullivan* malice" (deliberate or reckless falsity) standard, which must be alleged and proved if a public official is the defamation plaintiff.

2. *Walker* and *Butts* extended the *Sullivan* malice requirement to public figure defamation plaintiffs.

3. *Gertz* said that matters of general or public interest did *not* perforce require *Sullivan* malice. A private defamation plaintiff could recover actual damages in accord with state law, except that liability could not be imposed without fault. Accordingly, *Gertz* require the proof of negligence at least. To recover presumed or punitive damages, however, the plaintiff must allege and prove *Sullivan* malice.

4. *Greenmoss Builders* limited *Gertz* on the question of punitive damages to matters of public concern. Whether state law governs other aspects of defamation actions brought by private plaintiffs regarding communications that do not involve matters of public concern was not specifically addressed in the majority opinion. *Sullivan* malice would be required to recover punitive damages if the defamation involved a matter of public concern.

5. *Hepps* held that the falsity of the speech must also be proven by the plaintiff when the media is a defendant.

It is uncontested in the instant case that the speech involves a private matter. Thus, that issue was not addressed in the order granting certiorari.

## II. What Standard Does the Constitution Require that a Plaintiff Prove in a False Light Action: *Sullivan* Malice or Negligence?

The Restatement of Torts incorporates the *Sullivan* malice standard into its *prima facie* case for false light actions.

> § 652E. Publicity Placing Person In False Light
> One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if
> (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
> (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Restatement (Second) of Torts § 652E (1977). A caveat, however, follows immediately after this section:

> The Institute takes no position on whether there are any circumstances under which recovery can be obtained under this Section if the actor did not know of or act with reckless disregard as to the fal-

> sity of the matter publicized and the false light in which the other would be placed but was negligent in regard to these matters.

*Id.* The Restatement position was based upon the pre-*Gertz* law, and only the caveat acknowledges the post-*Gertz* trend.

In *Time, Inc. v. Hill*, 385 U.S. 374, 387-88 (1967), the Court, in a pre-*Gertz* decision, held that in a false light privacy case the plaintiff, a "newsworthy person," was required to prove *Sullivan* malice. The Court applied *Sullivan* malice in this matter of public interest but noted that this conclusion was reached only by applying first amendment principles in *Sullivan*. *Id.* at 390-91.

Months after *Gertz* was decided, a false light case arose where a newspaper published a false story about the poverty of a family whose father had been killed when a bridge collapsed. *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974). The trial judge had instructed the jury that liability would attach only upon a finding that the newspaper acted with *Sullivan* malice. *Id.* The plaintiff had alleged *Sullivan* malice, and on appeal the matter was not raised. *Id.* The Supreme Court stated:

> Consequently, this case presents no occasion to consider whether a State may constitutionally apply a more relaxed standard of liability for a publisher or broadcaster of false statements injurious to a private individual under a false-light theory of invasion of privacy, or whether the constitutional standard announced in *Time, Inc. v. Hill* applies to all false-light cases. *Cf. Gertz v. Robert Welch, Inc.*, 418 U.S. 323.

*Id.* at 250-51. However, the continued validity of *Time, Inc. v. Hill* was questioned by Justice Powell in his concurring opinion in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975):

> The Court's abandonment [in *Gertz*] of the "matter of general or public interest" standard as the determinative factor for deciding whether to apply the *New York Times* malice standard to defamation litigation brought by private individuals . . . calls into question the conceptual basis of *Time, Inc. v. Hill*. In neither *Gertz* nor our more recent decision in *Cantrell v. Forest City Publishing Co.*, . . . however, have we been called upon to determine whether a State may constitutionally apply a more relaxed standard of liability under a false-light theory of invasion of privacy.

*Id.* at 498 n.2 (Powell, J., concurring).

Some states have adopted the Restatement's language for false light and have incorporated the *Sullivan* malice standard into the *prima facie* case without regard to the caveat quoted above.

One case shows the possible anomaly created if *Sullivan* malice is mandated in all false light cases. *Dodrill v. Arkansas Democrat Co.*, 265 Ark. 628, 590 S.W.2d 840 (1979), *cert. denied*, 444 U.S. 1076 (1980). An attorney had been suspended for misconduct; reinstatement was predicated upon his re-taking and passing the bar. *Id.* at

631, 590 S.W.2d at 841. Although the bar examiners customarily supplied defendant newspaper with the names of all of those passing the bar, plaintiff's name was not on the list. *Id.* The newspaper falsely reported that plaintiff failed the bar. *Id.* at 632, 590 S.W.2d at 841. The plaintiff sued for libel and false light invasion of privacy. *Id.* at 633, 590 S.W.2d at 842. Applying *Gertz* and its progeny, the Arkansas Supreme Court concluded that plaintiff was not a public figure, therefore *Sullivan* malice need not be proven in the libel claim. *Id.* at 634-37, 590 S.W.2d at 843-44. Relying upon both *Time, Inc. v. Hill*, and the Restatement approach, the court held that plaintiff had to prove *Sullivan* malice to support his false light claim. *Id.* at 639, 590 S.W.2d at 845.

Other jurisdictions have held that proof of *Sullivan* malice is not constitutionally mandated in all false light actions. In *Wood v. Hustler*, 736 F.2d 1084 (5th Cir. 1984) *cert. denied*, 105 S. Ct. 783 (1985), the Fifth Circuit considered whether a private figure plaintiff was required to prove *Sullivan* malice in a false light action against a media defendant. The *Wood* court held that a private-figure false light plaintiff need not prove *Sullivan* malice against a media defendant. *Id.* at 1091. The *Wood* court reasoned that application of the actual malice standard in *Time, Inc. v. Hill* was justified because published material was a question of public concern. However, the authority of *Time, Inc. v. Hill*, is undermined when the subject matter is of private concern. Consequently, the private figure plaintiff in *Wood* prevailed against a media defendant who negligently placed that plaintiff in a false light. *Id.* at 1092.

Similarly the Supreme Court of Appeals of West Virginia held that in light of decisions subsequent to *Time, Inc. v. Hill*, the *Sullivan* malice requirement is no longer applicable in privacy actions against media defendants, at least where private figures are concerned. *Crump v. Beckley Newspapers*, 320 S.E.2d 70, 89 (W. Va. 1984). Citing *Gertz*, the court held that in the absence of a constitutionally privileged communication, the test to be applied in a false light invasion of privacy action against media defendant is negligence, i.e., what a reasonable person would have done under like circumstances. *Id.*

## III. Does the Application of the Doctrine of *Res Ipsa Loquitur* Satisfy Constitutional Requirements of Proof of Negligence?

One noted scholar explains the doctrine of *res ipsa loquitur* thus:

> [W]here it is shown that the thing or instrumentality which caused the injury complained of was under the control or management of the

> defendant, and that the occurrence resulting in the injury was such as in the ordinary course of things would not happen if those who had its control or management used proper care, there is sufficient evidence, . . . that the injury arose from or was caused by the defendant's want of care.

S. Speiser, *The Negligence Case: Res Ipsa Loquitur* § 1:1 (1972). The majority of American courts treat *res ipsa loquitur* as circumstantial evidence, thereby raising an inference of negligence; a minority of the courts give the doctrine a greater effect and elevate it to the level of a presumption. W. P. Keeton, D. Dobbs, R. Keeton and D. Owen, *Prosser and Keeton on the Law of Torts*, § 40, at 257-58 (5th Ed. 1984).

Whether an inference or a presumption, the Second Restatement of Torts states:

> To determine whether *res ipsa loquitur* applies the courts will ask whether:
>
> a. the event is of the kind which ordinarily does not occur in the absence of negligence:
> b. other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and
> c. the indicated negligence is within the scope of the defendant's duty to the plaintiff.

Restatement (Second) of Torts § 328D (1977).

The second element in this analysis modifies what was traditionally known as the exclusive control requirement. "It would be far better, and much confusion would be avoided, if the rigid 'control' test were discarded altogether, and we were to require instead that the apparent negligent cause of the accident be such that the defendant would more likely than not be responsible for it." W.P. Keeton, *et al., Prosser and Keeton on the Law of Torts* § 39, at 250-51. The common law test for a finding of *res ipsa loquitur* has been proof that defendant exercised exclusive control over the instrumentality of the injury and that in the ordinary course of events, but for defendant's negligence, this injury would not have resulted. A growing trend in the courts is a broader application of the doctrine by utilizing a probability analysis.

> All that is needed is evidence from which reasonable persons can say that on the whole it is more likely that there was negligence associated with the cause of the event than that there was not . . . . Where no such balance of probabilities in favor of negligence can reasonably be found, res ipsa loquitur does not apply.

*Id.* at 248 (citations omitted).

In the instant case, there may be a question about whether the defendant exercised exclusive control over its publication system, and a question about whether the first amendment precludes the

application of the doctrine to prove fault in false light cases.

### A. *Exclusive Control*

The record does not set forth any certain test for applying *res ipsa loquitur*. However, regardless of which test is applied, whether these facts warrant, as a matter of law, the application of *res ipsa loquitur*, depends upon the defendant's control over the publication.

> The res ipsa loquitur doctrine does not apply where the agency causing the accident was not under the sole and exclusive control of the person sought to be charged with the injury, and if it appears that the accident was, or might have been in part due to the act of a third person over whom the defendant had no control, the doctrine is not applicable . . . . In other words, the doctrine of res ipsa loquitur is not applicable where the defendant has no control over the injuring instrumentality, or where there is a divided responsibility, and the injury may have resulted from a cause over which the defendant had no control.

S. Speiser, *The Negligence Case: Res Ipsa Loquitur* § 2:11 (1972) (citations omitted).

The issue of exclusive control arises in the instant case because none of the parties has knowledge of who inserted the sentence relating to plaintiff. Thus, the question of control will turn on whether the court focuses on defendant's conduct in implementing a publication system accessible by unknown third parties or disgruntled employees.

### B. *Constitutional Requirements and Res Ipsa Loquitur*

In *New York Times Co. v. Sullivan*, the Court concluded plaintiffs must prove *Sullivan* malice with clear and convincing evidence. 376 U.S. at 285-86. The Court recently reaffirmed the clear and convincing evidence standard in the context of a defendant's motion for summary judgment where *Sullivan* malice must be proved. *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505 (1986).

> In sum, we conclude that the determination whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case . . . . Consequently, where the *New York Times* 'clear and convincing" evidence requirement applies, the trial judge's summary judgment inquiry as to whether a genuine issue exists will be whether the evidence presented is such that a jury applying that evidentiary standard could reasonably find for either the plaintiff or the defendant.

*Id.* at 2514.

The Court has left open the question of whether private-figure plaintiffs must show clear and convincing evidence of negligence where the speech does not involve a matter of public concern and

state law has not adopted *Sullivan* malice in al injurious falsehood cases. One commentator has recently addressed this question but did not support his conclusion with any authority. "Proof of actual malice may be distinguished from proof of negligence in that actual malice must be established by 'clear and convincing evidence' while negligence need not be." Bloom, *Proof of Fault in Media Defamation Litigation*, 38 Vanderbilt L. Rev. 247, 255 (1985).

Even if the "clear and convincing" evidence is the appropriate standard in all injurious falsehood cases, it is an open question whether applying a liberal interpretation of *res ipsa loquitur* suffices to meet this elevated standard.