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CASES NOTED

LIBEL: A TWO-TIERED CONSTITUTIONAL STANDARD

American Opinion,[1] a magazine of the John Birch Society, published an article claiming that the murder trial of a Chicago police officer was a frame-up and part of a nationwide Communist conspiracy to discredit the police. The article falsely accused Elmer Gertz, a reputable Chicago attorney retained in civil litigation against the officer, of being a principal architect of the "frame-up," a "Leninist" and a "Communist-fronter."[2] A reprint of this article was handed to his law partner's wife while she was shopping, and soon afterward Gertz initiated a diversity action[3] for libel[4] in the United States District Court for the Northern District of Illinois. The jury awarded him $50,000, but the District Court set aside the verdict and granted defendant's motion for judgment *n.o.v.*, holding that the constitutional privilege enunciated in *New York Times Co. v. Sullivan*[5] applied to discussion of any matter of public interest even though private individuals such as Gertz might be defamed.[6] Gertz appealed to the Court of Appeals for the Seventh Circuit, which affirmed the District Court,[7] citing the Supreme Court's intervening decision in *Rosenbloom v. Metromedia, Inc.*[8] On certiorari, the United States Supreme Court *held*, reversed and remanded: The *New York Times* protection does

1. Published by respondent Robert Welch, Inc.

2. In addition to being called a Communist and a conspirator, Gertz was charged with having a criminal record, being an official of the "Marxist League for Industrial Democracy," and being an officer of the National Lawyers Guild which was described as a Communist front organization primarily responsible for planning the Communist attack on Chicago police during the 1968 Democratic convention.

3. The office of *American Opinion's* managing editor was in Boston. Gertz claimed that he had been injured in his professional reputation and practice by defendant's publications, and sought actual damages of $10,001 and punitive damages of $500,000 in each of two counts. Gertz v. Robert Welch, Inc., 306 F. Supp. 310 (N.D. Ill. 1969).

4. Gertz brought the action under Illinois libel law. In ruling on defendant's motion to dismiss for failure to state a claim upon which relief can be granted, the District Court held that causing prejudice to a person in his profession or trade by falsely labeling him a Communist established a per se case of defamation under Illinois law and that plaintiff was not, therefore, required to plead special damages. Gertz v. Robert Welch, Inc., 306 F. Supp. 310, 311 (N.D. Ill. 1969).

5. 376 U.S. 254 (1964) [hereinafter referred to as *New York Times*], holding that a public official may not recover damages for a defamatory falsehood relating to his official conduct unless he proves the statement was made with actual malice or reckless disregard for the truth.

6. After finding that the defendant, albeit negligent, had not acted with actual malice or in reckless disregard of the truth, the court relied in part on Rosenbloom v. Metromedia, Inc., 415 F.2d 892 (3d Cir. 1969) for its holding. Gertz v. Robert Welch, Inc., 322 F. Supp. 997, 999 (N.D. Ill. 1970).

7. Gertz v. Robert Welch, Inc., 471 F.2d 801 (7th Cir. 1972).

8. 403 U.S. 29 (1971) [hereinafter referred to as *Rosenbloom*], holding that when a matter of public or general interest is published, a private individual may recover for a libel only if he can prove that the publication was made with knowledge that it was false or with reckless disregard for the truth.

not extend to publishers or broadcasters of defamatory falsehoods about private individuals, but states may not impose liability without fault, may not permit recovery of punitive damages when liability is not based on knowledge of falsity or reckless disregard for the truth, and may not allow compensation other than on evidence of actual injury when liability is established under a less demanding standard than the *New York Times* test.[9] *Gertz v. Robert Welch, Inc.*, 94 S. Ct. 2997 (1974).

Beginning with *New York Times*, and for a decade thereafter,[10] the Supreme Court has recognized a basic conflict between the law of defamation and the first amendment, particularly when matters of public interest are involved.[11] From the first, the Court's thrust[12] has been to promote "uninhibited, robust, and wide-open debate"[13] by providing publishers and broadcasters "breathing space"[14] so that undesirable self-censorship did not result from fear of potentially crippling libel judgments. To that end the Court gradually broadened the *New York Times* standard[15] to protect any medium[16] from assault by any plaintiff involved in a matter of general or public interest[17] unless it knowingly published a defamatory falsehood or did so with reckless disregard for the truth.[18] A balance strongly in favor of first amendment rights was struck.

In *Gertz* the Court clearly does not abandon its goal of avoiding self-censorship by the media, but by drawing from the *Rosenbloom* standard with the one hand and giving back only a little with the other, the Court has significantly reworked the balance to the detriment of free press and speech.[19] First, the Court retracted the scope of

9. The case was remanded "[b]ecause the jury was allowed to impose liability without fault and was permitted to presume damages without proof of injury . . . ." 94 S. Ct. at 3013.

10. For a comprehensive history of the development of the law of defamation during this period, *see, e.g.*, Comment, *Times to Rosenbloom: A Press Free from Libel—The Editors Speak*, 27 U. MIAMI L. REV. 109 (1972); Comment, *The Expanding Constitutional Protection for the News Media from Liability for Defamation: Predictability and the New Synthesis*, 70 MICH. L. REV. 1547 (1972) [hereinafter cited as MICHIGAN]. *See generally* W. PROSSER, THE LAW OF TORTS §§ 111-16 (4th ed. 1971).

11. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 44 (1971) (opinion of Brennan, J.).

12. For a list of the most important defamation cases decided by the Supreme Court, *see id.* at 30 n.1.

13. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

14. *Id.* at 272.

15. See note 5 *supra*.

16. Although the Court does not directly consider the issue, there is good reason to believe that the *New York Times* privilege extends to private individuals and institutions as well as to publishers and broadcasters. *See* Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 30 (1971); RESTATEMENT (SECOND) OF TORTS, Explanatory Notes § 581A, comment *h* at 137 (Tent. Draft No. 20, 1974).

17. On the problem of determining what constitutes a "matter of general or public interest," *see* MICHIGAN, *supra* note 10, at 1560-65.

18. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 52 (1971).

19. It is significant to note, however, that Ramsey Clark, currently Chairperson of the National Advisory Council for the A.C.L.U., argued Mr. Rosenbloom's side of the case, and that the A.C.L.U. has officially adopted a position in favor of permitting private individuals to

the *New York Times* privilege to leave the media with protection only in cases concerning public officials or public figures. Then, the Court provided a set of constitutionally based rules to effectively limit the amount of damages that might be recovered by persons in a libel action.[20] In effect, the Court created a two-tiered constitutional standard for libel law, the first tier being the *New York Times* privilege that may be invoked in libel actions involving plaintiffs with public status,[21] and the second being the *Gertz* rule, a less vigorous protection of publishers and broadcasters from liability and damages when injury is claimed by plaintiffs of private status.

Aside from the substantial contraction of its scope, the first tier remains essentially unchanged by the *Gertz* decision. So long as the press and broadcasters do not knowingly publish defamatory falsehoods or recklessly disregard the truth, they have protection against libel actions by public officials and public figures. If a plaintiff does establish liability,[22] the proof and measure of damages apparently remains as before.[23]

The second tier, however, presents an entirely new situation. As Justice White states in his dissent, *Gertz* federalizes "major aspects of libel law by declaring unconstitutional in important respects the prevailing defamation law in all or most of the 50 States."[24] First, it prevents the states from imposing liability without fault.[25] Justice Powell implicitly assumes that negligence will be the basis of liability employed by most or all states, although the option remains open to adopt other bases such as the *New York Times* rule or the complete elimination of libel, as previously suggested by Justice Black.[26]

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recover in libel actions. F. HAIMAN, THE FIRST FREEDOMS: SPEECH PRESS ASSEMBLY 23 (1972). *See* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 517-62 (1970). *But see* Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 214-16 (1890).

20. But the Court "took" from those private citizens who might have occasion to bring a libel action not arising out of a matter of general or public interest. Prior to *Gertz* no restrictions on damages applied to their suits.

21. On the determination of which plaintiffs have public status, *see* Note, *The Invasion of Defamation by Privacy*, 23 STAN. L. REV. 547, 565 (1971). A possible inference from this Note is that the current Court, in future cases, might further diminish the scope of the *New York Times* privilege by limiting the "public" plaintiff category to those who "either *voluntarily* [enter] the forum of discussion . . . or *voluntarily* [attain] a position that invites public attention." *Id.* (emphasis added). Consider Justice Powell's statement: "Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, *but the instances of truly involuntary public figures must be exceedingly rare* . . . ." 94 S. Ct. at 3009 (emphasis added).

22. On the problem of the meaning of "actual malice," *see* MICHIGAN, *supra* note 10, at 1565-67, 1573.

23. *See generally* Arkin and Granquist, *The Presumption of General Damages in the Law of Constitutional Libel*, 68 COLUM. L. REV. 1482 (1968).

24. 94 S. Ct. at 3022.

25. For an explanation of strict liability in the common law of defamation, *see* RESTATEMENT (SECOND) OF TORTS, Explanatory Notes § 580, comment *b* at 122 (Tent. Draft No. 20, 1974).

26. *E.g.*, Curtis Publishing Co. v. Butts, 388 U.S. 130, 170-72 (1967) (concurring opinion); New York Times Co. v. Sullivan, 376 U.S. 254, 293-97 (1964) (concurring opinion). *See generally*

Gertz also prohibits the award of punitive damages, usually the most significant component of damages in a libel suit,[27] unless knowledge of falsity or reckless disregard for the truth is shown. This leaves most plaintiffs with compensation only for actual damages[28] and delivers all but perhaps the smallest of newspapers or broadcast stations from fear of financial collapse because of libel actions.[29]

Third, *Gertz* requires proof that actual injury occurred as a result of the libel unless the "actual malice" test of *New York Times* is met. Justice Powell offers some elucidation of the meaning of "actual injury":

> Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering.[30]

He also comments on the required proof: "[A]ll awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury."[31]

The reasons behind the creation of this second constitutional tier appear to be the very ones rejected by the *Rosenbloom* plurality. In *Gertz*, Justice Powell declares:

> We would not lightly require the State to abandon [its legitimate interest in compensating individuals injured by defamation] for . . . the individual's right to protection of his own good name . . . [is] "a concept at the root of any decent system of ordered liberty."[32]

Justice Brennan pointed out in *Rosenbloom*, however, that

> The *New York Times* standard was applied to libel of a public official or public figure to give effect to the [First] Amendment's function to encourage ventilation of public issues, not because the public official has any less interest in protecting his reputation than an individual in private life.[33]

T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 624-26 (1970); Cahn, *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U.L. REV. 549 (1962); Kalven, *The Reasonable Man and the First Amendment: Hill, Butts, and Walker*, 1967 SUP. CT. REV. 267, 292-95.

27. 94 S. Ct. 2997 (1974). Gertz demanded $10,000 compensatory damages, as compared to $1,000,000 punitive. *See also Rosenbloom* (claim for $25,000 compensatory; $725,000 punitive); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) (claim for $60,000 compensatory; $3,000,000 punitive); *New York Times* ($500,000 total claim).

28. Although, in the absence of proof of actual damages, nominal damages are clearly possible if liability is established.

29. The cost of litigation is also important here.

30. 94 S. Ct. at 3012.

31. *Id.*

32. *Id.* at 3008, *citing* Rosenblatt v. Baer, 383 U.S. 75, 92-93 (1963).

33. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 46 (1971).

Justice Powell argues that private individuals are more vulnerable to injury by false statements because they do not have access to the "channels of effective communication" enjoyed by public figures.[34] Yet Justice Brennan noted that

> In the vast majority of libels involving public officials or public figures, the ability to respond through the media will depend on the same complex factor on which the ability of a private individual depends: the unpredictable event of the media's continuing interest in the story.[35]

Justice Powell completes his argument by suggesting that "public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehoods,"[36] while private individuals have not. But Justice Brennan recognized that

> Voluntarily or not, we are all "public" men to some degree. . . . [T]he idea that certain "public" figures have voluntarily exposed their entire lives to public inspection, while private individuals have kept theirs carefully shrouded from public view is, at best, a legal fiction.[37]

Thus, there was no new reasoning behind the decision to remove private individuals from the scope of the *New York Times* privilege.[38] More than anything else, the decision reflects the change in the Court's composition subsequent to the *Rosenbloom* decision.[39]

Nor was there much new thinking in the constitutional limitations imposed on state libel actions.[40] The idea that states should not be allowed to impose liability without fault and that only actual damages should be recoverable was fully developed in the dissenting opinions of Justices Marshall and Harlan in *Rosenbloom*.[41] Once again, change in the composition of the Court was the determinative factor.

On first sight the decision does not seem too ominous for publishers and broadcasters.[42] The threat of large judgments because of punitive damages has been eradicated. Publication of defamatory falsehoods about anyone must be made at least negligently, and actual

34. 94 S. Ct. at 3009.

35. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 46 (1971).

36. 94 S. Ct. at 3010.

37. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 48 (1971).

38. For example, much more consideration could have been given to the alternatives to damages. *See* RESTATEMENT (SECOND) OF TORTS, Special Note on Alternative Remedies to Damages at 295-97 (Tent. Draft No. 20, 1974).

39. Justice Powell and Justice Rehnquist joined the Court subsequent to *Rosenbloom*. Most likely their presence was a significant factor in Justice Blackmun's change of position.

40. Sections 580 and 621 of Tentative Draft No. 20 of the Restatement (Second) of Torts anticipated all three constitutional prohibitions on the basis of previous opinions of the Court. One law review commentator had even analyzed the potential defects of such prohibitions prior to the *Gertz* decision. Note, *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 38, 228 (1971).

41. 403 U.S. at 62-87 (1971).

42. At least one member of the media saw it that way. TIME, July 8, 1974, at 58.

harm must be proved in court before any compensatory damages can be recovered, a task traditionally recognized as difficult.[43]

Yet a constitutional decision such as this was not made without reason.[44] Despite the burdens for a particular plaintiff, he now has a much better chance of "stinging" the media with a lawsuit. With the privilege of publishers and broadcasters removed, a private citizen can quite easily get a jury trial because the direction of recent cases has been to view all libel as actionable per se.[45] Even if he doesn't recover the damages allowed under the new standard and vindicate himself in the process, he is still able to harass the defendant with a trial.[46]

More importantly, *Gertz* reverses an attitude. The lower courts,[47] plaintiff's attorneys,[48] law review commentators,[49] and even the American Law Institute[50] have assumed that the *New York Times* privilege pre-empted the field of defamation except in the rarest of cases. The decision will encourage potential plaintiffs and their attorneys to be bold, with the likely result that many more publishers and broadcasters will find themselves defendants in libel actions in the years ahead.

BRADFORD SWING

IRS PREVENTED FROM SEIZING DOCUMENTS: ATTORNEY ASSERTS CLIENT'S FIFTH AMENDMENT PRIVILEGE

Dr. Mason, a taxpayer, was visited by Special Agents of the Internal Revenue Service, who informed him that his tax returns were under investigation. He immediately called his accountant, defendant Candy, who advised Dr. Mason not to show any of his records to the agents. Defendant Candy then called defendant Kasmir, an attorney,

43. W. PROSSER, THE LAW OF TORTS § 112, at 765 (4th ed. 1971).

44. Justice Blackmun suggested that it was to resolve the "uncertainty" of a "sadly fractionated" Court in *Rosenbloom*. 94 S. Ct. at 3014.

45. RESTATEMENT (SECOND) OF TORTS, Explanatory Notes § 569, at 59 (Tent. Draft No. 20, 1974). It is interesting to note that the Supreme Court's decision to prohibit imposition of strict liability has removed the basis for the per se/per quod controversy, and thus has ended the matter. *Id.*

46. Note that the burden of proving truth lies with the defendant once a per se case of libel is established.

47. For a list of decisions by lower courts assuming the *Rosenbloom* plurality opinion to have become the established law, see Note, *Misinterpreting the Supreme Court: An Analysis of How the Constitutional Privilege to Defame Has Been Incorrectly Expanded*, 10 IDAHO L. REV. 213, 217 (1974).

48. On the attitude of attorneys, see *id.*

49. One commentator expressed support of the standard ultimately adopted in *Gertz*, but seemed resigned to the inevitability of the *Rosenbloom*, or even of Justice Black's, standard. Note, *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 38, 227-28 (1971).

50. RESTATEMENT (SECOND) OF TORTS, Chapter 24A, at 133-45 (Tent. Draft No. 20, 1974).