Mississippi College Law Review

Volume 5
Issue 2 *Vol. 5 Iss. 2*

Article 6

1985

Libel - Constitutional Law - Individual Involved in Matter of Legitimate Public Interest Must Prove Actual Malice to Recover for Defamation in Mississippi - Ferguson v. Watkins

Greg Weber

LIBEL – CONSTITUTIONAL LAW - Individual Involved in Matter of Legitimate Public Interest Must Prove Actual Malice to Recover for Defamation in Mississippi. *Ferguson v. Watkins*, 448 So. 2d 271 (Miss. 1984)

FACTS[1]

Physicians Drs. Robert P. Tate, Charles B. Ferguson and David S. Anderson directed emergency room medical services at Marshall County Hospital. The hospital had operated at a loss for several years before Alvin Word III was hired as its administrator on June 1, 1977.

One of Word's principal assignments was to get the essentially publically funded hospital into good financial shape. In doing this, the administrator "stepped on some toes," including those of the physicians. This conflict led the physicians, who as a group were paid $135,000 a year to keep the emergency services available after hours, to deliver an ultimatum. They sent a letter to the hospital Board of Trustees stating it is "him or us."[2] The letter was sent in April and Word's contract was not renewed. He left the hospital's employ after his initial year. About two weeks after Word's departure from the hospital, the *North Mississippi Times*, a weekly newspaper with a limited circulation in Marshall County, published a column by William E. Watkins.[3] The article was very critical of the county government, which provided substantial funding for the hospital, and it also criticized the physicians for their efforts to have Word removed and for their operation of the emergency room. The article stated the physicians had a "lucrative" position operating the emergency room and the author understood why they had wanted Word to leave because "I wouldn't want someone to come along and tear up my little playhouse either."[4]

The physicians brought suit for libel against the author Watkins, the newspaper's editor and North Mississippi Communications,

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1. The facts are taken from the court's opinion in Ferguson v. Watkins, 448 So. 2d 271 (Miss. 1984).

2. *Id.* at 273.

3. *Id.* at 281. The complete article appears in an appendix to the majority opinion. However, the paragraphs which referred to the plaintiffs stated:

> I get the feeling that Marshall County taxpayers are being raked over the coals with this emergency room operation. To be guaranteed $135,000 for three internists to man the emergency room from 5 p.m. to 8 a.m. weekdays and 24 hours on weekends, seems very lucrative especially insomuch as the doctors are not at the hospital but rather available for immediate response if needed. I don't blame Drs. Robert Tate, David Anderson and Charlie Ferguson for wanting to get rid of Alvin Word III, as if I had such a good set-up I wouldn't want someone to come along and tear up my little playhouse either.

Id.

4. *See supra* note 3.

Inc., the publisher, based on the contents of the article. The trial judge vacated a January 1981 jury verdict for each of the individual plaintiffs.[5] He entered instead a judgment for nominal damages and "lawful costs," finding that no special damages were required because the statements were libelous *per quod* and not *per se.*[6]

The plaintiffs appealed, and the Mississippi Supreme Court stated that the only issue was whether the vacated judgment should be reinstated.[7] The court affirmed the trial court's order on two independent grounds: the statements in the article were not libelous,[8] or assuming the statements were libelous, the physicians were vortex public figures[9] who could not recover for failure to prove that Watkins, the editor or the publisher acted with actual malice.[10] The court defined the vortex public figure as "[a]ny person who becomes involved, voluntarily or involuntarily, in any matter of legitimate public interest—and this certainly includes the method of administration of any program of services financed in whole or in substantial part by public monies."[11]

This Note will be limited to a discussion of the court's adoption of the vortex public figure standard alternatively referred to as a limited purpose public figure. First this Note will trace the development of a limited purpose public figure as a constitutional doctrine involving protection of freedom of the press. The Note will then deal with unresolved problems in applying this standard, and finally, will turn to a discussion of the Mississippi Supreme Court's adaptation of the limited purpose public figure and its strengths and short-comings.

EVOLUTION OF THE LIMITED PURPOSE PUBLIC FIGURE

The modern law of libel and constitutional protection for false

5. *Watkins*, 448 So. 2d at 274. The jury had awarded a $6,500 judgment for Tate, and $5,000 each to Ferguson and Anderson.

6. *Id.* at 274. The court did not address what, if any, distinction Mississippi law provides concerning libel *per quod* and libel *per se*. Generally, libel *per se* is the publication of matter which is defamatory on its face and unambiguous, and generally involves a presumption of harm. Libel *per quod* generally involves the publication of matter innocent on its face and which becomes defamatory only to those who are aware of extrinsic facts that make the publication defamatory. W. PROSSER & W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS 795-96 (5th ed. 1984).

7. *Watkins*, 448 So. 2d at 275.

8. *Id.* at 276.

9. *Id.* at 279.

10. *Id.*

11. *Id.* at 278.

statements of facts originated in *New York Times v. Sullivan.*[12] In that case the Court dealt with a defamation action brought by the Montgomery, Alabama Commissioner of Public Affairs against a New York newspaper and four civil rights leaders for some false statements printed in an advertisement.[13] The statements falsely depicted police actions and though they did not mention the plaintiff by name, he argued the false statements were imputed to him since he was in charge of the department.[14]

Speaking for the Court, Justice Brennan stated the Constitution required a different standard in assessing whether a public official, as opposed to a private individual, could recover for defamation:[15]

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his 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.[16]

Such a guarantee was mandated by our "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open." [17] Uninhibited debate requires that protection be afforded erroneous statements to provide the needed "breathing space" for freedom of expression.[18]

The requirement of proof of actual malice to establish libel was extended to include public figures, as well as public officials, in *Curtis Publishing Co. v. Butts,*[19] decided jointly with *Associated Press v. Walker.* Butts was a college athletic director employed by a private corporation who alleged that he had been libeled in a story detailing how he had helped to fix a college football game.[20]

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12. 376 U.S. 254 (1964). One author in a separate text commented that:

> The Supreme Court of the United States on March 9, 1964, in an attempt to bring order and cohesion to the jurisprudence of libel, extended to citizens everywhere a constitutional privilege to falsely defame public officials. The privilege, however, was conditional. As declared by the Court . . . it existed only so long as the false libels were about officials' public conduct and were published without actual malice . . . [i]n effect, the Court had issued a new character of freedom to allow people to make mistatements of fact in even scandalous, contemptuous criticism of public officials.

C. LAWTHORNE, THE SUPREME COURT AND LIBEL 26 (1981).

13. 376 U.S. at 256.

14. *Id.* at 258.

15. *Id.* at 279.

16. *Id.* at 279-80. The Court required that the plaintiff demonstrate the actual malice by clear and convincing evidence. *Id.* Actual malice was later interpreted to require that the publisher of the false statement actually "entertained serious doubts as to the truth of his publication." St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

The Court recently held that a court ruling on a motion for summary judgment where the plaintiff must prove actual malice "must be guided by the *New York Times* 'clear and convincing' evidentiary standard in determining whether a genuine issue of actual malice exists – that is, whether . . . a reasonable jury might find that actual malice had been shown." Anderson v. Liberty Lobby, Inc., 106 S. Ct. 2505, 2515 (1986).

17. 376 U.S. at 270.

18. *Id.* at 272.

19. 388 U.S. 130 (1967), *reh'g denied*, 389 U.S. 889 (1967).

20. *Id.* at 135-36.

In the companion case, Walker claimed he had been libeled in a story which he alleged falsely depicted him as inciting a crowd to riot during racial controversy at the University of Mississippi.[21]

Although there was no majority opinion,[22] "seven members of the Court who deem[ed] it necessary to pass upon the question agree[d] that [Butts and Walker] are 'public figures' for First Amendment purposes."[23] Public figures' "views and actions with respect to public issues and events are often of as much concern to the citizen as the attitudes and behavior of 'public officials' with respect to the same issues and events."[24] Justice Harlan noted that Butts and Walker commanded continuing public interest and possessed sufficient media access to rebut the falsehoods, "Walker, by reason of thrusting his personality into the 'vortex' of an important public controversy."[25]

The Court split on the issue of what standard of fault should apply in cases involving a public figure plaintiff in a state libel case, but a majority applied the actual malice standard of *New York Times*.[26]

To this point the Court had focused on the plaintiff's characteristics in delineating a standard of fault that applied to "public officials" and "public figures." However, in *Rosenbloom v. Metromedia, Inc.*,[27] the Court expanded the *New York Times* standard to "all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous."[28]

Rosenbloom involved a libel suit brought against a radio station

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21. *Id.* at 140.

22. Justices Clark, Stewart and Fortas joined Justice Harlan's announcement for the Court. *Id.* at 133. Chief Justice Warren concurred in the public figure characterization as did Justices Brennan and White. Justice Black, who was joined by Justice Douglas, concurred in the Court's reversal of the judgment in the *Walker* case. Justice Black reiterated his position that "it is time for this Court to abandon New York Times v. Sullivan and adopt the rule to the effect that the First Amendment was intended to leave the press free from the harrassment of libel judgments." *Id.* at 172.

23. *Id.* at 162 (Warren, C.J., concurring).

24. *Id.*

25. *Id.* at 155.

26. Chief Justice Warren, joined by Justices Brennan and White in a joint concurring opinion, and Justices Black and Douglas in a joint concurring opinion so held. However, Justices Black and Douglas would have preferred adoption of a first amendment rule freeing the press from libel suits. *Id.* at 172. Justices Harlan, Clark, Stewart and Fortas would have used a standard requiring a showing of "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." *Id.* at 155.

27. 403 U.S. 29 (1971) (plurality opinion). *See* Lawthorne, *supra* note 12, at 72-80.

28. 403 U.S. at 44. The decision in *Rosenbloom* followed the Court's decision in Time, Inc. v. Hill, 385 U.S. 374 (1967), that private individuals involved in a matter of public interest could not recover under a New York privacy statute for material and substantial falsification without a showing of actual malice under the *New York Times* test. The Court in *Hill* left open the question of whether a private individual involved in a matter of public interest would also have to prove *New York Times* actual malice to recover for libel. *Hill*, 385 U.S. at 390-91. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW, n.47 at 949 (2d ed. 1983).

by a magazine distributor because the station's newscasts characterized some of the distributor's magazines as obscene, and because reports of the distributor's suit to prevent police from interfering in his business also characterized Rosenbloom and his business associates as "smut distributors" and "girlie-book peddlers."[29]

The news broadcasts had been the result of Rosenbloom's arrest as part of a "series of enforcement actions under the city's obscenity laws" by the Philadelphia Police Department.[30]

Though no opinion garnered more than three votes,[31] a majority upheld the court of appeals decision that a jury verdict for Rosenbloom be set aside because Rosenbloom was required to meet the *New York Times* standard and failed to meet that standard as a matter of law.[32]

Justice White characterized the first amendment considerations after *Rosenbloom* as follows:

> [I]t would seem that at least five members of the Court would support each of the following rules: For public officers and public figures to recover for damage to their reputations for libelous falsehoods, they must prove either knowing or reckless disregard of the truth. All other plaintiffs must prove at least negligent falsehood, but if the publication about them was in an area of legitimate public interest, then they too must prove deliberate or reckless error. In all actions for libel or slander, actual damages must be proved, and awards of punitive damages will be strictly limited.[33]

Justice Brennan's plurality opinion stated the expansion of the actual malice protection to reporting of matters of general or public concern is based on the public's interest in the event,[34] and the realization that "[t]he *New York Times* standard was applied to libel . . . to give effect to the [First] Amendment's function to encourage ventilation of public issues, not because the public offi-

29. 403 U.S. at 36.

30. *Id.* at 32-33.

31. Justice Brennan announced the Court's decision in an opinion joined by Justice Blackmun and the Chief Justice. Justice Black concurred citing his position announced in New York Times v. Sullivan and Curtis Publishing Co. v. Butts. *Id.* at 57 (Black, J., concurring). Justice White concurred but stated the Court went too far and he would hold that the *New York Times* standard would apply, regardless of whether a private individual was involved, if the press "report and comment upon the official actions of public servants." *Id.* at 62 (White, J., concurring). Justice Harlan filed a separate dissenting opinion. Justice Marshall, joined by Justice Stewart, dissented. Justice Douglas took no part in the decision.

32. *Id.* at 40.

33. *Id.* at 59 (White, J., concurring).

34. *Id.* at 43.

cial has any less interest in protecting his reputation than an individual in private life."[35]

A negligence standard suggested by Justice Harlan was rejected because the plurality thought a negligence standard would not provide sufficient "breathing space" to first amendment values.[36] The dissenters' suggestion of limiting recovery for private individuals to only actual damages was thought to promote a chilling effect.[37]

However, a broad interpretation of "public or general concern" and the addition to the Court of Justice Powell[38] followed, and two years after *Rosenbloom* was decided, the Court granted certiorari in the case of *Gertz v. Robert Welch, Inc.*, to "reconsider the extent of a publisher's constitutional privilege against liability for defamation of a private citizen."[39] In essence, the Court in *Gertz* adopted the dissenters' view from *Rosenbloom*.[40]

In *Gertz*, a Chicago attorney, Gertz, who was prominent in some circles, was retained to represent the family of a youth killed by a police officer in a civil suit against the officer. Attorney Gertz took no part in the officer's criminal trial nor did he speak with the press. His only involvement in the matter was as the family's counsel in the civil action.[41] However, a report in a John Birch Society publication concerning the criminal trial falsely reported Gertz's affiliation with Marxist and communist organizations.[42]

The Court, speaking through Justice Powell, rejected the *Rosenbloom* plurality's extension of the actual malice standard in state defamation actions involving private individuals.[43]

Instead, the Court left it to the states to decide the basis of liability so long as they neither imposed liability without fault[44] nor allowed damages without a showing of actual injury, unless actual

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35. *Id.* at 46. The Court, citing Time, Inc. v. Hill, 385 U.S. 374, 388 (1966), stated that a distinction based on the "public" nature of the plaintiff could distort first amendment precepts:

> Voluntarily or not, we are all "public" men to some degree. Conversely, some aspects of the lives of even the most public men fall outside the area of matters of public or general concern . . . [i]n any event, [a public figure-private individual] distinction could easily produce the paradoxical result of dampening discussion of issues of public or general concern because they happen to involve private citizens while extending constitutional encouragement to discussion of aspects of the lives of "public figures" that are not in the area of public or general concern.

Id. at 48.

36. *Id.* at 52. Justice Harlan, in a separate dissenting opinion, suggested a reasonable care standard be applied where the litigant seeking redress was a private individual. *Id.* at 72.

37. *Id.* at 52-53.

38. *See generally*, LAWTHORNE, *supra* note 12, at 79-80.

39. 418 U.S. 323, 325 (1974).

40. "[F]or all practical purposes, the Court had adopted the view of the dissenters in the *Rosenbloom* case." LAWTHORNE, *supra* note 12, at 81. *See also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 638 (1978).

41. 418 U.S. at 325-26.

42. *Id.* at 326.

43. *Id.* at 346.

44. 418 U.S. at 347.

malice was involved.[45] Throughout the Court's opinion are references to the balancing of the state's interest in compensating the injury to an individual's reputation with constitutional requirements.[46]

The Court clearly rejected the *Rosenbloom* "public or general concern" standard as a constitutional requirement.[47] However, the Court left the states free to set their own standard of fault for private persons, including, if they wished, the *Rosenbloom* standard.[48] Five states have adopted a *Rosenbloom*-based test in light of *Gertz*.[49]

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45. 418 U.S. at 349. The Court also required that "[s]tates 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.*

46. The Court considered strict liability as a constitutionally impermissible standard. "This approach provides a more equitable boundary between the competing concerns involved here. It recognizes the strength of the legitimate state interest . . . yet shields the press and broadcast media from the rigors of strict liability for defamation." 418 U.S. at 347-48.

47. "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." *Id.* at 346. The Court thought the *Rosenbloom* standard would require an *ad hoc* determination of "what information is relevant to self-government" and also doubted "the wisdom of committing this task to the conscience of judges." *Id.*

48. 418 U.S. at 347. *See* Walker v. Colorado Springs Sun, Inc., 188 Colo. 86, 538 P.2d 450 (1975), *cert. denied*, 423 U.S. 1025 (1975), *overruled in part*, Diversified Management, Inc. v. Denver Post, Inc., 653 P.2d 1103, 1106 (Colo. 1982), where the court stated "[w]e find *Gertz* slightly enigmatic in that it permits us to rule—as we do here rule – contrary to some of the opinions expressed therein." *Walker*, 188 Colo. at 96, 538 P.2d at 456. *But see* Collins and Drusall, *The Reaction of the State Courts to Gertz v. Robert Welch, Inc.*, 28 CASE W. RES. L. REV. 306, 326-28 (1978), for an argument that states have no compelling rationale to retain a *Rosenbloom* standard.

49. Colorado, Walker v. Colorado Springs Sun, Inc., 188 Colo. 86, 538 P.2d 450 (1975) (stories and letters to the editor chiding antique store owner for not returning unwittingly acquired stolen goods), *cert. denied* 423 U.S. 1025 (1975), *overruled in part*, Diversified Management, Inc. v. Denver Post, Inc., 653 P.2d 1103, 1106 (Colo. 1982); Indiana, Aafco Heating and Air Conditioning Co. v. Northwest Publications, Inc., 162 Ind. App. 671, 321 N.E.2d 580 (1974), *cert. denied*, 424 U.S. 913 (1976); Michigan, Peisner v. Detroit Free Press, Inc., 82 Mich. App. 153, 266 N.W.2d 693 (Mich. App. 1978) (attorney appointed in criminal case fell under state privilege to report on matters of public interest); New York, Chapadeau v. Utica Observer-Dispatch, Inc., 38 N.Y.2d 196, 341 N.E.2d 569, 379 N.Y.S.2d 61 (1975) (school teacher's arrest on drug offense) (also requiring a showing that publication was made in grossly irresponsible manner); Utah, Seegmiller v. KSL, Inc., 626 P.2d 968 (Utah 1981) (limited range of public interest privilege did not extend to television station's report concerning mistreatment of horses on private ranch).

The vast majority of states, however, have adopted a negligence standard where private individuals are involved: Arizona, Peagler v. Phoenix Newspapers, Inc., 114 Ariz. 309, 560 P.2d 1216 (1977) (involving a car dealer and erroneous statements concerning his method of resolving complaints); Arkansas, Dodrill v. Arkansas Democrat Co., 265 Ark. 628, 590 S.W.2d 840 (1979) (erroneous report that attorney suspended from law practice failed reinstatement examination), *cert. denied sub. nom.* Little Rock Newspapers, Inc. v. Dodrill, 444 U.S. 1076 (1980); California, Vegod Corp. v. American Broadcasting Co., 25 Cal. App. 3d 763, 603 P.2d 14, 160 Cal. Rptr. 97 (1979), *cert. denied*, 449 U.S. 886 (1980) (where the court rejected the *Rosenbloom* standard in suit involving going out of business sale at a "Landmark" store); Connecticut, Corbett v. Register Publishing Co., 33 Conn. Supp. 4, 356 A.2d 472 (1975) (son of youth division police officer erroneously reported to have been arrested); Florida, Miami Herald Publishing Co. v. Ane, 423 So. 2d 376 (Fla. Dist. Ct. App. 1982) (plaintiff was erroneously reported to have recently purchased a truck confiscated by police and containing marijuana); Hawaii, Cahill v. Hawaiian Paradise Park Corp., 56 Hawaii 522, 543 P.2d 1356 (1975) (radio comment that implied plaintiff and family were communists); Illinois, Troman v. Wood, 62 Ill. 2d 184, 340 N.E.2d 292 (1975) (owner of house implicated as home of neighborhood gang); Kentucky, McCall v. Courier-Journal and Louisville Times Co., 623 S.W.2d 882 (Ky. 1981), *cert. denied*, 456 U.S. 975 (1982) (report that attorney would fix criminal case); Maryland, Jacron Sales Co. v. Sindorf, 276 Md. 580, 350 A.2d 688 (1976) (statement by plaintiff's former employer to present employer); Massachusetts, Stone

Thus, the Court maintained a constitutional standard for public officials and public figures, but allowed states to set their own standards of fault for suits involving private individuals.

The Court stressed the differences between public and private individuals as reasons the latter deserve a lesser proof requirement.[50] But the Court's attempt to provide a test to help distinguish between public and private individuals for purposes of applying the different standards has been said to suffer from some of the same problems as the rejected *Rosenbloom* test.[51]

The Court in *Gertz* identified two types of public figures: persons who gained such pervasive powers and influence in society to be public figures for all purposes and those more common public figures who have "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved."[52]

Since *Gertz*, the Supreme Court has given several examples of the class of persons subjected to proving actual malice by virtue of being public figures. In *Time, Inc. v. Firestone*[53] the Court held

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v. Essex County Newspapers, Inc., 67 Mass. 849, 330 N.E.2d 161 (1975) (city redevelopment authority official erroneously reported to own drugs his son was being prosecuted concerning); Montana, Madison v. Yunker, 180 Mont. 54, 589 P.2d 126 (1978) (student newspaper called plaintiff a congenital liar); New Hampshire, McCusker v. Valley News, 121 N.H. 258, 428 A.2d 493 (1981) (story stating deputy sheriff was being paid though he was unable to work), *cert. denied*, 454 U.S. 1017 (1981); Ohio, Thomas H. Maloney & Sons, Inc. v. E.W. Scripps Co., 43 Ohio App. 2d 105, 334 N.E.2d 494 (1974) (*Rosenbloom* standard did not apply to private contractor and reports of his mistake of demolishing the wrong building), *cert. denied* 423 U.S. 883 (1975); Oklahoma, Martin v. Griffin Television, Inc., 549 P.2d 85 (Okla. 1976) (broadcasts of complaint that pet store owner was unethical); New Mexico, Marchiondo v. Brown, 98 N.M. 394, 649 P.2d 462 (1982) (article imputing to plaintiff a crime and other unprofessional conduct); South Carolina, Jones v. Sun Publishing Co., 278 S.C. 12, 292 S.E.2d 23 (1982) (plaintiff falsely reported to have pled guilty to charges of copyright infringement), *cert. denied*, 459 U.S. 944 (1982); Tennessee, Memphis Publishing Co. v. Nichols, 569 S.W.2d 412 (Tenn. 1978) (implication that wife's gunshot wound was the result of an extramarital affair); Texas, Poe v. San Antonio Express-News Corp., 590 S.W.2d 537 (Tex. Civ. App. 1979), *writ of error refused*, (story stated teacher had fondled female students); Utah, Seegmiller v. KSL, Inc., 626 P.2d 968 (Utah 1981) (negligence standard of fault applied where story did not come under limited public interest privilege); Washington, Taskett v. King Broadcasting Co., 86 Wash. 2d 439, 546 P.2d 81 (1976) (story implied that vacationing, financially troubled plaintiff had skipped town on creditors); Wisconsin, Denny v. Mertz, 106 Wis. 2d 636, 318 N.W.2d 141 (1982) (story stated plaintiff-shareholder was fired by employer who was subject of plaintiff's shareholder suit), *cert. denied*, 459 U.S. 883 (1982); Washington, D.C., Phillips v. Evening Star Newspaper Co., 424 A.2d 78 (D.C. 1980) (story stated plaintiff arrested for homicide in wife's accidental shooting death), *cert. denied*, 451 U.S. 989 (1981).

50. 418 U.S. at 344-45. The Court went on to state:

> 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 . . . . Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures *have thrust themselves* to the forefront of particular public controversies in order to influence the resolution of the issues involved..

Gertz, 418 U.S. at 345 (emphasis added).

51. *See* L. TRIBE, *supra* note 40, at 644. "Now judges are asked to determine whether a controversy is 'public,' a determination indistinguishable to the naked eye from whether the subject matter is of public or general concern." *Id.*; Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583, 590 (1st Cir. 1980); Time, Inc. v. Firestone, 424 U.S. 448, 488 (1976) (Marshall, J., dissenting).

52. 418 U.S. at 345.

53. 424 U.S. 448 (1976).

that the wife of a well-known businessman was not a public figure for purposes of an allegedly defamatory story about her suit for divorce.[54] The Court looked to the nature of the event and found that marriage dissolution was not the type of public controversy the Court referred to in *Gertz*.[55] The Firestone divorce was not a public issue. Consequently, Mrs. Firestone was not constitutionally required to prove actual malice to prevail in her libel suit. Similarly, in *Wolston v. Reader's Digest Association, Inc.*,[56] a man who had been called before a grand jury investigating communist activities in 1958 and who failed to answer a subpoena for health reasons was not a public figure for purposes of a book which 20 years later referred to him as a Soviet agent.[57] Justice Blackmun characterized the Court's holding in *Wolston* as follows: "A person becomes a limited-purpose public figure only if he literally or figuratively 'mounts a rostrum' to advocate a particular view."[58]

The Court went one step further in *Hutchinson v. Proxmire*.[59] There, a research behavioral scientist who obtained a federal grant to study aggression and reactions to stress in monkeys had results of his study published in scientific journals. The Court held he was not a public figure for purposes of a libel action against a United States senator who publicly questioned the wisdom of the expenditure.[60] Concern about general public expenditures, without more, is not sufficient controversy to make a public grant recipient a public figure.[61]

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54. *Id.* at 455.

55. *Id.* at 454.

56. 443 U.S. 157 (1979).

57. The Court found that petitioner assumed no special prominence in any public question, he did not try to draw attention to himself to invite comment, nor did he seek to arouse public sentiment in his favor. *Id.* at 168.

58. 443 U.S. at 169 (Blackmun, J., concurring).

59. 443 U.S. 111 (1979).

60. The Court found the only controversy involved in the case was concern about general public expenditures. "But that concern is shared by most and relates to most public expenditures; it is not sufficient to make Hutchinson a public figure." *Id.* at 135. This would extend the public figure distinction to anyone benefiting from a public grant, which the Court stated was rejected in earlier decisions. *Id.* The Court reserved judgment on whether Hutchinson was a public official because neither the district court nor the court of appeals had ruled on the question. *Id.* at 119.

61. *Id.* at 135. The court also stressed that Hutchinson had not assumed "any role of public prominence" in the expenditure question. *Id.*

Despite considerable guidance from the Supreme Court, lower courts continue to struggle with the issue of who is and who is not a limited-purpose public figure.[62]

One suggested test would look to five factors, including access to communicative avenues to counteract the defamatory statements and the necessity of an existing controversy prior to the defamatory publication.[63] Judge Karlton's thoughtful analysis yields a definition which regards access to media channels as only relevant evidence of status and not part of the definition of a limited-purpose public figure.[64] One circuit court of appeals is uncertain whether the intent to influence is determinative or merely a significant factor in deciding limited-purpose public figure status.[65]

Though precision in establishing a working definition of a limited-purpose public figure may be lacking, it is certain that the Supreme Court considers voluntariness of involvement vital, and the Court requires some "public controversy" which cannot begin with the defamatory statement.[66] Some courts have interpreted the latter requirement as involving matters of legitimate

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62. *See* Harris v. Tomczak, 94 F.R.D. 687 (E.D. Cal. 1982); Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 898 (1980); Rosanova v. Playboy Enterprises, Inc., 580 F.2d 859, 861 (5th Cir. 1978) ("[I]t falls within that class of legal abstractions where 'I know it when I see it.' ") (quoting Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)).

Two recent Supreme Court cases addressing defamation suits brought by private figures do not appear to add much to the Court's expression of who are limited purpose public figures. In Philadelphia Newspapers, Inc. v. Hepps, 106 S. Ct. 1558 (1986), the Court, without revealing its analysis, applied private figure precedent to the principal stockholder of a convenience store corporation reported to be benefiting from links with organized crime. In Dun & Bradstreet v. Greenmoss Builders, 105 S. Ct. 2939 (1985) (plurality opinion) the Court also dealt with a defamation suit which it found was based on a matter of private concern. The Court did not specifically consider whether Greenmoss, a construction contractor, was a private figure for purposes of a false report concerning bankruptcy proceedings circulated among Dun & Bradstreet's subscribers. However, Justice O'Conner, for the Court in *Hepps*, considered Greenmoss a private figure. *Hepps*, 106 S. Ct. at 1563.

63. *Fitzgerald*, 691 F.2d at 668. The court listed the five requirements as:

> (1) the plaintiff had access to channels of effective communication; (2) the plaintiff voluntarily assumed a role of special prominence in a public controversy; (3) outcome of the controversy; (4) the controversy existed prior to the publication of the defamatory statements; and (5) the plaintiff retained public figure status at the time of the alleged defamation.

Id.

64. Harris v. Tomczak, 94 F.R.D. at 703. Judge Karlton defined a limited-purpose public figure as: "a person who, by voluntary and intentional conduct, has vigorously sought to directly influence resolution of a particular controversy, identifiable as such from the intended audience's perception, resolution of which can reasonably be said to have a perceptible impact on persons other than the immediate participants in the controversy." *Id.* The court went on to state that "the allegedly defamatory statement must be made within the scope of the particular controversy and must be reasonably related to that controversy." *Id.*

65. Jenoff v. Hearst Corp., 644 F.2d 1004, 1007-08 (4th Cir. 1981). *See* Note, *Defining a Public Controversy in the Constitutional Law of Defamation*, 69 VA. L. REV. 931, 944-56 (1983), for an argument that the Supreme Court's public controversy requirement has led to confusion and *ad hoc* application by lower courts because the Court has not clearly outlined an analytical framework.

66. Jenoff v. Hearst Corp., 644 F.2d 1004, 1007-08 (4th Cir. 1981).

public concern[67] requiring some existing public discussion.[68]

MISSISSIPPI'S NEW STANDARD

In *Ferguson*, the Mississippi Supreme Court attempted to resolve what were two different privileges – a state privilege concerning fair comment[69] and the constitutional standard of *New York Times* as expanded in *Gertz*.[70]

Both deal with protection afforded statements made concerning individuals who have taken public positions.[71] The *Ferguson* court opinion described the *Gertz* standard of a limited-purpose public figure as a "vortex public figure."[72] The court characterized the *Gertz* standard as involving "one who is otherwise a private figure but who thrusts himself or becomes thrust into the vortex of a matter of legitimate public interest."[73] The court went on to state that:

> We emphasize that the matter of legitimate public interest need not produce actual controversy. It is enough that the matter is in the public domain. Any person who becomes

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67. Levine v. CMP Publications, Inc., 738 F.2d 660 (5th Cir. 1980); *Fitzgerald*, 691 F.2d at 669. The Supreme Court recently adopted the "public concern" standard, at least in its application to private individuals. Philadelphia Newspapers, Inc. v. Hepps, 106 S. Ct. 1558 (1986); Dun & Bradstreet v. Greenmoss Builders, 105 S. Ct. 2939 (1985). In *Hepps*, Justice O'Conner for the Court summarized precedent by stating that "[w]hen the speech is of a public concern and the plaintiff is a public official or public figure, the . . . plaintiff [must] surmount a much higher barrier before recovering damages from a media defendant than is raised by the common law." 105 S. Ct. at 1563. Since *Hepps* did not involve a limited purpose public figure, it is difficult to tell whether a controversy will no longer be required. This could have a bearing should the Court again address a case such as Hutchinson v. Proxmire, 443 U.S. 111 (1979). *See supra* notes 59-61 and accompanying text.

68. *Levine*, 738 F.2d at 672, where the court stated that public controversy "assumes the existence of some public debate over matters that legitimately concern the public."; *Fitzgerald*, 691 F.2d at 668.

69. The court noted Mississippi's recognition of a qualified privilege for fair comment, announced in Edmonds v. Delta Democrat Publishing Co., 230 Miss. 583, 93 So. 2d 171 (1957). The court there said:

> When a person comes prominently forward in any way and becomes a public or quasi-public figure, he invites free expression of public opinion, including criticism. When such criticism is in the form of an opinion, relates to public assertions or acts rather than to the individual in his private affairs, is fair in the sense that the reader can understand the factual basis for the opinions containing the criticism, and the publication relates to a matter of public interest, then the occasion is conditionally privileged; and no action will lie for such publication no matter how severe the criticism or unfavorable the comments, if the privilege is not abused.

230 Miss. at 590-91, 93 So. 2d at 173.

70. *See supra* notes 44-53 and accompanying text.

71. Ferguson v. Watkins, 448 So. 2d 271, 277 (Miss. 1984). The court noted that several courts have used similar terms to describe the *Gertz* limited-purpose public figure, but the court incorrectly stated the term originated in *Gertz*. While the limited-purpose figure standard was announced in *Gertz*, the "vortex" term was used previously to describe General Walker's actions in entering the public controversy which precipitated his defamation suit. Associated Press v. Walker, 388 U.S. at 130, 155 (1967).

72. 448 So. 2d at 277.

73. *Id.* The court mistakenly characterizes the *Gertz* limited-purpose public figure standard as requiring a matter of legitimate public interest. The Supreme Court has always required a public controversy. The difference is major in light of the Mississippi court's position that a matter of legitimate public interest includes any program of services financed by public funds, a position the Supreme Court clearly rejected in Hutchinson v. Proxmire. *See supra* note 61 and accompanying text. In addition, the Mississippi court reads *Gertz* far too liberally when it does not qualify *Gertz* as applying only very rarely to persons who were involuntarily thrust to the forefront. *Gertz*, 418 U.S. at 323, 345.

> involved, voluntarily or involuntarily, in any matter of legitimate public interest – and this certainly includes the method of administration of any program of services financed in whole or in part by public monies–becomes in that context a vortex public figure who is subject to fair comment.[74]

The court resolved the two privileges stating that while the Mississippi fair comment doctrine "arguably" dealt with only commentary, the court viewed the definition of the "public or quasi-public figure" of *Edmonds* (or the "*Edmonds* vortex public figure, if you will" as the court characterizes it) as broader than the limited-purpose public figure of *Gertz*.[75]

Likewise, though more restrictive in its definition of a limited-purpose public figure, the Mississippi court found that the *Gertz* standard, employing the *New York Times v. Sullivan* actual malice test, uses a more objective measure of actual malice and applies to fact as well as commentary and opinion.[76] The court thus combined what it considered the more expansive provisions to arrive at a new classification.[77] Applying its new test, the court found the plaintiffs were vortex public figures and not entitled to a rein-

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74. 448 So. 2d at 278.

75. *Id.* at 278-79. The court does not explain in what respect the "*Edmonds* vortex public figure" is broader than the limited-purpose public figure of *Gertz*, and it does not appear this contention bears up under scrutiny. *Edmonds* dealt with a vocal proponent of prohibition in the context of a public referendum on liquor. There could be no doubt that Edmonds had mounted a rostrum to influence a public controversy under the *Gertz* definition. The court also looked to Reaves v. Foster, 200 So. 2d 453 (Miss. 1967), a case involving a public school principal who sought damages for criticism of his administration of the school amid civil rights fervor. Though the court in *Reaves* failed to discuss it, there would seem to be little question that Reaves would be classed as a public official under the definition from Rosenblatt v. Baer, 383 U.S. 75 (1965); *see supra* note 17. As a public official, his official acts are open to discussion and there is no need for the court to ascertain the existence of a public controversy, or to find any amount of involvement, voluntary or otherwise. Indeed, the language of *Edmonds* that the court seems to rely on appears much closer to the *Gertz* analysis. *See supra* note 69, where *Edmonds* is cited as providing that a person who comes prominently forward "in any way" is subject to fair comment. Contrary to what the court in *Ferguson* holds, this language seems to require the mounting of a rostrum.

The court also cites several other decisions involving law enforcement officers (NAACP v. Moody, 350 So. 2d 1365 (Miss. 1977); Arnold v. Quillian, 262 So. 2d 414 (Miss. 1972); Pride v. Quitman County Voters League, 226 So. 2d 735 (Miss. 1969), and a political candidate (Perkins v. Mississippi Publishers Corp., 241 So. 2d 139 (Miss. 1970)) which lent themselves to application of either the fair comment or the *New York Times* privilege. It would seem that the types of plaintiffs mentioned by the court would again fall within the public official definitions. In none of the cases directly above did the court analyze the *Edmonds* doctrine and it does not appear that, with the exception of the political candidate, any of the law enforcement officer plaintiffs would fit the *Edmonds* requirements. It is difficult to understand how the *Ferguson* court finds the *Edmonds* definition of a quasi-public figure as any broader than that of *Gertz*. The court seems to say it arises by implication as a result of misguided or incomplete analysis in previous cases applying the *Edmonds* standard.

76. 448 So. 2d at 278.

77. The court stated:

> [W]e hold that *under the law of this state* all otherwise actionable utterences - commentary, opinion or fact - made regarding a public figure or a vortex public figure are qualifiedly privileged. The qualification on the privilege is that the person defamed may yet recover if he proves that at the time of the utterance the defendant either (a) knew clearly that the utterance was false, defamatory and otherwise actionable, or (b) acted in reckless disregard of whether it was false, defamatory and otherwise actionable.

448 So. 2d at 279.

statement of the jury verdict because they failed to prove actual malice.[78]

ANALYSIS AND CONCLUSION

There appears to be little quarrel with the result in *Ferguson*, but there are problems with the court's analysis and questions concerning the new test which should be answered. First, though the Mississippi court is correct in its determination that nothing said in *Gertz* requires a stricter view of who is a limited-purpose public figure, it is questionable that Mississippi precedent backs up the court's view that the *Edmonds* quasi-public figure definition is broader than that of *Gertz*.[79] The Mississippi court has given a public figure flavor to plaintiffs in cases involving persons who would rightly be considered public officials. The separate rationales for requiring public officials and public figures to prove actual malice calls upon the Mississippi court to reevaluate its extension of the public figure doctrine in *Ferguson*. It is submitted that a *Gertz* standard would more closely follow the Mississippi precedent concerning when a private individual must prove actual malice in a defamation suit. But barring adoption of a *Gertz* standard, the Mississippi court should resolve important questions concerning the scope of its new test.

The Mississippi court in *Ferguson* essentially adopted a *Rosenbloom* standard by another name.[80] In the process it appears the court has left itself with the same *ad hoc* determinations of what is a matter of legitimate public interest which the Supreme Court has rejected. The court does mention that administration of public monies is a matter of legitimate public concern, but the court should go farther and develop a framework to give guidance to lower courts.

The Utah Supreme Court, interpreting a state statute, has provided a workable starting point.[81] The Utah court held that public interest included matters relating to the "public health and safety . . . legitimate issue[s] with respect to functioning of governmental bodies, officials, or public institutions, or with respect to matters involving the expenditure of public funds."[82]

This standard would require refinement: there is nothing to help differentiate legitimate from frivolous issues. However, adopting this standard is at least an initial step the Mississippi court

78. *Id.*
79. *See supra* note 76 and accompanying text.
80. *See supra* note 29 and accompanying text.
81. Seegmiller v. KSL, Inc., 626 P.2d 968 (Utah 1981).
82. *Id.* at 978.

should take to alleviate the ambiguity of its decision in *Ferguson*. In addition, the Mississippi court should clarify its use of the term "involvement." The court states that those potential defamation plaintiffs who become involved in a matter of legitimate public interest will be required to prove actual malice. However, the court relies on *Edmonds* where it was said that only those who come "prominently forward in any way" become public figures. Is involvement a lesser standard than prominence? It would appear so, but the court in *Ferguson* also looks to the plaintiffs' affirmative act of sending an ultimatum as proof they had become public figures. It stops short of saying this affirmative act was required to meet the involvement requirement. An argument could be made that merely being employed at the hospital where public monies are being administered constitutes involvement in a matter of legitimate public interest. The court should give more focus to this requirement.

Greg Weber