UIC Law Review

Volume 20 | Issue 4 Article 18

Summer 1987

Brief for Respondent, 20 J. Marshall L. Rev. 916 (1987)

Jeffrey Alitz

Fred Armstrong

Christine Greenlees

NO. 86-80

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1986

SHORELINE PRESS, INC.,
Petitioner,

- vs. -

BRADLEY STARK,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
For the Thirteenth Circuit

BRIEF FOR RESPONDENT

Counsel for Respondent
Jeffrey Alitz
Fred Armstrong
Christine Greenlees
Boston University
School of Law
765 Commonwealth Avenue
Boston, MA 02215

QUESTIONS PRESENTED

I. Whether the Constitution requires that a private person prove *New York Times v. Sullivan* "actual malice" (knowledge or reckless disregard) to recover in a false light action where the injurious falsehood is not a matter of public concern?

II. Whether the Constitution requires that a private person prove fault in a false light action where the injurious falsehood is not a matter of public concern and actual malice is not required?

III. Whether the application of the doctrine of *res ipsa loquitur* satisfies the constitutional requirement of proof of negligence where a private person has been placed in a false light by a media defendant?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

PERIODICALS AND TREATISES

PROCEEDINGS BELOW

On May 22, 1984, plaintiff Bradley Stark filed a false light invasion of privacy action in the District of Marshall against defendant Shoreline Press, Inc. [R.2]. Jurisdiction was based on diversity pursuant to 28 U.S.C. § 1332(a)(1) because the parties are citizens of different states and plaintiffs claimed damages exceeding $10,000. [R.1,2]. Plaintiff's complaint alleged that defendant publicized an untruthful statement which placed him in a false light in a manner highly offensive to a reasonable person, and asked for punitive and compensatory damages. [R.2]. Defendant moved to dismiss the complaint for failure to allege deliberate or reckless falsity. [R.2]. The district court denied defendant's motion. [R.2].

Plaintiff then moved for summary judgment pursuant to F.R. Civ. P. Rule 56. [R.1]. The district court found that no genuine issue of material fact existed and that plaintiff was entitled to judgment on the issue of liability as a matter of law. [R.1]. The court ordered a trial on the issue of damages alone. [R.7].

The summary judgment order was appealed by defendant to the United States Court of Appeals for the Thirteenth Circuit on an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). [R.8]. The Court of Appeals affirmed in part and reversed in part and remanded the matter for further proceedings. [R.9].

Defendant Shoreline Press, Inc. then petitioned for a writ of certiorari to the Supreme Court of the United States, which was granted on June 30, 1986. [R.10].

STATUTES AND RULES CONSTRUED

The following statutes and rules are construed in the present case and are reproduced in full in the Appendix:

U.S. CONST. amend. I;

Restatement (Second) of Torts, § 652E, Publicity Placing Person in False Light.

STATEMENT OF THE CASE

The defendant, Shoreline Press, Inc., publishes a newspaper in the State of Lincoln. That newspaper is also distributed in the State of Marshall. [R.1]. The plaintiff, Bradley Stark is an attorney licensed and practicing in the State of Marshall. [R.1].

The newspaper contains a weekly "Law News" column which reports news relating to the legal community. The May 14, 1984 "Law News" column included the following sentence:

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

[R.2].

The statement was published although Mr. Stark has never filed for bankruptcy or represented anyone in a bankruptcy matter. [R.4]. The defendant has admitted that the statement concerning Mr. Stark is false and that "the injurious falsehood in this case involves a matter not of public concern about a private person." [R.9]. Additionally, the defendant concedes that the "Law News" column never before contained information about attorneys filing for personal bankruptcy, nor do the newspaper's reporters check bankruptcy filings. [R.4].

The May 14, 1984 column was drafted by Amy Curtin, a reporter for the defendant. On May 9, the article was transmitted from Curtin's personal home computer to the defendant's mainframe computer through a modem. [R.2]. Curtin used a password to gain access to the mainframe. She maintains that when transmitted, her article contained no reference to Mr. Stark. [R.3].

Curtain's article was edited on May 10, 1984 by Douglas Adams, editor of the defendant's business section. He also used a password to gain access to the computer. Adams found no reference to Mr. Stark at this time, or on May 11 when he prepared the column for printing. [R.3].

The column was printed in the business section for the Monday, May 14 edition on Sunday afternoon. [R.3]. Michael Roper directed the printing process by loading the edited column from the mainframe into the computer that operates the printing presses. [R.3]. It is not noted in the record if Roper used a password to gain access to the system.

The parties have stipulated that (1) there is no evidence of computer malfunction; (2) one of the defendant's employees may have added the offensive material to the column; and (3) a computer "hacker" could have penetrated the printing system and inserted the false material. [R.3].

Mr. Stark filed a false light action against the defendant on May 22, 1984. The complaint alleged that the defendant published a false statement that placed Mr. Stark in a false light and asked for punitive and compensatory damages. [R.2].

SUMMARY OF ARGUMENT

The Constitution does not require a private plaintiff in a false light action involving a matter not of public concern to prove *Sullivan* "actual malice." "Actual malice" requires that the plaintiff show

the defendant acted with knowledge or reckless disregard of the falsity of the matter publicized. It is designed to protect First Amendment concerns that debate on public issues be "uninhibited, robust, and wide-open." Matters not of public interest do not implicate the same First Amendment concerns. Compensation to plaintiffs injured by false speech that was not knowing or reckless, or issues of private concern, does not affect the robust debate of public issues.

The "actual malice" standard was extended to false light actions by *Time, Inc. v. Hill* in 1966. *Hill* was later discredited and impliedly overruled by *Gertz v. Robert Welch, Inc.*. Because of the similarity between false light actions and defamation actions, there is no reason for such a gross disparity in the burden of proof. Constitutional concerns are still protected in false light actions even without a showing of "actual malice" because a plaintiff must still show that the false light in which he was placed would be "highly offensive to a reasonable person," thus precluding recovery for minor misstatements of fact.

An increasing number of courts have realized that there is no constitutional or practical reason to hold private plaintiffs to a standard of proof that effectively precludes relief. This Court should affirm the first part of the opinion of the United States Court of Appeals for the Thirteenth Circuit and hold that a private plaintiff in a false light action involving no matter of public concern need not show "actual malice" in order to recover actual, presumed, and punitive damages.

The Supreme Court has moved steadily towards lowering the burden of proof for private plaintiffs in defamation and false light cases. *Gertz v. Robert Welch, Inc.* did away with the actual malice requirement in suits with private plaintiffs, leaving the door open to the States to establish their own liability standards. While *Gertz* proscribed a strict liability standard, it is distinguishable from the case at bar. Also, recent case law suggests that a strict liability standard is permissible in specific situations where no First Amendment interest is at stake and the plaintiff is a private individual. In the instant case the individual's reputation interest should be protected.

First Amendment protections should not be extended to false statements, especially when the plaintiff is a private individual. In situations where the statements are both false and of a non-public nature, common law liability rules should govern. This Court should reverse the findings of the Court of Appeals on the issue of fault.

Alternatively, even if the plaintiff must prove negligence in this action, the doctrine of *res ipsa loquitur* clearly satisfies constitutional requirements of proof. The Supreme Court and lower federal and state court decision that have developed the negligence stan-

dard have not prescribed the means to find negligence. Moreover, *res ipsa loquitur* is a settled doctrine of negligence that safeguards both plaintiffs' and defendants' interests. The doctrine is particularly applicable when the injurious statement is false, not of public concern, and is the direct result of the defendant's negligent operation of its newspaper. The defendant's First Amendment rights are not at issue in this action as publication was due to the failure of the defendant to employ a secure printing system and a final proofreading safeguard. In light of the lessened threat to the newspaper's constitutional freedoms, the doctrine of *res ipsa loquitur* should be used to find negligence.

ARGUMENT

I. THE CONSTITUTION DOES NOT REQUIRE THAT A PRIVATE PERSON PROVE *New York Times v. Sullivan* "ACTUAL MALICE" (KNOWING OR RECKLESS FALSITY) TO RECOVER IN A FALSE LIGHT ACTION WHERE THE INJURIOUS FALSEHOOD IS NOT A MATTER OF PUBLIC CONCERN.

The Supreme Court began its exploration of the interrelationship between the First Amendment and the torts of defamation and false light invasion of privacy in *New York Times v. Sullivan*, 376 U.S. 254 (1964). In *Sullivan*, the Court formulated the now-famous rule that a public official could not recover for a defamatory falsehood unless he can prove that the statement was made with "actual malice." *Id.* at 279-280. "Actual malice" was defined as "knowledge that [the statement] was false or . . . reckless disregard of whether it was false or not." *Id.* The defendant must be shown to have "in fact entertained serious doubts as to the truth of his publication." *St. Amano v. Thompson*, 390 U.S. 727, 731 (1967). *Sullivan* "actual malice" is different from common-law malice in the sense of spite or ill-will. *Beckley Newspapers v. Hanks*, 389 U.S. 81, 82 (1967).

The "actual malice" requirement was extended to defamation cases brought by public figures in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), *reh'g denied*, 389 U.S. 889 (1967) (a public figure was defined essentially as one who both commands continuing public interest and has sufficient media access to counter the effects of defamation; *see, Rinsley v. Brandt*, 446 F.Supp. 850, 855 (D. Kan. 1977)). "Actual malice" reached its widest application in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), which extended it to cover private individuals involved in matters of public or general interest. *Id.* at 43.

Rosenbloom was impliedly overruled three years later by *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) which rejected public interest analysis and returned to the status analysis of the public offi-

cial/figure—private individual distinction. *Id.* at 344-345. *Gertz* held that private individuals could recover damages for actual injury without a showing of *Sullivan* "actual malice." *Id.* at 348-349. However, private plaintiffs would still be required to show "actual malice" to recover presumed or punitive damages. *Id.*

Recently, the Court returned to public interest analysis in *Dunn & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939 (1985) (plurality opinion), and held that private plaintiffs could recover presumed and punitive damages in defamation cases without showing "actual malice" when the defamatory statements do not involve matters of public concern. *Id.* at 2946, 2948. The plurality distinguished *Gertz* and "every other case in which this court has found constitutional limits to state defamation laws" as involving "matter[s] of undoubted public concern." *Id.* at 2944. After *Greenmoss*, it appears that a two-part test is evolving for application of the *Sullivan* "actual malice" standard in defamation cases, as was noted by the Court in *Philadelphia Newspapers, Inc. v. Hepps*, 106 S. Ct. 1558 (1986). "The first [part] is whether the plaintiff is a public official or figure, or is instead a private figure." *Id.* at 1563. "The second is whether the issue is of public concern." *Id.*

The *Sullivan* "actual malice" standard was applied to false-light invasion of privacy cases in *Time, Inc. v. Hill*, 385 U.S. 374 (1966) using the public-interest analysis the Court later applied to libel in *Rosenbloom*. The Court held that "redress [of] false reports of matters of public interest [is precluded] in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth." 385 U.S. at 388. The Court characterized the plaintiff as a "private individual," but specifically declined to base its holding on a status-analysis. *Id.* at 300, 301. The Court's use of status-analysis in *Gertz* "calls into question the conceptual basis" of *Hill*. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 498 (1974) (Powell, J., concurring). The Court has declined two opportunities to determine whether *Gertz* effectively overrules *Hill*, *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974) and *Cohn*, 420 U.S. at 469.

The *Sullivan* "actual malice" standard should not be applied to respondent, a private person, to recover in a false light action involving a matter not of public concern because (1) *Hill* does not apply to false light actions involving matters of private concern; (2) *Gertz* overrules *Hill*; and (3) the trend in the law is towards lowering the burden for private plaintiffs in cases involving injurious falsehoods not of public concern.

A. *Time, Inc. v. Hill Does Not Apply To False Light Actions Involving Matters Of Private Concern.*

Petitioner Shoreline Press, Inc. concedes that the injurious falsehood in this case involves a matter not of public concern about a private person. [R.9]. *Hill* requires application of the *Sullivan* "actual malice" standard only in cases involving "matters of public interest. *Hill*, 385 U.S. at 388. On its facts, then, *Hill* does not apply to this case and common law standards are retained. However, a case of this importance requires more than semantic distinctions.

Speech on matters of public concern is at the heart of the First Amendment's protection. *Greenmoss*, 105 S. Ct. at 2945. (citations omitted). The *Sullivan* "actual malice" requirement is based on "the principle that debate on public issues should be uninhibited, robust, and wide-open. . . ." *Sullivan*, 376 U.S. at 270. The "matters of public interest" contemplated by the Court in *Hill* go beyond political issues and include entertainment. *Hill*, 385 U.S. at 388. The Court concluded that the subject-matter of the article involved in *Hill*, "the opening of a new play linked to an actual incident, is a matter of public interest," *Id.*, and justified application of the "actual malice" standard.

Speech on matters of purely private interest is of less First Amendment concern. *Greenmoss*, 105 S. Ct. at 2946. Actions for redress of injurious falsehoods pertaining to private matters do not implicate the same concerns with stifling "robust debate" or "meaningful dialogue." *Id.* Whether speech addresses a matter of public concern must be determined by its "content, form, and context . . . as revealed by the whole record." *Id.* at 2947. Bankruptcy of a private individual does not generally relate to politics or entertainment. Were the report of Stark's bankruptcy actually true, it would be of interest at most to his family, friends, clients, and creditors, all of whom would undoubtedly become aware of it in any event, with or without the assistance of the press. The general public would not take the slightest interest in the bankruptcy report, and its suppression would not affect the "robust debate" of public issues.

Hill can be distinguished from the present case on two other grounds. First, *Hill* involved a New York privacy statute that had already been construed by the New York Court of Appeals as limited to "newsworthy" persons and events. 385 U.S. at 383. No such statute is involved in the present case.

Second, the plaintiff in *Hill* was a private person who had once been involved in an event that had caught the public interest, a hostage-taking that was widely publicized. Today, Mr. Hill would be classed as a limited-purpose public figure under the *Gertz* status-analysis. *See Gertz*, 418 U.S. at 351 ("an individual . . . [who] is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.); *see also* Lehman, *Triangulating the Limits on the Tort of Invasion of Privacy: The De-*

velopment of the Remedy in Light of the Expansion of Constitutional Privilege, 3 Hastings Const. L.Q. 543, 567 (1976) (*Invasion of Privacy*). Therefore, the *Hill* case can be seen as involving a public figure, a fact which calls for the application of "actual malice" even after *Gertz*. *Hill* serves as no precedent for applying "actual malice" to this case.[1]

B. *Gertz v. Robert Welch, Inc. Overruled Time, Inc. v. Hill.*

At the very least, *Gertz* "calls into question the conceptual basis" of *Hill*, as Justice Powell noted in his concurrance in *Cohn*, 420 U.S. at 498, n.2. Respondent submits that *Gertz* impliedly overruled *Hill* in the same way as it did for *Rosenbloom*. *See Invasion of Privacy*, 3 Hastings Const. L.Q. at 575. One circuit, *Wood v. Hustler Magazine, Inc.*, 736 F.2d 1084 (5th Cir. 1984), *cert. denied*, 105 S. Ct. 783 (1985); two district courts, *Rinsley v. Brandt*, 446 F.Supp. at 850, *Dresbach v. Doubleday & Co.*, 518 F.Supp. 1285 (D.D.C. 1981); and one state, *Crump v. Beckley Newspapers*, 320 S.E.2d 70 (W. Va. 1984), have recognized that *Hill* no longer controls privacy actions after *Gertz*.

The "public interest" analysis used in *Hill* was used in *Rosenbloom* to extend the "actual malice" standard to private plaintiffs involved in matters of "public or general interest." 401 U.S. at 43. Three years later, *Rosenbloom's* public-interest analysis was criticized in *Gertz* because it "inadequately serves both of the competing values at stake"—freedom of speech and protection of individual reputations. 418 U.S. at 346. *Rosenbloom* was also criticized in *Gertz* for forcing judges to decide on an "ad hoc" basis what is and is not an issue of "general or public interest." *Id.* In the area of privacy, focusing on the public or private interest raises the same criticisms. A private individual's entire past history can become a subject of public interest when that individual becomes involved in a newsworthy event. *Invasion of Privacy*, 3 Hastings Const. L.Q. at 574. Under this analysis, the only way a private individual can retain his right of privacy is to avoid any event likely to attract public interest, which "would seem to be prior restraint in its purest form." *Id.*

Focusing on the plaintiff's status avoids the subjectivity of the public interest analysis and draws a clearer line between the competing interests of constitutional protection of free speech and states' interest in protecting their citizens' reputations. Rather than focus on whether the matter involved is "relevant to self-government," *Rosenbloom*, 403 U.S. at 79, the *Gertz* test focuses on

1. Petitioner wisely concedes that Mr. Stark is a private individual. Mr. Stark has not achieved "pervasive fame or notoriety" nor has he "voluntarily inject[ed] himself" or been "drawn into a particular public controversy." *Gertz*, 418 U.S. at 323.

whether the plaintiff has sufficient access to the media to contradict the lie or error, and whether the plaintiff has "voluntarily exposed [himself] to increased risk of injury" by assuming public office or a role of "especial prominence in the affairs of society," *Gertz*, 418 U.S. at 344, 345. Private individuals, the Court notes, are more vulnerable to injury than public officials and public figures, but are also more deserving of recovery. 418 U.S. at 345.

If *Gertz* does not overrule *Hill*, it leaves private plaintiffs with an awkward dual standard. A false light invasion of privacy action protects a plaintiff's reputation, "with the same overtones of mental distress as defamation." *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 574 (1976) (quoting Prosser, *Privacy*, 48 Calif. L. Rev. 383, 400 (1960)). There are several other similarities between a false light action and a defamation action, most notably that "the matter publicized as to the plaintiff must be untrue." *Crump*, 320 S.E.2d at 87. The major difference is that the information published showing the plaintiff in a false light need not be defamatory, although it often is. *Id. See, e.g., Hill*, 385 U.S. 374 (where the published material showed plaintiff as heroic).

Actions for false light invasion of privacy and defamation may be pleaded together, but there can only be one recovery for a particular publication. Restatement (Second) of Torts, § 652E, comment b. In such a joint action, plaintiff would be subjected to two different standards for the same operative facts, status analysis under *Gertz* for the defamation claim and public interest analysis under *Hill* for the false-light claim, even though he is only entitled to one recovery. *See Invasion of Privacy*, 3 Hastings Const. L.Q. at 574. A private plaintiff would have to show "actual malice" to recover on the false light claim, but not to recover on the defamation claim, effectively precluding false light as an alternative basis for recovery. If the ultimate issue in both theories is knowledge with respect to falsity, there is no reason to make a required showing of it dependent on plaintiff's status in defamation cases, and the issue's status in false-light cases. *Id.* at 592. *See also* Phillips, *Defamation, Invasion of Privacy, and the Constitutional Standard of Care*, 16 Santa Clara L. Rev. 77, 99, 101 (1975) ("There appears to be no reason for the gross disparity in burden of proof in two such similar actions").

A concern that a lower standard than "actual malice" for private plaintiffs in false-light actions would have a "chilling effect" on the press is misplaced. A plaintiff in a false light action must still show that "the false light in which he was placed would be highly offensive to a reasonable person." *Crump*, 320 S.E.2d at 90 (citing Restatement (Second) of Torts § 652E(a)). "This requirement ensures that liability will not attach for the publication of information so innocuous that notice of potential harm would not be present."

Id. In addition, "recognition of retraction or apology as mitigating factors in the assessment of damages furnishes media defendants with an institutional mechanism for avoiding or minimizing unnecessary liability." *Id.*

Therefore, respondent argues that *Gertz* effectively overruled *Hill*, and the initial determination of whether a plaintiff must prove *Sullivan* "actual malice" should be based upon whether plaintiff is a public or private figure, and not upon whether the matter that allegedly places the plaintiff in a false light is of public interest.

Petitioner may argue that the Restatement (Second) of Torts has adopted *Time, Inc. v. Hill* and the "actual malice" standard for all false light actions. However, this is not strictly true. Section 652E(b) does state that the defendant in a false light action will be liable if he had "knowledge of or acted in reckless disregard as to the falsity of the publicized matter. . . ." But a caveat to the section notes that "[t]he 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. . . ." Comment d to that section notes that the full extent of the authority of *Hill* is "presently in some doubt" and that the Restatement adopts the rule of *Hill* "[p]ending further enlightenment from the Supreme Court." Courts that have adopted the Restatement rule have done so pending the Court's resolution of this issue, and in at least one case indicated the desire to apply a lower standard if *Hill* is overruled. *See McCall v. Courier-Journal and Louisville Times Co.*, 623 S.W.2d 882, 888 (Ky. 1981), *cert. denied*, 456 U.S. 975 (1982). Therefore, the Restatement does not serve as strong authority for arguing that the *Sullivan* "actual malice" standard should apply to private plaintiffs in false light actions.

C. *There Is A Trend Towards Lowering The Burden For Private Plaintiffs In Cases Involving Injurious Falsehoods Not of Public Concern.*

The *Sullivan* "actual malice" standard puts a difficult and expensive burden on a plaintiff. *Greenmoss*, 105 S. Ct. at 2950 (White, J., concurring). Plaintiffs frequently lose on summary judgment or never get to the jury because of insufficient proof of knowledge or reckless disregard. *Id.* Even if a plaintiff wins before the jury, verdicts are often overturned on appeal. *Id.* Mr. Hill, the plaintiff in *Time, Inc. v. Hill*, had litigated his case for eleven years before it was reversed by the Supreme Court. 374 U.S. at 411 (Fortas, J., dissenting). *Gertz* helps a private plaintiff in a libel case only to a limited extent. Under *Gertz*, a private plaintiff must show actual damage to reputation, "a burden traditional libel law considered

difficult, if not impossible to discharge," *Greenmoss*, 105 S. Ct. at 295 (White, J., concurring), in order to avoid a showing of "actual malice." And, he must still show "actual malice" in order to recover presumed and punitive damages. *Gertz*, 418 U.S. at 349.

In *Greenmoss*, the Court acknowledged that the burden the "actual malice" test places on plaintiffs is not constitutionally required in libel cases involving matters of purely private concern. 105 S. Ct. 2946. The Court balanced First Amendment concerns with the state interest in providing remedies for defamation and held that "[i]n light of the reduced constitutional value of speech involving no matters of public concern, . . . the state interest supports awards of presumed and punitive damages—even absent a showing of 'actual malice'." *Id.* Therefore, in defamation cases involving private matters, a private plaintiff may recover actual, presumed, and punitive damages without showing "actual malice." However, under the current interpretation of *Hill*, a private plaintiff who brought a false light action together with a defamation action would have to prove "actual malice" to recover on the false light claim, but not to recover on the defamation claim. To eliminate this inconsistency, and to reflect the "reduced constitutional value of speech involving no matter of public concern," *Greenmoss*, 105 S. Ct. at 2946, private plaintiffs bringing false light actions involving no matter of public concern or interest should not have to show "actual malice" on the part of the defendant. Respondent requests this Court to affirm the decision of the Court of Appeals on this issue.

II. A Private Person In A False Light Action Not Involving A Matter Of Public Concern Does Not Have To Prove Fault If Deliberate Falsity Or Reckless Disregard Of The Truth Is Not Required.

The false light action comprises one component of the right of privacy. Dean Prosser described it as an action which protects a plaintiff's reputation interest. *See generally* Prosser, *Privacy*, 48 Calif. L.Rev. 383 (1960). Defamation actions are closely related as they purport to protect the same interest, yet they remain a separate tort. Because both the District Court and the Court of Appeals in the instant case relied on case law that involved defamation actions, this argument will also refer to defamation cases to support the false light claim. It is often the case that a plaintiff will be successful in either a defamation or a false light action given the same set of facts.

A. *It is constitutional for a State to require a lower standard of liability in false light actions involving false statements of a non-public nature that are injurious to a private individual.*

The constitutionalization of false light privacy actions began with the U.S. Supreme Court's decision in *Time, Inc. v. Hill*, 385 U.S. 374 (1967). There the Supreme Court held that actual malice regarding the matter published had to be shown before a public figure plaintiff could recover. The actual malice standard first appeared in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), a libel case involving a public figure.

Since then this Court has struggled to strike a balance between the First Amendment's privilege of free speech and the right of privacy. Three factors have influenced the outcome of the cases. In order of the weight given to them by this Court, they are: whether the false information was public or private, whether the plaintiff was a public or private individual, and whether the defendant was media or non-media.

Recently this Court has begun to reverse the trend started in *Time*, and has exhibited a willingness to allow the States to decide liability issues in certain instances. These instances include the instant case, where traditional common law norms should govern because no First Amendment concerns are implicated.

Respondents' reliance on *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) is misplaced. *Gertz* was a libel case brought by a private individual against a newspaper. Unlike the instant case, however, the false information in *Gertz* involved a statement implicating "matters of general or public interest." *Id.* at 337. In *Gertz* this Court lowered the burden of proof for private plaintiffs in defamation actions. The Court departed from the actual malice standard espoused in *New York Times Co. v. Sullivan*, supra, where the plaintiff was a public figure. The *Gertz* Court recognized the important interests of a private individual who had not subjected himself to media attention.

Relying on both the private individual's personal reputation interest and the "constitutional valuelessness" of false speech, the *Gertz* Court lowered the barriers to private plaintiffs to succeed in defamation cases. *Id.* at 340. *Gertz*, however, left unanswered the question of when it should apply. *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939, 2942 (1985). Specifically, the opinion did not make clear whether more weight should be given to the plaintiff's status or the nature of the false information.

Gertz left to the States the task of setting the proper standard of liability. Admittedly, the *Gertz* opinion warned States not to impose liability without fault. *Id.* at 347. The more recent case of *Dunn & Bradstreet, Inc. v. Greenmoss Builders, Inc., supra*, however, lends strength to the suggestion that *Gertz* should be limited to its facts and that the Supreme Court is moving towards a lower

standard of proof in non-public defamation cases.

The *Gertz* opinion showed deference to the States when it said that "the States should retain *substantial latitude* in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual." (emphasis added) *Id.* at 345-46. The instant case falls within this description and this Court should respect the State of Marshall's legitimate interest in protecting the reputation interests of its citizens.

B. *After Greenmoss the States Should be Free to Choose Any Standard of Liability Where the Information is Non-Public*

In *Greenmoss* a construction contractor brought a defamation action against a credit reporting agency. The credit agency had issued a false credit report to a number of subscribers, stating that the construction contractor had filed for bankruptcy. *Id.* at 2941. The central issue focused on by the Court in *Greenmoss* was whether the false statement was a matter of public concern. *Id.* at 2941. Because of the non-public nature of the false information the Court concluded that *Gertz* liability requirements were inapplicable. *Id.* at 2945.

For the same reasons that *Gertz* was held inapplicable to *Greenmoss*, so it is inapplicable to the instant case. The District Court in the instant case correctly held that *Greenmoss* did not impose a strict liability requirement on the States where the plaintiff was a private individual and the false information was of a non-public nature. The case at bar presents a new set of facts for this Court to consider, involving a private plaintiff, a media defendant, and information published by the defendant that is non-public.

While the defendant in *Gertz* was a non-media defendant, the *Greenmoss*' Court's decision not to apply *Gertz* focused more on the non-public nature of the false statement rather than on the defendant's status. *Greenmoss* was a plurality opinion, yet all the opinions stressed the non-public element of the case. *Id.* at 2947, 2948, 2953. The *Greenmoss* Court itself attempted to limit *Gertz* by emphasizing that important aspects of the *Gertz* opinion were made "only within the context of public speech." *Id.* at 2945, n.4.

Justice White's concurrence in *Greenmoss* is worthy of close scrutiny, for its reasoning is particularly cogent and apposite to the instant case. Justice White refers directly to the type of fact pattern facing this Court today, saying:

> If *Gertz* is to be distinguished from [*Greenmoss*], on the ground that [*Gertz*] 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.

Id. at 2953. The "common law rules" to which Justice White refers are the traditional strict liability rules applied by the States in defamation cases.

Referring to the proper fault standard in such cases, Justice White concluded that "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." *Id.* A strong argument can be made in the instant case that the principles of *Greenmoss* should be applied. Because the *Greenmoss* Court focused on the nature of the information, that is what this Court should look at to determine whether *Gertz* should apply. The false information in both *Greenmoss* and the instant case is about bankruptcy, a matter which petitioner has already conceded is private. [R.9]. Additionally, *Greenmoss* determined that information of this nature is non-public.

Gertz involved a private plaintiff but public information. *Greenmoss* involved both a private plaintiff and private information, as does the instant case. The record states that Respondent neither filed for bankruptcy himself nor represented any clients who had filed bankruptcy. [R.4]. The fact that the instant case involved a media defendant should not lead this Court to apply *Gertz*. The focus of *Greenmoss* was the non-public nature of the false information. This factor led the Court to conclude that First Amendment protections should not be triggered, and this Court should follow this precedent.

While Justice White noted that the "driving force" behind *New York Times* and *Gertz* was a desire to "protect the press from intimidating damages liability that might lead to excessive timidity," he concluded that the Court "engaged in severe overkill in both cases." *Id.* at 2952. As an alternative to having a very high burden of proof for the plaintiff, he suggested putting a limit on recoverable damages. *Id.* This goal could be accomplished by either the courts or the legislature. It is a workable suggestion that would safeguard both the press' First Amendment interests and the individual's reputational interests.

The three Justices joining the main opinion in *Greenmoss* also bear out Justice White's concurrence. Justice Powell, writing for himself and Justices Rehnquist and O'Connor, discussed the balancing analysis employed in *Gertz* and then applied it to the facts in *Greenmoss*. The *Greenmoss* Court identified two separate balancing analyses which should be employed, depending on whether the individual harmed is a public or private figure.

The Court recognized that, where a public figure was involved,

the balancing analysis would be between "First Amendment concerns and the limited state interest present in the context of . . . actions brought by public persons." *Id.* at 2944, quoting from *Gertz*, 418 U.S. at 343. But where the plaintiff was a private individual the Court acknowledged that the state's interest became "strong and legitimate". By contrast, the First Amendment interest waned when the defamatory statements involved no issue of public concern. *Id.* at 2944-45.

The Court explained the need for a greater protective role for the state when the plaintiff is a private individual in the following way:

> . . . private persons have not voluntarily exposed themselves to increased risk of injury from defamatory statements and . . . they generally lack effective opportunities for rebutting such statements.

Id. at 2944, quoting from *Gertz* at 345. The Court is saying that a public figure must bear the risk of false utterances by the press whereas, when a private individual's reputation is at stake the risk-bearer becomes the publisher of the defamatory statements.

C. *Allowing the State of Marshall to Apply Strict Liability in This Case Will Not Offend Existing First Amendment Philosophy.*

The discussion in *Greenmoss* about the private individual's reputational interest points towards a willingness on the part of the Supreme Court to let the States regulate themselves when both the plaintiff and the false information are non-public, as in the instant case. The Court strongly endorses the private individual's reputational interest when it says that "the individual's right to the protection of his own good name 'reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, . . . is left primarily to the individual States under the Ninth and Tenth Amendments. . . .'" *Id.* at 2945, quoting from *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (concurring opinion) and *Gertz*, 418 U.S. at 341.

Greenmoss lends strong support to the notion that false non-public statements do not warrant constitutional protection. This Court has consistently reaffirmed its belief that "matters of public concern [are] at the heart of the First Amendment's protection." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978), quoting *Thornhill v. Alabama*, 310 U.S. 88 (1940). *See also NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *Carey v. Brown*, 447 U.S. 455 (1980).

The speech involved in the instant case, as in *Greenmoss*, is a

"matter of purely private concern." *Connick v. Myers*, 461 U.S. 138 (1983). In such cases, allowing the States to set their own liability standards will not offend the First Amendment. The Oregon Supreme Court described the "private speech" areas as follows:

> [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. The facts of [such a] case are wholly without the First Amendment concerns with which the Supreme Court of the United States has been struggling.

Harley-Davidson Motorsports, Inc. v. Markley, 279 Or. 361, 366, 568 P.2d 1359, 1363 (1977) *Accord, Rowe v. Metz*, 195 Colo. 424, 426, 579 P.2d 83, 84 (1978); *Denny v. Mertz*, 106 Wis. 2d 636, 661, 318 N.W.2d 141, 153, *cert denied*, 459 U.S. 883 (1982).

In these cases, the States should be allowed to rely on common law tradition, allowing it to evolve naturally. The instant case presents such a situation, and this Court should reverse the findings of the Court of Appeals on the issue of fault.

III. Even If Negligence Must Be Proven By The Plaintiff The Application Of The Doctrine Of Res Ipsa Loquitur Satisfies Constitutional Requirements Of Proof.

Although it is evident that a media defendant may be held strictly liable for a publication that casts a false light upon a private person, it is also clear that even if a negligence standard is adopted, the settled doctrine of *res ipsa loquitur* operates as proof of that negligence. The doctrine simply allows an inference of a defendant's negligence to arise, based upon the happening of an accident and a description of some of the facts surrounding it, without direct evidence as to the defendant's conduct at the time the negligence occurred. Harper, James and Gray, 19.5 *The Law of Torts* 21 (2d. ed. 1986). The development of the constitutional limits on proof in defamation and false light actions and the defendant's, responsibility for the lack of a secure printing system make this case fit squarely within the doctrine.

A. *The Negligence Standard Adopted By The Court Of Appeals Is A Broad, Undefined Requirement.*

The standard articulated in *Gertz v. Welch*, 418 U.S. 323 (1978), whereby private figure plaintiffs alleging libel against media defendants need only prove fault to recover has proven to be a vague standard. Smith, *The Rising Tide of Libel Litigation: Implications of the Gertz Negligence Rule*, 44 Mont. L.Rev. 71, 1983. First, the *Gertz* Court did not expressly state that negligence must

be proven, but only that a degree of fault be shown for defamation to lie. *Id.* at 347. Subsequently, only lower federal and state courts have determined that in defamation actions involving private plaintiffs in a matter not of public concern, negligence is the appropriate standard. *Wood v. Hustler* 736 F.2d 1084 (5th Cir. 1984), *Crump v. Beckley*, 320 S.E.2d 70 (1984). Secondly, neither *Gertz* nor other Supreme Court decisions that have referred to the *Gertz* standard have defined the components or boundaries of negligence in regard to libel litigation. *Gertz*, at 347; *Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469 (1975). Rather, the Court left the determination of which standard of liability will apply in libel actions to the discretion of the states and did not prescribe the requirements that would be necessary to prove that liability.

Extending from the sphere of defamation to false light actions the requirement that negligence must be proven [R.7], does not impart any further constitutional constraints on the method used to reach negligence. *Dresbach v. Doubleday & Co., Inc.*, 518 F. Supp. 1285 (D.D.C. 1981); *Bickler v. Union Bank and Trust Company of Grand Rapids*, 745 F.2d 1006 (6th Cir. 1984). Therefore, the wide liability parameters roughly outlined in "*Gertz* appl[y] equally to false light and defamation cases" and allow states a broad determination of the components of negligence in both causes of action. *Wood v. Hustler Magazine*, 736 F.2d 1084 (5th Cir. 1984). For the reasons stated below, it is clear that a state may, in proper cases, apply the doctrine of *res ipsa loquitur* and not overstep the vague constitutional requirement that a plaintiff in a false light action prove negligence.

B. *Res Ipsa Loquitur Satisfies The Requirement Of Proof In A False Light Action Where The Offensive Statement Is False And Is Due To Defendant's Negligent Operation Of Its Newspaper.*

The defendant concedes that the information about the plaintiff appearing in defendant's newspaper was false, not of public concern and due to an unknown source. [R.3,4]. These concessions make the instant case particularly receptive to the doctrine of *res ipsa loquitur* and lessen concerns that its application will impact First Amendment freedoms. Franklin, *What Does 'Negligence' Mean in Defamation Cases*, 6 Comm/Ent L.J. 259 (1981).

1. False statements of fact regarding matters of purely private concern receive minimal First Amendment protection.

The *Gertz* Court, as well as setting out a reduced standard for finding media defendants liable for defamation, reiterated a theme

common in First Amendment debate, that "there is no constitutional value in false statements of fact." *Id.* at 340. The Court later afforded a modicum of First Amendment protection to these statements but the long dicta in the case regarding the Court's belief that "the erroneous statement of fact is not worthy of constitutional protection" underscored the holding that protection has been granted only in light of competing freedom of speech values. *Id.* at 340-341. The Court went so far as to equate false statements of fact with inflammatory speech, as being of "no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Gertz* at 340, citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). The low value placed on false statements and the corresponding slight protection the statements are afforded has been followed in state courts. *See Miller v. KSZ, Inc.*, 626 P.2d 968, 974 (Utah 1981) ("Society has no interest in the dissemination of statements which are false and which could have been prevented through the exercise of reasonable care.") The defendant has conceded that the material regarding the plaintiff was false and any negligence requirement that is imposed on this speech need therefore only conform to the lessened First Amendment protection that *Gertz* indicates must be adopted in false statement actions.

The Supreme Court has also recently indicated that private speech "is of less First Amendment concern" than public speech. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S.Ct. 2939 (1985) at 2945. The *Greenmoss* Court distinguished private from public statements and held that in the former, "while such speech is not totally unprotected by the First Amendment . . . its protections are less stringent." *Id.* at 2946. The false statement in the case at bar, that the plaintiff was bankrupt, was not of public concern. With the reduced First Amendment protection regarding this speech, no showing is required that the proof of negligence meet more than a *res ipsa loquitur* standard.

Gertz and *Greenmoss* evidence a clear progression in the law that demands that false statements regarding private individuals are to be given only a low level of First Amendment protection. Since the court below has adapted these holdings to find that a negligence standard governs false light actions, it necessarily follows that the most stringent test of negligence need not be proven. [R.9.] The doctrine of *res ipsa loquitur* serves as strong evidence of proof in light of the lowered First Amendment barriers.

C. *The Doctrine Of Res Ipsa Loquitur Is A Procedurally Sound Means To Prove Negligence In Tort Actions That Demand A Balancing Of Interests.*

An action in false light requires that a media defendant be shown to have: (1) published; (2) a matter concerning another, (3) that would be offensive to a reasonable person. Restatement (Second of Torts) § 652E (1976). The Court below has further required that negligence as to the publication of the matter must be asserted and proven. [R.9.] In certain false light actions, the doctrine of *res ipsa loquitur* is a valid means to satisfy the negligence requirement and it is particularly applicable to the case at bar.

1. *Res ipsa loquitur* affords procedural safeguards for defendants.

The doctrine of *res ipsa loquitur* enables a plaintiff to establish a prima facie case of negligence by proving that the nature of the accident could only occur if the defendant was negligent. W. Prosser, *Handbook of the Law of Torts*, § 39 at 214 (4th ed. 1971). The doctrine is not employed to circumvent the negligence requirement, nor does it operate as a pseudonym for strict liability. Rather, it is a procedure that establishes the existence of negligence and, like a showing of specific negligence, demands that essential elements be demonstrated before it may be used. W. Prosser, § 39 at 214.

Res ipsa loquitur has been adopted by every state, although it has been referred to and defined in different ways. J. Henderson & R. Pearson, *The Torts Process*, 429 (2 ed. 1981). The elements that form the basis of these definitions are satisfied only if: (1) the accident would not normally have occurred absent some negligence; (2) the harm producing instrumentality was under the exclusive control of the defendant; and (3) the plaintiff was not contributorily negligent. Prosser, Keeton, *Prosser & Keeton on the Law of Torts*, § 78, at 545 (5th ed. 1984). These elements serve both to define the doctrine and act as checks so that this negligence standard is not summarily applied simply because it has been pleaded. Moreover, because the application of the doctrine creates only a permissive inference that negligence exists, its use should not be equated with a conclusive finding of fault. *Watzig v. Tobin*, 292 Or. 645, 642 P.2d 651 (1982). As stated by the United States Supreme Court:

> . . . *res ipsa loquitur* means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient.

Sweeney v. Erving, 228 U.S. 233, 240 (1913). *See also, D.C. Transit Sys. Inc. v. Slingland*, 266 F.2d 465, 469 (D.C. Cir. 1959) ("where *res*

ipsa loquitur applies, . . . the jury 'are at liberty to decide for themselves whether the preponderance is with the plaintiff even where there is no evidence to countervail the inference.' ")

Application of the doctrine's logic has shown that its procedures may be used both to infer negligence and uphold constitutional requirements of proof. A recent Supreme Court of Hawaii decision held that a defendant can be found negligent where neither direct nor expert testimony is offered. *Kohn v. West Hawaii Today, Inc.*, 65 H. 584, 656 P.2d 79 (1982). In *Kohn*, the court decided that although there was no direct evidence offered to show that the defendant negligently failed to confirm a libelous story, the jury could properly infer that because the newspaper published the misleading article, the staff "failed to follow the procedures normally taken to ensure accuracy." 656 P.2d at 83. The decision impliedly supports the use of a *res ipsa loquitur* standard where circumstantial evidence is sufficient to infer negligence.[2] Further, the court's holding rejected the contention that *res ipsa loquitur*, applied in defamation actions, "could produce a form of strict liability de facto and thus circumvent the constitutional requirement of fault". Restatement (Second) of Torts § 508B, comment g (1977).

The doctrine is an accepted means to prove negligence and both the elements it requires and its procedural application serve as strong evidence that the broad *Gertz* requirement of proof of fault is properly satisfied. The Court of Appeals erred in holding that the doctrine of *res ipsa loquitur* cannot satisfy the constitutional requirement of proof.

D. *The doctrine of res ipsa loquitur is particularly applicable in false light actions, where the defamatory falsehood is a product of a media defendant's failure to protect its printing system.*

The instant action presents a case of first impression. Prior false light and defamation cases have primarily centered upon the conflict between the desire to redress injured plaintiffs and the need to uphold free speech concerns. *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974) ("newsworthiness" privilege accorded newspaper only overridden on showing that reporter recklessly included false statements regarding plaintiffs in article); *Appleby v. Daily Hampshire Gazette*, 395 Mass. 32, 487 N.E. 2d 721 (1985) (Newspaper found not liable for relying on stories received from wire service

2. *See* Harper, James and Gray, 19.5 *The Law of Torts* 27 (2d. ed.) "It has been ably argued that there is nothing distinctive about the doctrine of *res ipsa loquitur*; that the cases where it is involved represent simply an application of well recognized principles of inference and circumstantial proof."

as burden of checking information would impinge First Amendment freedoms). The false light which the defendant cast upon Bradley Stark was not the result of the exercise of freedom found central in prior false light and defamation actions, but was rather due to the negligent maintenance of the defendant's printing system.

It is apparent that there exists an overriding interest in preventing "apprehensive self-censorship" by the publishing media. *Stone v. Essex County Newspapers, Inc.*, 367 Mass. 849, 860, 330 N.E.2d 161, 168 (1975). *See also, Gertz* at 340. This overriding interest has been most visible where publishers, editors and reporters have been held to a relatively low standard of care. Publishers have not been required "to do independent research to verify everything written by a reputable author." *Dresbach*, at 1292. Editors have been shielded from "duplicating their reporters' work and rechecking with specificity all of their sources in order to establish a defense to libel claims [since this would] operate to dampen the free exercise of the rights guaranteed by the First Amendment." *Karaduman v. Newsday, Inc.*, 51 N.Y.2d 531, 542-43, 416 N.E.2d 557, 562 (1980). Finally, reporters have not been held liable "for reported falsehoods which could not have been avoided by standard practices of good journalism." Spencer, *Establishment of Fault in Post-Gertz Libel Cases*, 21 St. Louis U.L.J., 374, 383 (1977).

The circumstances of the defendant's negligence, however, raise none of the inferences regarding reporters' privileges, the value of free expression or the fear of self censorship that have perpetuated the low level of due care demanded of the media. The material that placed the plaintiff in a false light in the instant case, was not published as the result of a reporter's failure to adequately investigate facts or sources, or even because of negligent proofreading. [R.1-4.] Rather, the statements were allowed to be published because the defendant's printing system was neither secure nor provided for a post-printing, proofreading check.

The article was printed on Sunday afternoon for a Monday distribution. [R.3]. This timetable certainly provided adequate opportunity for a final proofreading and the failure to enact this precaution gives rise to an inference of negligence. As one commentator has noted, "this type of error is the only one that appears not to involve any real degree of journalistic skill or judgment." Franklin, at 271. It is an error solely dependent upon the defendant's failure to provide a secure printing system and the existence of failure may be inferred through the doctrine of *res ipsa loquitur.*

False light and defamation actions based upon the inclusion or unintended material have not been frequently litigated, but the few existing cases do provide support for the application of a *res ipsa loquitur* standard. The Michigan Court of Appeals has recently held

that a defendant newspaper could not escape liability for damages caused by a libelous advertisement by arguing that the printing procedure "was highly automated and that the libelous matter was inserted by an unknown employee." *Pettengill v. Booth Newspapers, Inc.*, 88 Mich. App. 587, 588, 278 N.W.2d 682, 683 (1979). The *Pettengill* court did not explicitly note that *res ipsa loquitur* was pleaded but it did decide that "defendant [cannot] hide behind the theory that a "phantom writer" is responsible for its negligence." *Id.* at 591, 684.

Pettengill contained the elements that form *res ipsa loquitur*. First, the plaintiff was clearly not contributorily negligent. Second, the Court's statement that the defendant could not hide behind a "phantom writer" theory and the lack of any direct evidence implicating the defendant, indicates that the court found that the defendant possessed exclusive control over the printing process and that the accident would not have occurred absent some negligence. In effect, although the court did not overtly apply *res ipsa loquitur*, the basic principles of the doctrine were followed in *Pettengill*. *See also* J. Henderson & R. Pearson at 429.

A similar issue was decided by the New York Court of Appeals in *Chapadeau v. Utica Observer Dispatch, Inc.*, 38 N.Y.2d 196, 341 N.E.2d 569 (1975). There, it was held that a typographical error which allegedly libeled the plaintiff was not sufficient to result in liability. The negligence in the instant case, however, resulted from the inclusion of an entire sentence that placed the plaintiff in a false light. The sentence in the "Law News" column was three lines in length, erroneously reported that the plaintiff had filed for bankruptcy (although an attorney's personal bankruptcy report had never before been noted in the column), and was clearly outside the "limited number of typographical errors" that had been excused by the *Chapadeau* court. *Id.* at 572. Additionally, the cases may be distinguished through the observation in *Gertz* which suggested that statements which a reasonable editor should realize will cause harm, are to be judged more rigorously than errors which do not warn of "defamatory potential." *Gertz* at 348. *See also* Franklin at 271, n 71.

The false statement in the "Law News" column falls within the sphere of statements which are to be rigorously judged. The fact that either a secure printing system or a post-printing proofreading procedure would have caught the false statements, indicates that the defendant can be charged with the responsibility for allowing the statement to be printed.

Finding the defendant negligent under a *res ipsa loquitur* standard will not compromise the newspaper's First Amendment freedoms, as none are at issue. This action "most closely resembles more common forms of negligence and might benefit most from the use of

outside analogies." Franklin, at 271.

Thus, the failure of the defendant to prevent the distribution of the injurious material is not unlike malpractice actions that are based upon the failure to remove foreign objects from a patients body. *See, e.g., Burke v. Washington Hosp. Center*, 475 F.2d 364 (D.C. Cir. 1973); *Tice v. Hall*, 310 N.C. 589, 313 S.E.2d 565 (1984). These type of malpractice suits are generally held to warrant application of the doctrine. Similarly, the mere existence of a falsehood that casts a private person in a false light, when caused by an unsecure printing system demands that *res ipsa loquitur* be used.

It is clear that concrete application of the doctrine to this false light suit is feasible and constitutional. The system was under the defendant's control, the plaintiff was certainly not contributorily negligent and the fact that either a more secure printer or a post-printing proofreading check would have prevented the injury indicates that the doctrine is applicable. Finally, the absence of any threats to the defendant's First Amendment freedoms dictates that *res ipsa loquitur* may act as sufficient proof of negligence, within the confines of this suit. The defendant should not be allowed to hide behind the Amendment and the Court of Appeals decision denying the application of the doctrine should be reversed.

CONCLUSION

For the foregoing reasons, respondent requests that this Court affirm the United States Court of Appeals for the Thirteenth Circuit on the first issue and reverse on the second and third issues.

Respectfully submitted,
Bradley Stark

By his attorneys
September 26, 1986

APPENDIX

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

RESTATEMENT (SECOND) OF TORTS

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.

Caveat:

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

THE JOHN MARSHALL LAW REVIEW

INDEX

VOLUME 20