Loyola of Los Angeles
Entertainment Law Review

Volume 4 | Number 1 Article 9

1-1-1984

Libel and Privacy

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VI. LIBEL AND PRIVACY

A. *Fictional Work Not Defamatory*

New York law has been extended by another case disallowing a cause of action for defamation arising from a fictional work.[1] In *Springer v. Viking Press*,[2] the court held there was no cause of action for defamation. The case concerned plaintiff Lisa Springer and defendant Robert Tine who met while attending Columbia University and developed a close personal relationship.[3] While working on a novel, defendant informed plaintiff he had patterned the relationship between the hero and heroine on their own.[4]

In 1980, two years after Springer and Tine rancorously terminated their friendship, the novel "State of Grace" was published by defendant Viking Press.[5] Plaintiff based her cause of action for defamation on physical similarities between herself and the character Lisa Blake and their common first name.[6] Plaintiff contended that people who knew both her and Tine believed that Lisa Blake and herself were one and the same person.[7]

Springer's complaint alleged seven causes of action: (1) and (2) libel; (3) prima facie tort seeking treble damages; (4) prima facie tort seeking punitive damages; (5) invasion of privacy under New York Civil Rights Law; (6) exemplary damages and (7) counsel fees.[8] Defendants moved to dismiss the complaint, while plaintiff cross moved for summary judgment on the issue of liability.[9] The supreme court, special term, denied plaintiff's cross motion for summary judgment and granted defendant's motion to the extent of dismissing the third, fourth, fifth and sixth causes of action.[10] Both parties appealed.[11]

The *Springer* court first considered the causes of action dismissed by the lower court. It succinctly stated that the third cause of action seeking treble damages was not allowable in the absence of a statutory

1. Springer v. Viking Press, 90 A.D.2d 315, 457 N.Y.S.2d 246, 249, (1982).
2. 457 N.Y.S.2d at 249.
3. *Id.* at 247.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*

right and here, there was no statute involved.[12] The court affirmed the trial court's dismissal of the third and fourth causes of action alleging a prima facie tort holding that if complete relief can be accorded under the classical tort of libel, then a prima facie tort may not also be pleaded.[13]

Plaintiff's fifth cause of action alleged invasion of privacy under Sections 50 and 51 of the New York Civil Rights Law.[14] The court held that since "State of Grace" did not use plaintiff's name, portrait or picture, no cause of action existed.[15] The *Springer* court explained that there was no right of action for invasion of privacy independent of the statute.[16]

As to plaintiff's sixth cause of action, the court held that a claim for exemplary damages could not stand as a separate cause of action.[17] The court explained that if the right exists at all it was merely an element of an underlying cause of action.[18]

In regard to the causes of action for defamation, the court looked at the similarities and dissimilarities between Lisa Springer and Lisa Blake. The court found the similarities between the two superficial and the dissimilarities profound.[19] It held that in order for a defamatory statement concerning a character in a fictional work to be actionable, the character must be so closely related to the real person that a reader of the book, knowing the plaintiff, would have no difficulty linking the two.[20]

The three cases cited by the *Springer* court, *Allen v. Gordon*,[21] *Lyons v. New American Library, Inc.*,[22] and *Giaimo v. Literary Guild*,[23] all held that for a plaintiff to be entitled to maintain an action for a defamatory statement, it must be shown that the publication was "of and concerning" the plaintiff.

In *Allen*, the fact that plaintiff was the only psychiatrist surnamed Allen in Manhattan was insufficient to support a cause of action since

12. *Id.* at 247-48.
13. *Id.* at 248.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* at 249.
20. *Id.*
21. 86 A.D.2d 514, 446 N.Y.S.2d 48 (1982), *aff'd* 452 N.Y.S.2d 25 (1982).
22. 78 A.D.2d 723, 432 N.Y.S.2d 536, 537 (1980).
23. 79 A.D.2d 917, 434 N.Y.S.2d 419 (1981).

the book was not "of and concerning" him.[24] In *Springer*, the reason for disallowing a cause of action was even stronger. There may be only one Dr. Allen in Manhattan, but there are hundreds of "Lisa's" in New York.

In *Fetler v. Houghton Mifflin Co.*,[25] the court held that the plaintiff's burden of proving a statement was "of and concerning" him was not a light one. The similarities between the fictional work in question and the plaintiff could not be superficial since the libel must designate the plaintiff in such a way as to let those who know the plaintiff believe he is the person meant.[26]

In *Fetler*, the court held that the similarities between the character Maxim in the novel "The Travelers" and plaintiff "established the necessary links," for a cause of action in defamation.[27] The novel depicted events in the life of a family composed of a father, mother and thirteen children, of whom ten were boys and the third, fourth and eighth were girls.[28] Such was the exact composition of plaintiff's family.[29]

In "The Travelers," Maxim and plaintiff were the same age and same nationality.[30] Their fathers were both ministers and both families traveled in a bus throughout Europe giving concerts.[31] These factual similarities were reinforced when the author, plaintiff's brother, told plaintiff the book "was about our father, the family concerts and me."[32] The court held that Maxim was a prominent character throughout the novel and that numerous events in the story paralleled and described the plaintiff.[33]

In contrast, in *Springer* there were only a few similarities between the plaintiff and the character Lisa Blake in "State of Grace." The only similarities between the two were their physical attributes, the fact both went to college and both have the same street address.[34]

In *Springer*, unlike in *Fetler*, profound dissimilarities existed in both manner of living and in outlook between the two "Lisa's." Lisa Springer was a tutor, while Lisa Blake was a prostitute who earned

24. 446 N.Y.S.2d at 49.
25. 364 F.2d 650, 653 (2nd Cir. 1966).
26. *Id.* at 651.
27. *Id.* at 652.
28. *Id.* at 651.
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.* at 652.
34. 457 N.Y.S.2d at 248-49.

seventy five thousand dollars a year, lived luxuriously on Fifth Avenue and drove a BMW.[35]

However, *Springer*, unlike *Fetler*, did not take into consideration the fact that the author of "State of Grace" actually told plaintiff he had loosely patterned the chapter in question on the relationship between himself and plaintiff.[36] While not conclusive as to the defamation issue, the *Springer* court could have considered this revelation by Tine as indicating his intent, especially since Springer and Tine rancorously terminated their relationship.[37]

In *Ladany v. William Morrow & Co., Inc.*,[38] defendant Serge Groussard, a French journalist, wrote a book concerning the 1972 attack on the Israeli Olympic team of which plaintiff was a member. The book, "The Blood of Israel," contained a number of references to plaintiff.[39] The court found that Groussard's account of the attack contained elements of falsity and that the interviews with Ladany which Groussard described in his book had never taken place.[40]

The court, in holding that a cause of action for defamation did not exist, explained that in deciding whether a book is defamatory its pertinent chapters must be read as a whole.[41] "The Court 'will not pick out and isolate particular phrases;' nor will it 'strain to place a particular interpretation on the published words.' . . . Rather, the words are 'given their natural import, and their plain and ordinary meaning.' "[42] The court looked at the seventy-five pages that dealt with the attack and escape, compared it to the book as a whole, and found that plaintiff was not defamed in any way.[43]

In applying the *Ladany* rationale to the facts in *Springer*, one should note that the chapter in question covers only ten and one-half pages.[44] In "The Blood of Israel" Ladany was a key character, unlike Lisa Blake in "State of Grace." When compared to "State of Grace" as a whole, plaintiff's interpretation that the depiction of Lisa Blake was a portrayal of herself may be unreasonable since the novel concerns Vati-

35. *Id.* at 249.
36. *Id.* at 247.
37. *Id.*
38. 465 F. Supp. 870, 871 (S.D.N.Y. 1978).
39. *Id.*
40. *Id.* at 874.
41. *Id.* at 876.
42. *Id.*
43. *Id.* at 878.
44. 457 N.Y.S.2d at 247.

can finances and politics.[45]

Thus, the holdings of these cases demonstrate that the burden on a plaintiff to prove a statement is "of and concerning" him is difficult. The work in question must be viewed as a "whole" and not in isolated parts. *Fetler* is a good example of the many common facts a plaintiff needs to demonstrate to meet this burden.

Although there were only a few factual similarities in *Springer*, the court committed a major error, which was mentioned in the dissent,[46] by not considering the statement by a former professor who had known Springer and Tine that he believed Lisa Springer was the Lisa Blake in "State of Grace." Since the only issue in *Springer* was identification,[47] it seems this statement would have satisfied the test that a reader of the book, knowing the plaintiff, had no difficulty in linking the two Lisa's.[48]

With the stringent requirements for a successful defamatory cause of action in New York, it seems all too easy for a bitter ex-lover or friend to write a fictional work and thinly disguise a character in it with just enough common traits for the plaintiff or a close friend to know it concerns the plaintiff, but not enough factual similarities to pass the court's rigid scrutiny.

Margaret Klug

B. *Lyrics of Song Not Defamatory*

Florida law has recently denied a woman who witnessed a celebrated murder trial a cause of action for defamation arising from a song in which she was portrayed.[1] In *Valentine v. C.B.S., Inc.*,[2] the court held there was no cause of action for common law defamation, invasion of privacy, nor unauthorized publication.

The case culminated in 1975 when defendants Bob Dylan and Jacques Levy wrote a song called "Hurricane."[3] The song depicted the 1967 murder trial of prize fighter Rubin "Hurricane" Carter and John Artis.[4] The song in three stanzas also mentioned a witness, Patty Val-

45. *Id.*
46. *Id.* at 250.
47. *Id.*
48. *Id.* at 249.

1. Valentine v. C.B.S., Inc., 698 F.2d 430, 432 (11th Cir. 1983).
2. *Id.* at 431.
3. *Id.*
4. *Id.*

entine, who testified at the trial.[5] Defendant C.B.S. manufactured and distributed the song and defendant Warner Brothers Publications published the sheet music.[6]

Patty Valentine brought suit alleging common law defamation, invasion of privacy and unauthorized publication of her name.[7] The District Court for the Southern District of Florida granted summary judgment for the defendants and plaintiff appealed.[8]

The Eleventh Circuit first considered plaintiff's argument that "Hurricane" was defamatory because it implied she participated in a conspiracy to unjustly convict Carter.[9] The court held that the three stanzas referring to Patty Valentine related to events occurring the night of the murder and did not allege a conspiracy.[10] The *Valentine* court believed plaintiff's interpretation was extreme and not one a reasonable person would make.[11]

Plaintiffs alleged that the defendants failed to verify the lyric's accuracy; however, the court found that plaintiff offered nothing to rebut defendants' testimony that they believed the song did not depict Valentine as a member of the alleged conspiracy.[12] The court held that the lyrics were substantially and materially true when compared with plaintiff's trial testimony.[13]

As to the invasion of privacy claim, plaintiff had stipulated that the trial, including her testimony, received national publicity.[14] The court held that the song concerned matters of public interest and would not support an invasion of privacy claim even though plaintiff was an involuntary participant in the trial.[15] The court believed "Hurricane" disclosed no private facts but only details Valentine had previously disclosed through her public trial testimony.[16]

The Eleventh Circuit affirmed the trial court's holding that the ballad did not commercially exploit plaintiff's name.[17] The court held that the use of a name was not harmful "simply because it [was] in-

5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* at 432.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.* at 433.
15. *Id.*
16. *Id.*
17. *Id.*

cluded in a publication sold for profit."[18]

Valentine v. C.B.S., Inc., continued the traditional belief found in Section 13 of Florida's Declaration of Rights which states that every person may fully speak and write his or her sentiments on all subjects, although they are responsible for the abuse of that right.[19] The question as to when one has abused such a right was at issue in the present case and also in *McCormick v. Miami Herald Publishing Co.*.[20]

In *McCormick* the plaintiff had asserted a cause of action for defamation arising from a newspaper story alleging he owed the Internal Revenue Service $40,000 in back taxes.[21] The *McCormick* court held that language should not be interpreted by extremes, but construed as the common mind would understand it.[22] The court stated that although the story was not a model of perfect journalism, it did not accuse plaintiff of tax evasion.[23]

Similarly, in *Valentine*, "Hurricane" did not accuse plaintiff of participating in a conspiracy. In applying the common mind standard, which the *Valentine* court correctly used, one can see that the three stanzas referring to plaintiff all relate to events which occurred the night of the murder: stanza one describes Patty Valentine entering from the upper hall of the barroom and seeing the bartender in a pool of blood; stanza two stated Patty saw three bodies and called the police, and stanza four had Patty Valentine nodding her head to the statement by Bello and Bradley that the murderers "jumped into a white car with out-of-state plates."[24] It was not until stanza ten that "Hurricane" stated "Bello and Bradley . . . badly lied" when they testified.[25]

Using plaintiff's interpretation that by nodding her head she acquiesced in the lie of the other two witnesses, would require connecting the language of stanza four to stanza ten.[26] This would not be a rational approach since stanzas one, two and four where plaintiff was mentioned concern events immediately after the murder and nowhere imply a conspiracy.[27]

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18. *Id.*

19. Fla. Const. Declaration of Rights, §13, as interpreted in Cason v. Baskin, 155 Fla. 198, 20 So. 2d 243, 251 (1944).

20. 139 So. 2d 197 (D. Fla. 1962).

21. *Id.* at 199.

22. *Id.* at 200.

23. *Id.* at 201.

24. 698 F.2d at 432 n.1.

25. *Id.*

26. *Id.*

27. *Id.*

The fact that the song stated in stanza four that plaintiff agreed with Bello and Bradley as to their identification to the police of the getaway car did not mean plaintiff should be implicated in stanza ten which stated: "Rubin Carter was falsely tried. The crime was murder 'one,' guess who testified? Bello and Bradley and they both badly lied."[28] If Bob Dylan and Jacques Levy believed Patty Valentine was a member of the alleged conspiracy, they would have named her as they directly named Bello and Bradley.

In regard to plaintiff's argument that the song's statements were untrue, the *Valentine* court cited *Hill v. Lakeland Ledger Publishing Corp.*[29] which followed *McCormick's* holding that publications should be substantially true, and mere inaccuracies, not materially affecting the article, were immaterial. Plaintiff's 1967 trial testimony indicates she saw the aftermath of a murder, called the police and while doing so saw two men running to a car with out-of-state plates.[30] When one compares this testimony with "Hurricane's" lyrics it is obvious the court was correct in holding that the lyrics were substantially and materially true.[31]

The *Valentine* court also correctly decided that no invasion of privacy claim was presented. Since the seminal case of *Cason v. Baskin*,[32] Florida law has held that the right of privacy does not prohibit the publication of material which is of legitimate public interest. The law seems settled that where one, whether willingly or not, becomes involved in a matter of public interest, it is not an invasion of their right to privacy to publish their name in connection with such matters of general interest.[33]

Although a story may be embarrassing or distressful to a plaintiff this does not mean it cannot be published.[34] "Hurricane" describes an event of legitimate public interest. Indeed, the public was so interested, a general outcry arose for a new trial.[35] Naturally the 1967 trial, including Patty Valentine's testimony, received national coverage.

The Eleventh Circuit also correctly affirmed the trial court's holding that "Hurricane" did not commercially exploit Patty Valentine's

28. *Id.*
29. 231 So. 2d 254, 256 (D. Fla. 1970).
30. 698 F.2d at 432.
31. *Id.* at 432 n.1.
32. 20 So. 2d at 251.
33. Jacova v. Southern Radio and Television Company, 83 So. 2d 34, 36 (1955).
34. Cape Publications, Inc. v. Bridges, 423 So. 2d 426, 428 (D. Fla. 1982)(U.S. appeal pending)
35. 698 F.2d at 431.

name.[36] The song concerned the 1967 trial and facts surrounding the murder; not any one person in particular.[37] One's First Amendment rights would be severely limited if one could not use the name of an individual without their consent for any purpose.

Thus, *Valentine v. C.B.S., Inc.*, correctly allowed Bob Dylan and Jacques Levy to fully speak and write their opinion in "Hurricane" on the alleged conspiracy to unjustly convict Rubin "Hurricane" Carter. By doing so, they did not abuse this right since plaintiff was not defamed, her right to privacy was not invaded, and her name was not commercially exploited.

Margaret Klug

C. *Topless Pro Boxer—"Public Figure" Standard*

A New York court recently held that High Society Magazine's publication of a photograph supposedly depicting the plaintiff, Cathy Davis posing as a topless boxer, was a "newsworthy event" and was absolutely privileged in *Davis v. High Society Magazine, Inc.*[1]

The caption of the photograph lead the reader to believe that the topless boxer was the plaintiff when in fact the topless boxer was not the plaintiff. Because the plaintiff was a "public figure," she could not recover unless she proved "actual malice."[2] The existence of "actual malice" was a factual question pertaining to the defendant's state of mind and did not readily lend itself to summary judgment which the plaintiff sought.[3]

Plaintiff, Cathy (Cat) Davis, a champion female boxer, according to her complaint, a "radio and television personality," brought this action claiming that defendants, High Society Magazine, Inc. and Dorjam Publications, Inc., violated her right to privacy by publishing a picture of a topless boxer captioned "Cat Davis" in an issue of "Celebrity Skin III" magazine.[4]

"Celebrity Skin" is a magazine which specializes in photographs of "well-known women caught in the most revealing situations and positions."[5] The magazines included an article and pictorial of plaintiff

36. *Id.* at 433.
37. *Id.* at 432 n.1.

1. Davis v. High Society Magazine, Inc. 457 N.Y.S.2d 308, 315 (A.D. 1982).
2. *Id.* at 316.
3. *Id.*
4. *Id.* at 310-11.
5. *Id.* at 310.

containing three photographs. Two of the photographs appeared to be of actual boxing matches, which the plaintiff acknowledged were of her. The third photograph, which particularly offended the plaintiff, showed two women posing topless. The plaintiff claimed that the topless photo was not of her.[6]

The defendant answered the complaint stating: (1) that the photograph complained of was sent to High Society from a source in Maryland which had been reliable in the past, (2) that the plaintiff's husband/manager approached High Society with the possibility of doing an interview with the plaintiff, indicating however, that the plaintiff did not pose nude and (3) that before any deal was reached, High Society published and distributed the complained of article.[7]

Beside the topless photograph was the caption "Cat Davis" in bold print, followed by:

> Her vital statistics are: 35-25-35, 16 fights and 15 k.o.'s! Pound for pound, the 132 lb. beauty is one of the best female boxers in the ring today. Although her manager/husband Sal Algieri claims she's never posed nude, this photo sent in by a reader sure looks like the Top Cat to us.[8]

Davis filed this action claiming a violation of her right to privacy. The action was supported by uncontested sworn statements by the plaintiff and others to the effect that neither of the women in the topless photograph was in fact the plaintiff.

The trial court granted summary judgment in favor of the plaintiff on the grounds that defendant High Society had not put forth any allegations to seriously dispute the plaintiff's sworn statements which tended to prove that neither of the women in the topless photograph was in fact the plaintiff. The defendant also had not raised the issue that the plaintiff had consented to the publication.[9]

On appeal, the defendant[10] claimed that the New York Civil Rights Law under which the plaintiff brought her action did not apply in a case where the publication was of a "newsworthy event." The appeal was sustained, the summary judgment reversed, and the case was remanded for trial on the facts.[11]

The right to privacy cause of action is relatively new to the tort

6. *Id.* at 311.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* at 312.
11. *Id.* at 316.

arena and lacks uniformity from state to state despite the active role that the Supreme Court has played in the formation of the rules that surround it. Common law did not recognize the right to privacy.[12] It was not until Harvard Law Review published an article by Justices Warren and Brandeis[13] that the right to privacy was given its judicial origin in the United States.[14] While the Supreme Court has recognized a national right to privacy in marriage based on the first, third, fourth, fifth and ninth amendments,[15] enforcement of an action based on a right to privacy is still considered to be primarily under the states' police power.

New York adopted the right to privacy cause of action with a statute which prohibits the misappropriation of a person's name or likeness for commercial purposes without their consent. The cause of action was a statutory reaction to *Roberson v. Rochester Folding Box Co.*[16] In *Roberson*, a flour company began using an image of the infant Roberson's face as a trade symbol on their flour bags. The New York court dismissed the case and refused to recognize Roberson's right to privacy as grounds for a cause of action.

The following year, the New York legislature enacted sections 50 and 51 of its Civil Rights Law[17] making the misappropriation of one's name or likeness for purposes of trade or advertising without consent redressable under New York law.[18] While there is case law in New York tending to infer that New York has accepted a right to privacy cause of action based on the right to be free from publicity which places one in a "false light,"[19] a recent decision stated that whether

12. Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 545, 64 N.E. 442 (1902).

13. Warren and Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1891).

14. Melvin v. Reid, 112 Cal. App. 285, 297 P. 91 (1931).

15. Griswold v. Connecticut, 381 U.S. 479 (1965).

16. 171 N.Y. 538, 64 N.E. 442 (1902).

17. N.Y. Civ. Rights Law §§ 50-51 (McKinney 1983).

18. 457 N.Y.S.2d 308, 312 (A.D. 1982).

19. *See* Spahn v. Julian Messner, Inc., 18 N.Y.2d 324, 274 N.Y.S.2d 877, 221 N.E.2d 840 (1965), where publisher of unauthorized biography of professional baseball player's life fictionalized facts concerning the player's childhood, his relationship with his father, his courtship of his wife, important events during their marriage, and during his military service. The court held that if the publication is neither factual nor historical, section 51 applies and since the player was a living person, consent must be obtained. *See also* Nader v. General Motors Corporation, 307 N.Y.S.2d 647 (1970), where agents of General Motors conducting a series of interviews with acquaintances of the plaintiff, questioning them about and casting aspersions upon Nader's political, social, racial, sexual and religious views, and kept him under surveillance in public places for an unreasonable length of time, violated his right to privacy despite the fact that there was no misappropriation of his name or likeness for trade or advertising.

"false light" is a recognized cause of action in New York is undecided.[20]

The appellate court in *Davis* interpreted sections 50 and 51 of the New York Civil Rights Law[21] as applying only to those cases where there is a commercial misappropriation of a person's name or likeness without permission.[22] The issue then became whether High Society's use of the plaintiff's name and photographs was for a commercial misappropriation.

While the Supreme Court has recognized a right to privacy in some instances under the Constitution, New York courts, in accordance with the New York statutes, have given the right to privacy action a narrow interpretation by confining judicial relief to cases involving "commercial misappropriation."[23] "Commercial misappropriation" is defined more specifically in New York as appropriation for purposes of "trade" and "advertising."[24]

Advertising is defined as "solicitation for patronage, intended to promote the sale of some collateral commodity or service."[25] In *Flores v. Mosler Safe Co.*,[26] a safe and vault manufacturer and retailer circulated an article which described a fire that resulted in a sale by the defendant, and named Flores, the plaintiff, as a possible cause of the fire. The New York Court of Appeals found that the article was for the "sole purpose of soliciting purchasers for the defendant's products" and therefore violated the the New York Civil Rights Law.[27] The article and picture of Cat Davis was not published for the purpose of selling anyone's services. Therefore, the court found that the article was not "advertising" for purposes of the New York statute.

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20. Arrington v. New York Times Co., 55 N.Y.2d 433, 449 N.Y.S.2d 941, 434 N.E.2d 1319 (1982).

21. N.Y. Civ. Rights Law §§ 50-51 (McKinney 1983).

22. The pertinent portion of § 51 reads:

> Any person whose name, portrait or picture is used in this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by section fifty of this article, the jury, in its discretion, may award exemplary damages.

Section 50 is the penal version of § 51.

23. 457 N.Y.S.2d 308, 313 (1982).

24. N.Y. Civ. Rights Law §§ 50-51 (McKinney 1983).

25. 457 N.Y.S.2d 308, 313.

26. 7 N.Y.2d 276, 196 N.Y.S.2d 975, 164 N.E.2d 853 (1959).

27. *Id.*

"Trade," under New York law, is potentially a broader category than "advertising" and is not specifically defined. The New York Court of Appeals in *Arrington v. New York Times Co.* stated that while profit motive was a necessary element in determining whether a publication of a name or picture was for "trade" purposes, it was not a sufficient motive.[28] In *Arrington*, a black man protested to having his picture taken for a feature article entitled "The Black Middle Class: Making It." He was able to state a cause of action in right to privacy because it was not clear for purposes of summary judgment that the photographer and graphic artist had not sold Arrington's photograph solely for the furtherance of their trade.[29]

In *Binns v. Vitagraph Co.*[30] the New York Court of Appeals confronted the problem of separating publication for trade purposes, which requires the consent of the person whose name or likeness is being used, from general publication which does not require consent. In *Binns*, a comic book publisher fictionalized the experiences of the plaintiff who had refused to appear in movies or on stage after he had been acclaimed as a hero following an accident at sea. The final series of pictures in the comic book showed drawings of the plaintiff contorting his face "solely for the amusement of the spectators."[31] It is unclear whether the opinion relied on the lack of a relationship between the news story and the final series of pictures or on the fact that the defendant fictionalized the actual events which took place in the accident and rescue. Which ever the case, later cases have generalized from *Binns* and defined two types of circumstances where a publication will be considered for trade purposes: (i) when there is no reasonable relationship between the use of the person's name or likeness and the matter of public interest,[32] and (ii) when there was a substantial fictionalization.[33]

The "no real relationship" test[34] was applied in *Thomas v. Close-up, Inc.*[35] when Thomas' photograph was used in an article on drug

28. 55 N.Y.2d 433, 440, 449 N.Y.S.2d 941, 944, 434 N.E.2d 1319 (1982).

29. *Id.* at 443, 449 N.Y.S.2d at 945.

30. 210 N.Y. 51, 103 N.E. 1108 (1913).

31. *See* Malony v. Boy Comics Publishers, 277 A.D. 166, 172-73, 98 N.Y.S.2d 119 (1950) for a detailed account of the facts in *Binns*.

32. *See generally* Murray v. New York Magazine Co., 27 N.Y.2d 406, 318 N.Y.S.2d 474, 267 N.E.2d 256 (1971).

33. Pagan v. New York Herald Tribune, 32 A.D.2d 341, 343, 301 N.Y.S.2d 120, *aff'd*. 26 N.Y.2d 941, 310 N.Y.S.2d 327, 258 N.E.2d 727 (1970).

34. Murray v. New York Magazine Co., 27 N.Y.2d 406, 318 N.Y.S.2d 474, 267 N.E.2d 256 (1971).

35. 277 A.D. 848, 98 N.Y.S.2d 300 (1950).

dealing when he had no connection with the matter. The use of the plaintiff's picture was found to have no real relationship to the matter of public interest (the drug dealing) and therefore was considered to be for purposes of trade and in violation of the plaintiff's right to privacy under the New York Civil Laws.

The "substantial fictionalization" test[36] was applied in *Spahn v. Julian Messner, Inc.*[37] when a well known baseball player sued for invasion of his privacy when a publisher fictionalized facts concerning the player's childhood, his relationship with his father, his courtship of his wife, and important events during their marriage and his military service. The court held that since there was a substantial fictionalization of the facts, that the publisher was using the player's name for commercial exploitation [trade] purposes and therefore violating his right to privacy without his consent.[38]

Despite the existance of a statutory right to privacy in New York, there still exist counterbalancing considerations based on First Amendment freedom of the press. One such consideration is the value of the article as a newsworthy item. "Newsworthy" has been defined[39] to the point that publications can be protected even if they are not based on news or nonfiction[40] and even if the publications are made solely for pecuniary profit.

What constitutes a newsworthy item is also a function of the status of the plaintiff. In the present case the picture was deemed to be a newsworthy event because Davis was a well known female boxer. If she had posed semi-clad, the court reasoned that the event would be newsworthy to a great many people.[41]

A second consideration is whether the person is "public" or "private." Under *New York Times v. Sullivan*,[42] if a plaintiff is a public figure or public official, then the plaintiff has the burden to prove that the publisher acted with the actual intent to publish false information, or with a reckless disregard for the truth.[43] Whether or not a plaintiff is

36. Pagan v. New York Herald Tribune, 32 A.D.2d 341, 343, 301 N.Y.S.2d 120, *aff'd.* 26 N.Y.2d 941, 310 N.Y.S.2d 327, 258 N.E.2d 727 (1970).

37. 260 N.Y.S.2d 451, 454-55, (1965), *aff'd.* 18 N.Y.2d 324, 274 N.Y.S.2d 877, 221 N.E.2d 543 (1966), *aff'd.* 21 N.Y.2d 124, 286 N.Y.S.2d 832, 233 N.E.2d 840 (1967).

38. 21 N.Y.2d 124, 129, 286 N.Y.S.2d 832, 836, 233 N.E.2d 840, 843 (1967).

39. 457 N.Y.S.2d 308, 315.

40. University of Notre Dame Du Lac v. Twentieth Century-Fox Film Corp., 22 A.D.2d 452, 256 N.Y.S.2d 301, *aff'd.* 15 N.Y.2d 940, 259 N.Y.S.2d 832, 207 N.E.2d 508 (1965).

41. 457 N.Y.S.2d 308, 315.

42. 376 U.S. 254 (1964).

43. *Id.* at 283.

a public figure or public official is a question of law for the court.[44] In *Curtis Publishing Co. v. Butts*,[45] a college football director was deemed to be a public figure for the limited purpose of an article that accused him of conspiring to fix football games. Since Butts was deemed to be a limited public figure, he had the burden to prove that Curtis Publishing Company had knowingly or recklessly disregarded the truth.

Similarly, in the present case, Davis was found to be a limited purpose public figure with respect to publications relating to her boxing. Even though the article and photo seemed to be at least as interested in Ms. Davis' breasts as her boxing, the court found that the article sufficiently related to her public image as a boxer to be "absolutely protected." The term "absolutely" does not preclude the plaintiff's recovery if she can prove actual malice (knowing or reckless disregard for the truth of the article).

The *Davis* court summarized the steps in the analysis of a right to privacy cause of action in New York against a media defendant by stating:

> [W]here [the] use [of a plaintiff's name or likeness] is associated with an item that would generally be considered newsworthy or of public interest and concerns a public official or figure, the Civil Rights Law is construed so that the use will be considered for the purposes of trade if it contains substantial falsification or is not really connected with the matter of public interest, and provided that the defendant was aware of, or recklessly disregarded, this fact.[46]

The court reasoned that the article in *Davis* was newsworthy and therefore protected under the First Amendment, that the article was not for advertising or trade purposes under the New York statutes and case law, and that plaintiff was a public figure for the limited purpose of an article relating to her boxing career.

The court concluded that since the plaintiff was a public figure, and since the article was newsworthy and therefore constitutionally protected, that the plaintiff must prove actual malice (a knowing or reckless disregard for the truth or falsity of the publication) in order to recover on her claim. Since the issue of actual malice is a question of fact for the jury, based on the thoughts and intentions of the publisher,

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44. 457 N.Y.S.2d 308, 316.

45. 388 U.S. 130 (1967).

46. 457 N.Y.S.2d 308, 315, *citing* Spahn v. Julian Messner, Inc., 21 N.Y.2d 124, 127, 286 N.Y.S.2d 832, 233 N.E.2d 840 (1967).

there existed a triable issue of material fact and summary judgment was improperly granted by the trial court.

Daniel Gilson

D. *Ms. Wyoming Not Defamed By "Penthouse"*

Penthouse magazine fortuitously escaped liability for defamation in a spoof of the Miss America Pageant. In *Pring v. Penthouse International, Ltd.*,[1] the court held that defendants' magazine article referred to plaintiff. However, it did not hold defendants liable, because the story could not, as a matter of law, be understood as describing actual facts. The court found the story to be thoroughly crude, but not exempt from the protection of the first amendment.[2]

Plaintiff, Kimerli Jayne Pring, competed in the Miss America Pageant as Miss Wyoming. She wore a blue evening gown and twirled a baton. Defendant, Phillip Cioffari, saw Pring's performance and wrote a story about a baton-twirling Miss Wyoming who also wore a blue gown.[3] Penthouse published "Miss Wyoming Saves the World" in August 1979. Cioffari had previously contributed to Penthouse, and the magazine relied on his representations that the story was fiction.

The fictional Miss Wyoming was named Charlene. Charlene went to Atlantic City accompanied only by a high school coach named Corky. All the other contestants had large, impressive entourages. In contrast to the singing and dancing of the other contestants, Charlene felt her baton twirling a pretty mean talent.

The story related, however, how Charlene had discovered her "*real* talent." She had fellated a high school football player and sent him floating into the air. In the talent competition, Charlene simulated fellatio with her baton, which both shocked and pleased the Pageant audience.

Charlene lost the contest, but resolved to show the world her real talent. She led Corky onto the stage and fellated him on national television. Were she Miss America, Charlene daydreamed, she would gladly fellate the entire Soviet Central Committee to preserve world peace. The cameras remained on Charlene and Corky as he floated off the stage.

Pring's amended complaint claimed that the story defamed her by

1. 695 F.2d 438 (10th Cir. 1982), *cert. denied*, —U.S.—, 103 S. Ct. 3112 (1983).

2. *Id.* at 443, citing Winters v. New York, 333 U.S. 507 (1948).

3. Franklin & Trager, *Literature and Libel*, 4 Comm/Ent 205, 236 n. 96 (1982) [hereinafter cited as Franklin & Trager].

saying that Miss Wyoming had fellated two men and imitated fellatio on her baton. By limiting the complaint to specific instances in the story, she precluded Penthouse from exploring, generally, her sexual history.[4] The circuit court accepted the jury's finding that the story, as a whole, referred to Pring.[5] The jury awarded her $26.5 million against Penthouse.[6]

The trial court also found that Penthouse had acted with "actual malice" toward Pring[7] and that she was a private figure.[8] The circuit court did not address these findings, but they permitted a judgment for punitive damages and compensatory damages without proof of actual injury.[9] Penthouse's potential liability, therefore, was limited only by the discretion of a local judge and jury.[10]

Penthouse prevailed on appeal because the story could not be reasonably understood as describing "actual facts" about Pring's conduct.[11] Though Penthouse presented the story in the factual setting of the Miss America Pageant in Atlantic City, Charlene's powers of levitation were pure fantasy. The story "present[ed] levitation as the central theme and as a device to 'save the world.' "[12] Because some of the charged incidents supposedly took place on national television and in front of the Pageant audience, there was "a sufficient signal that the story could not be taken literally."[13] Pring's witnesses all testified that

4. *Pring*, 695 F.2d at 441.

5. *Id.*

6. The trial court reduced the punitive damages component from $25 million to $12.5 million. Franklin & Trager at 226 n. 81. One author has noted that punitive damages may vastly exceed a state's maximum criminal penalty for malicious libel. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269, 279 (1983). Many jurisdictions prohibit insurance against such judgments. *Id.*

7. *See* Miss America Pageant, Inc. v. Penthouse Intl, Ltd., 524 F. Supp. 1280, 1287 (D. N.J. 1981). "Actual malice" is defined as "knowledge that [a statement] was false or with reckless disregard of whether it was false or not." New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964).

8. Pring argued that the "actual facts" requirement was applicable only to public figures. By inference, therefore, Pring was a private figure for the purpose of her suit. *See Pring*, 695 F.2d at 442.

9. In *Gertz v. Robert Welch, Inc.* 418 U.S. 323 (1974), the Court declined to require private plaintiffs to prove actual malice before recovering, the states may impose liability for defamation of private plaintiffs, so long as it is not without fault. *Id.* at 347. Because presumed damages are an "oddity" in tort law, a private plaintiff may collect only proven damages absent proof of "actual malice." *Id.* at 350.

10. First amendment protections do not generally extend to the long arm jurisdiction analysis. *See* Scott, *Jurisdiction Over the Press: a Survey and Analysis*, 32 Fed. Com. L. J. 19 (1980).

11. *Pring*, 695 F.2d at 442.

12. *Id.* at 441.

13. *Id.*

the story could not be about Pring; "she would not do that."[14] While tests of reason are typically questions for the jury, the question of whether a statement described "actual facts" was a question of law.[15] The appellate court concluded by noting that ideas which deviate from public standards and even "vulgar magazines" have the protection of the first amendment.[16]

A defamation defendant's first amendment protections are weaker against a private plaintiff than against a public official or public figure.[17] Still, even a private plaintiff can not recover for an unfavorable opinion. "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction . . . on the competition of other ideas."[18] The Supreme Court has recognized that public debate can become volatile; however, to preserve robust public debate, a defamation suit can succeed only on a false statement of fact.[19]

Penthouse prevailed on a novel application of this rule. The *Pring* court relied on *Greebelt Cooperative Publishing Association v. Bresler*[20] and *Old Dominion Branch No. 496 v. Austin*.[21] In *Greenbelt*, defendant's newspaper reported that plaintiff had been accused of "blackmail" during a city council debate on the city's planned purchase of land from plaintiff. The newspaper had accurately attributed such accusations, and it was clear from the context that plaintiff had not been accused of the crime of blackmail. Rather, this was a characterization of a tough bargaining position.[22] In *Old Dominion Branch*, defendant union published the names of three non-union letter carriers in its "List of Scabs." The union subsequently defined "scab" as a traitor to God, country, and family, and more depraved than Benedict Arnold and Judas Iscariot. The court treated this as an abusive opinion, nonetheless permissible in the heated context of a labor dispute.[23]

The *Pring* court did not distinguish fact from opinion, but fact

14. *Id.* at 441-42. This seems more probative of the propositions that Pring's acquaintances did not identify Charlene as Pring or that they did not believe the story. This would have been relevant to the proof of actual damages.

15. *Id.* at 442.

16. *Id.* at 443.

17. *See New York Times*, 376 U.S. 254; Curtis Pub. Co. v. Butts, 388 U.S. 130 (1967); and Gertz v. Robert Welch, Inc., 418 U.S. 323.

18. *Gertz*, 418 U.S. at 339-40.

19. *See infra* notes 20 and 21.

20. 398 U.S. 6 (1970).

21. 418 U.S. 264 (1974).

22. *Greenbelt*, 398 U.S. at 13-14.

23. *Old Dominion Branch*, 418 U.S. at 283-84.

from fantasy.[24] The distinction is, at best, a tenuous safeguard for the preservation of free-wheeling public debate.[25] The dissent in *Pring* considered levitation, dreams, and public performance as fiction, but fellatio as a specific deviant act. Fantasy was merely a gratuitous embellishment of fact.[26] Therefore, the swing of one vote would have prevented Penthouse from benefitting from the court's expansion of the "actual facts" requirement.

But for the the fanciful nature of the story, Penthouse would have faced an unexpected and open-ended liability.[27] Robert Hofler, a senior editor at Penthouse, had qualms about the story because he thought the subject had been overdone satirically. Penthouse's attorney asked only if the article was fiction. James Goode, editorial director, found nothing to indicate that the article was anything but fiction.[28] Furthermore, Penthouse relied on Cioffari's representation that the story was purely fictional.[29]

Denoting a story as fiction does not insulate its publisher from liability for defamation.[30] However, applying the "actual malice" standard to fiction has defied clear analysis.[31] The concern in defamation law is with "defamatory lies masquerading as truth."[32] But fiction is not intended to convey truth and is always, in some sense, false. It would be "absurd to infer [actual] malice" simply because a piece of fiction is false.[33]

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24. *Pring*, 695 F.2d at 441. *See* Franklin & Trager at 230-32. The authors described "faction" as a fictional work mythologizing real persons or events. Liability would turn on whether the reader would understand the work to be describing real events. For example *see*, R. Coover, The Public Burning, which depicted Richard Nixon attempting to seduce Ethel Rosenberg shortly before her execution.

25. There is no privilege, *per se*, on the discussion of public issues because it would require courts to evaluate purported public issues. The status of the plaintiff is a more judicially manageable standard. *Gertz*, 376 U.S. at 346. For a touch of rhetorical flourish, however, Penthouse might have argued, perhaps ironically, that it should be free to parody beauty pageants because they demean the status of women.

26. *Pring*, 695 F.2d at 443-44 (Breitenstein, Circuit Judge, dissenting).

27. *See supra* notes 6 and 9.

28. *Miss America Pageant*, 524 F. Supp. at 1285.

29. *Id.* at 1287.

30. *Pring*, 695 F.2d at 442.

31. Franklin & Trager at 206-07. *See also* Silver, *Libel, the 'Higher Truths' of Art, and the First Amendment*, 126 U. Pa. L. Rev. 1065 (1978).

32. Guglielmi v. Spelling-Goldberg Productions, 25 Cal. 3d 860, 871, 603 P.2d 454, 461, 160 Cal. Rptr. 352, 359 (1979) (Bird, concurring).

33. Bindrim v. Mitchell, 92 Cal. App. 3d 61, 88, 155 Cal. Rptr. 29, 44-45, *cert. denied*, 444 U.S. 984 (1979). Franklin & Trager have suggested four paradigms to resolve the problem of standards of fault for defamation in fiction. If an author publishes a veiled attack, intent is clearly present. Franklin & Trager at 223. If an author fails adequately to disguise a prominent figure, he ought to be liable for recklessness. *Id.* at 225. A failed disguise of an

The Supreme Court has prohibited liability for defamation without fault.[34] The *Pring* court discharged Penthouse on the basis of the chance inclusion of "levitation" in the story and did not discuss how Penthouse was at fault. A less farcical literary or dramatic work on the same subject matter, and developed in substantially the same way, would not have escaped liability. This suggests a return to the old standard of "not who was aimed at, but who was hit."[35] The open question, then, is the appropriate standard of conduct to avoid liability for "referring" to an unexpected plaintiff in a work of fiction.

There is little authority to resolve the question, but the "actual malice" standard is subjective. It relates not to whether a reasonable publisher ought to have investigated, but to whether he entertained serious doubts as to the truth of a statement.[36]

A restatement of the "actual malice" standard for a reference in fiction to an unexpected plaintiff would require that the defendant have entertained serious doubts as to whether the statement would be understood as referring to a particular plaintiff.

Because Cioffari had seen Pring on stage, he was arguably reckless in not further disquising his fictional baton twirler.[37] Penthouse, however, relied on Ciofarri's statement that the story was fiction and probably had no subjective doubt. Penthouse might have been negligent if it had a duty to investigate whether a reasonable person would identify Charlene as Pring.[38]

In *Bindrim v. Mitchell*,[39] defendant Mitchell attended a nude marathon encounter group with plaintiff psychologist Bindrim. She wrote a scurrilous and false account of the session and published it through defendant Doubleday. The court stated that Doubleday was entitled to rely on Mitchell's statement that the work was fiction prior to publishing the hardback edition. However, prior to publishing the paperback edition, Doubleday received a letter from Bindrim's attorney informing

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"ordinary citizen" ought to merit actual damages upon proof of negligence. *Id.* at 226. If an author has forgotten a plaintiff, he ought to be liable for negligence. *Id.* at 227. To prevent an accidental description, an author ought to consult readily available directories. *Id.* at 229-30.

34. *Gertz*, 418 U.S. at 347.

35. Laudati v. Stea, 44 R.I. 303, 306, 117 A. 422, 424 (1922).

36. St. Amant v. Thompson, 390 U.S. 727, 732-33 (1968).

37. *See supra* note 3. For example, Charlene could easily have haled from another state.

38. *See supra* note 35, Franklin & Trager at 229-30. Another court, however, found Penthouse's reliance on Cioffari to be justified. *Miss America Pageant* 524 F. Supp. at 1283. Further, a negligence standard arguably has a potential to erode the freedom of the press. *Gertz*, 418 U.S. at 360 (Douglas, J., dissenting).

39. 92 Cal. App. 3d 61, 155 Cal. Rptr. 29 (1979).

it of Bindrim's claim. Doubleday's duty to investigate arose when it had, or should have had, serious doubts as to whether Bindrim was the psychologist in the novel and whether he would be defamed.[40]

The *Bindrim* standard is analogous to the subjective "actual malice" standard. However, Bindrim was a public figure[41] and had to prove "actual malice" to recover anything.[42] Pring, as a private plaintiff, was entitled to recover for mere negligence, but only upon proof of actual injury.[43] Given that all the witnesses from her community who testified stated that the story could not be about Pring,[44] her damages might have been nominal.

More serious fictional and dramatic investigation of pressing social issues, such as prostitution, drug abuse, and domestic violence, are of undoubted value. It is not unreasonable, however, to require a negligent publisher or producer to compensate a private person for actual injury to reputation. But *Gertz* precludes the award of punitive or "presumed damages" for mere negligence. A private plaintiff defamed in a fictional work ought, therefore, to prove actual damages or that the defendant was aware of the possibility of defaming the plaintiff before he may recover. Imposing such a burden on plaintiffs will create a more definite limit on such liability than the whim of a home town jury.

William L. Cummings

E. *Falsely Portraying Person As a Prostitute is Defamatory*

Picture this scenario: you are at home watching television in the company of your husband and two year old son. Not allowing your son to view any fictional sex or violence which could conceivably have a detrimental effect upon his development, you feel that an ABC documentary can do no harm. This one is an hour long "ABC News Closeup" entitled "Sex for Sale: The Urban Battleground." The next thing you know, in the midst of a discussion of the large number of prostitutes which are now plaguing our nation's fair cities, appears a candid scene of *you* walking down the street . . . .

At the very least you would hope that your defamation claim

40. *Id.* at 74, 155 Cal. Rptr. at 36-37.
41. *Id.* at 71 n. 1, 155 Cal. Rptr. at 35.
42. *See supra* note 17.
43. *See supra* note 9.
44. *Pring*, 695 F.2d at 441-42.

against ABC would reach the jury and not be thrown out of court by way of summary judgment.

In the Sixth Circuit case *Clark v. American Broadcasting Companies*,[1] the court determined that as it was possible that Ruby Clark's appearance in a television broadcast concerning prostitution and its effects upon the neighborhoods in which it exists was capable of a defamatory interpretation, granting summary judgment for the broadcaster was improper.[2] Ruby Clark is not now, and never has been, a prostitute. Further, Ruby Clark was not a resident of the neighborhood portrayed as effected by the plague of prostitution, nor was she interviewed as to her views on the subject matter of the broadcast in which she was portrayed. Therefore, her "participation" in the broadcast was not within the scope of Michigan's qualified privilege.[3] Additionally, the court concluded that Ruby Clark did not have to prove that ABC acted with actual malice because '[p]laintiff is not a public figure for all purposes."[4]

What were the circumstances which placed Ruby Clark in such a precarious position? On April 22, 1977, ABC aired a broadcast in order to show the effects of commercialized sex on America's cities, towns and neighborhoods. The segment in which Ruby clark appeared focused on the devastating effect of street prostitution on a middle class neighborhood in Detroit. Several women, not necessarily prostitutes, were photographed as they walked down a public street.

The first woman was white, obese, approximately fifty years old, wearing a hat and carrying a shopping bag in both hands.

The second woman was black, slightly obese, approximately forty years old, wearing large framed glasses and was exiting a grocery store.

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1. 684 F.2d 1208 (6th Cir., 1982).

2. *Id.* at 1213.

3. *Id.* at 1216.

4. *Id.* at 1217. When a person is a public figure, a plaintiff must prove actual malice in order to recover for defamation. For purposes of the first and fourth amendments, the Court in Gertz v. Robert Welch, Inc., 418 U.S. 323, 346 (1974), defined "public figures" as follows:

> For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. 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. In either event, they invite attention and comment.

The court in *Gertz* noted that public figures may recover from injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth. 418 U.S. at 342. *See* Street v. National Broadcasting Co., 645 F.2d 1227, 1233 (6th Cir.), *cert. granted*, 454 U.S. 815, *cert. dismissed*, 454 U.S. 1095 (1981); Walker v. Cahalan, 542 U.S. 966 (1977).

The third woman was Ruby Clark. She was photographed using frontal close-ups. She appeared to be in her early to mid twenties, black, slim, quite attractive and stylishly dressed. She was wearing large earrings and had long hair which was pulled up above her head.

While these three women were shown in this documentary the dialogue included comments that the street prostitutes were often black, "[b]ut for black women whose homes were there, the cruising white customers were an especially humiliating experience."[5]

Seconds *after* Ruby Clark's appearance, a different black female appeared on the screen and stated, "[a]lmost any woman who was black and on the street was considered to be a prostitute herself. And was treated like a prostitute."[6]

When Ruby Clark's appearance is juxtaposed with that of the two matrons and with this dialogue, what possible conclusions would the average viewer draw in their own minds as to the livelihood of Ruby Clark? She certainly did not look at all like the two obese, older women. Also, she, unlike the other two, was attractive. And further, Ruby Clark is black.

The district court granted ABC's motion for summary judgment.[7] Concluding that the broadcast was not libelous, the court reasoned that Ruby Clark's appearance did not suggest that her activity parallelled that of a street prostitute.[8]

On appeal, the Sixth Circuit took a more personal view than did the district court, and reasoned that Ruby Clark's appearance was capable of at least two interpretations, one of which was defamatory.[9] Stereotypical behavior commonly associated with prostitution includes "wearing suggestive clothing, suggestive walking, overt acts of solicitation, and the like."[10] However, unlike the district court, the Sixth Circuit's discussion of this stereotypical behavior commonly associated with prostitution included the fact that Ruby Clark appeared on the broadcast during a discussion of street prostitution.[11] "Viewed in this manner, Plaintiff was either portrayed as a prostitute or could reason-

5. 684 F.2d at 1211.

6. *Id.*

7. *Id.* at 1210.

8. *Id.* at 1212.

9. *Id.* at 1213. That the broadcast is reasonably capable of a non-defamatory meaning is clear from the district court's reasoning. The district court focused *solely* on whether plaintiff's behavior during the broadcast was similar to the stereotypical actions commonly associated with prostitution in its determination that the broadcast was not libelous.

10. *Id.*

11. *Id.*

ably be mistaken for a prostitute."[12] Consequently, it was for the jury to decide whether the broadcast was understood as being defamatory.[13]

The court in *Clark* cites to *Schultz v. Newsweek, Inc.*[14] in pointing out that "[t]here is no rule which favors either granting or denying motions for summary judgment in defamation cases."[15] In *Schultz*, plaintiff brought a defamation suit against Newsweek after Newsweek published reports labelling plaintiff as an underworld figure and connecting him with the investigation of the disappearance of a union leader.[16] Summary judgment was granted for Newsweek after showing conclusively that a reasonable person, given the facts presented, would have found this plaintiff to be involved in the Mafia.[17]

In Ruby Clark's case, a reasonable person given the facts presented, which would have been only those facts presented on the News Close-Up, could have conclusively perceived Ruby Clark to be involved in the business of sex. Minimally, the ambiguity created when Ruby Clark's appearance was viewed within the context of the News Close-Up rendered the broadcast susceptible to both a defamatory and a nondefamatory interpretation, but certainly not solely a nondefamatory meaning. Therefore, it would have required a great deal of confusion as to who the parties to this case were to grant a summary judgment in favor of the party who made it so simple for the viewers to erroneously perceive Ms. Clark's profession. In fact, the documentary made it seem so obvious that Ruby Clark was a prostitute, that she was propositioned, was shunned by church members, and was confronted

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12. *Id.*

13. *Id.*; Schultz v. Reader's Digest Association, 468 F. Supp. 551, 554 (E.D. Mich., 1979); Michigan United Conservation Clubs v. CBS News, 485 F.Supp. 893, 902 (W.D. Mich., 1980), *aff'd*, 665 F.2d 110 (6th Cir., 1981).

In *Schultz*, plaintiff instituted a libel action against a magazine publisher on a claim that he had been defamed in an article entitled *Why Jimmy Hoffa Had to Die*, which concerned the disappearance of this former labor leader. 468 F. Supp. 551, 553. If the magazine article was reasonably susceptible of a defamatory interpretation, then it would be for the jury to determine whether that was the way the article was understood. 468 F. Supp. at 554.

In *Michigan United Conservation Clubs*, an organization of hunters and several of its members sued the news division of CBS claiming that they were defamed by two of the defendant's television broadcasts concerning the subject of hunting. 485 F. Supp. 893, 894. The court stated that if the publication was capable of more than one meaning, and one of those meanings was defamatory, then it would be for the jury to determine whether the communication was understood as being defamatory. 485 F. Supp. at 902.

14. 668 F.2d 911 (1982).

15. 684 F.2d at 1212.

16. 668 F.2d at 913.

17. *Id.*

with allegations that she was a prostitute.[18] Moreover, after the broadcast aired, two potential employers refused to hire Ms. Clark because they feared her "employment" would hurt their businesses.[19]

In *Schultz*, the information relied upon fit the reporter's own definition of "underworld figure" as "someone who has had more than an occassional brush with the forces of law and order."[20] Further, there was no evidence that the reporter had reason to believe this definition was false.[21] This is in direct contrast to *Clark* where it is evident that the producers of this broadcast were aware of the stereotypical prostitute, yet had no evidence whatsoever that Ruby Clark was a prostitute. However, they still photographed her in the context of this documentary.

Under Michigan law, there is a qualified privilege to publish information which is in the public interest, which imposes a burden on plaintiff of proving defendants acted with actual malice.[22] The court found that ABC did not act with actual malice.[23] However, as a matter of law, the court also determined that this qualified privilege did not apply in this case because "[a] newspaper or television broadcast concerning this incidental plaintiff is not in the public interest."[24] Although it can easily be argued that activities of street prostitutes are clearly in the public interest, Ruby Clark's participation in this broadcast was not in the public interest.[25] Ruby Clark was not a prostitute, nor was she a resident of the Detroit neighborhood discussed in the segment. It was not her reactions to street prostitution which were filmed, nor was she being harrassed by street prostitution. "Therefore her picture as she walked down a public street has absolutely no connection with the subject matter of the broadcast," and was not within Michigan's qualified privilege.[26]

In *Lawrence v. Fox*,[27] the court did a thorough job of explaining

18. *Clark*, 684 F.2d at 1211.
19. *Id.*
20. 668 F.2d at 914.
21. *Id.*
22. *Schultz*, 668 F.2d at 914.
23. *Clark*, 684 F.2d at 1214.
24. *Id.* at 1216.
25. *Id.*
26. *Id.* at 1217.
27. 97 N.W.2d 719 (1959). In *Lawrence*, a libel action against writers, newspapers, and a publishing company was brought by a former city deputy superintendent of police for publication of articles charging the deputy superintendent with fraud and corruption, protection of criminals and manipulation of liquor licenses, perjury, trickery and deceit. The language employed in the reports was "abusive and extreme, vitriolic in its terms." *Id.* at 720. The

the "why's," "what's," and "how's" behind "the privilege." It is a question for the court whether a privilege exists at all and to determine whether the circumstances under which the publication (or for purposes of this case, the photography) was made were such as to make the occasion privileged.[28]

> There is no need, at this date in our history, to urge that it is necessary to free institutions that the press itself be free. Today it is. The real issue before us is how free. Governmental interference is not the only threat to its freedom. On the contrary, a narrow or restrictive interpretation of the law of privilege in libel actions is equally dangerous. The publisher often faces a cruel dilemma: the more serious the charge of wrongdoing by a public official, more urgent the need for its airing. Yet, the more serious the charge, the greater the libel. It is in this uneasy and menacing situation that the law provides the publisher a sanctuary of sorts, the defense of privilege. It is no fortress, as we shall see. The defense interposed is that of privilege.[29]

Using this thought as a mere basis for "why have the privilege?", it becomes apparent that the American Broadcasting Company is making an effort to stretch this privilege to the limits of abuse. It is true that the privilege afforded varies with the importance of the social issues at stake.[30] However, the privilege should not be extended by way of giving power to the media to destroy the lives and/or reputations of innocent bystanders.

> At one extreme we have loose gossip, thoughtless or malevolent. Here the damage to the individual's reputation is balanced only against the social desirability of the unbridled tongue, the frenetic lashings of the scorpion's tail. Under the statutes of Edgar and Canute the tongue itself was forfeited. Modern law is more lenient. We class it simply as a case of "no privilege" and leave the parties to their proofs. At the other extreme are those occasions wherein the social interest involved in publication is so great as to immunize even deliberately malicious attacks upon one's character.[31]

Supreme Court of Michigan held that whether the publication was privileged was a question of law for the court and the lower court erred in submitting the question to the jury. *Id.* at 725.

28. Restatement (Second) of Torts § 619A (1981).

29. Lawrence v. Fox, 97 N.W.2d 719, 720 (1959).

30. *Id.* at 721.

31. *Id.*

Thus, perhaps it is a given that a discussion of selling sex as a commodity may be an important social issue because of the tremendous harm it causes to so many people. However, public policy as well as common sense should dictate that the privilege not be used as a means of displaying *anything* out of context. With the dialogue accompanying Ruby clark's stroll down the public thoroughfare, her portrayal was unquestionably used out of context.

In determining whether the privilege applies, the extrinsic circumstances, "the occasion," must be looked at rather than the actual words used.[32] This rule means no more than that the court must look to the extrinsic situation and not to the actual words used in order to determine whether the defamation is privileged.[33] The extrinsic circumstances in the case of Ruby Clark were that the American Broadcasting Company was reporting about an important area of civil concern. This creates a *qualified* privilege.[34] But having determined this, an additional step must be taken, namely, the ascertainment of the scope of this privilege.[35] Such privilege does not justify inaccuracies in the published report, or in this case, such an inaccurate photographed portrayal.[36]

The Supreme Court of Michigan, in *Nuyen v. Slater*,[37] included in its discussion of whether a qualified privilege exists the following:

> A publication is conditionally and qualifiedly privileged where circumstances exist, or are reasonably believed by the defendant to exist, which casts on him the duty of making a communication to a certain other person to whom he makes such communication in the performance of such duty, or whether the person is so situated that it becomes right in the interests of society that he should tell third persons certain facts, which he in good faith proceeds to do. This general idea has been otherwise expressed as follows: The communication made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a duty, it is privileged if made to a person having corresponding interest or duty, even though it contains

32. Bowerman v. Detroit Free Press, 283 N.W. 642, 644 (1939).

33. *Id.* In the libel case, *Bowerman*, the extrinsic circumstances were that the defendant's newspaper was reporting a judicial proceeding, and because it was a judicial proceeding a qualified privilege was created.

34. *See Bowerman*, 283 N.W. 642 (1939).

35. *Id.*

36. *See Bowerman*, 283 N.W. 642 (1939).

37. 127 N.W.2d 369 (1964).

> matter which, without this privilege, would be actionable and although the duty is not a legal one, but only a moral or social duty of imperfect obligation. The essential elements of a conditionally privileged communication may accordingly be enumerated as good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication in a proper manner and to proper parties only. The privilege arises from the necessity of full and unrestricted communication concerning a matter in which the parties have an interest or duty, and is not restricted within any narrow limits.[38]

Perhaps, this is legal jargon meaning that *how* and *when* something is said, or portrayed, is just as important as *what* is said, in the determination of whether or not the privilege can apply. Thus, when separating out the specific facts, it might appear that ABC had the privilege of using Ruby Clark in its educational documentary. But when viewed as a whole, the subject matter, the other matronly women portrayed, the dialogue, Ruby clark's attire, figure and general attractiveness, and the woman speaking immediately after Ruby Clark's "appearance," it is clear that an inaccuracy was portrayed which the privilege will *not* justify. "[W]e are looking at the stage, not at the script."[39] When appearing in the middle of fat, older women during a conversation of the embarrassing effects of street prostitution, it is quite simple for a television viewer to assume that the fat, older women were not prostitutes, but that Ruby Clark was.

Even more elementary to the discussion is that Michigan's qualified privilege does not extend "to plaintiffs who are not the focus of the alleged public interest publication."[40] It is indisputable that Ruby Clark was merely an incidental figure in the broadcast. What did the public gain by viewing this *non*-prostitute while simultaneously receiving the description of prostitutes, in which Ruby Clark's appearance "coincidentally" fit? Where would society be if in the name of the First Amendment the media were allowed to pick and choose unrelated individuals to fit into public interest news stories? Ruby Clark had absolutely nothing to do with the broadcast. She was not even given the opportunity to espouse her own views on the subject matter in which she was portrayed.

It is difficult to disagree with the fact that the media is an all im-

38. *Id.* at 372.
39. Lawrence v. Fox, 97 N.W.2d 719, 722 (1959).
40. Clark v. American Broadcasting Companies, 684 F.2d 1208, 1216 (1982).

portant and all encompassing force in our democratic and free society. Therefore, the implications of the decision in *Clark v. American Broadcasting Companies*, in its broadest sense, serve as reins on the media, an extremely influential entity.

As the manner in which society views prostitutes is not, as mathematicians would put it, a constant, I agree with the court's holding. Ruby Clark's appearance in the broadcast was capable of a defamatory interpretation.

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