EXPLORING THE ISSUE OF "STRICT LIABILITY" FOR DEFAMATION

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In a case that has gained the attention of the public and First Amendment scholars, an Oregon court this year held that a "blogger" sued for libel was entitled to no constitutional defenses where the plaintiffs were private figures, the blogger was not "media," and the posts did not involve matters of public concern. *Obsidian Finance Group, LLC v. Cox*, No. CV-11-57-HZ, 2011 WL 5999334 (D. Ore., November 30, 2011), motion for new trial denied, 2012 WL 1065484 (D. Ore. March 27, 2012). Following trial, a jury awarded plaintiffs $2.5 million in damages. Defendant's motion for a new trial was denied and the case is now on appeal to the Ninth Circuit. With the support of a noted First Amendment scholar, and an impressive group of amici, defendant is arguing that the jury instructions fundamentally misstated the law and the verdict was excessive.

The purpose of this article is to assess the legal bases, if any, for the recrudescence in the Cox case of the concept of "strict liability" in defamation law, whose demise had long been assumed as a result of the constitutional revolution in defamation law spawned by the *Sullivan* and *Gertz* cases, in the context of the important range of new and contentious issues raised by suits arising out of blogging on the internet.

Background

Plaintiff Kevin Padrick was a senior principal with Obsidian Finance Group, LLC (hereinafter "Obsidian"), an advisory and investment firm that specializes in unique and difficult business situations, including distressed enterprises and distressed assets. Padrick was appointed as a bankruptcy trustee in a bankruptcy case involving a company named Summit 1031.

Defendant Crystal Cox is a self-described "investigative blogger" who posted criticisms of Padrick and Obsidian on her own issue-specific website (www.obsidianfinancesucks.com) as well as websites operated by third parties. On January 14, 2011, Obsidian and Padrick filed a claim for defamation against Cox, alleging that Cox had published "the following false and defamatory statements of purported fact concerning Padrick and Obsidian:

> "a. Padrick has committed 'fraud against the government.'
>
> "b. Padrick 'stole [money] from the US Government.'
>
> "c. Padrick has engaged in 'illegal' and 'fraudulent' activity.
>
> "d. Padrick is 'VERY Corrupt' and has engaged in 'Corruption, Fraud, Tax Crimes, Solar Tax Credit Crimes.'
>
> "e. Padrick is a 'liar.'
>
> "f. Padrick pays off the media and politicians.
>
> "g. 'Did Oregon Attorney Kevin Padrick hire a hitman to kill me?'
>
> "h. Padrick has committed 'tax fraud.'

> "i. Padrick is "guilty of Fraud, Deceit on the Government, Illegal Activity, Money Laundering, Defamation, Harassment'
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> "j. 'Kevin Padrick of Obsidian Finance LLC is a Criminal, he has broken many laws in the last 2 years to do with the Summit 1031 case and regardless of the guilt of the Summit 1031 principals, Kevin Padrick is a THUG and a Thief hiding behind the Skirt tails of a corrupt unmonitored bankruptcy court system and protected by Corrupt Bend DA and Corrupt Bend Oregon Judges. And I will Expose every detail of every law he broke, every secret hand shake and back alley deal., every solar credit fraud., every sale to a friend or cronie (*sic*) of real estate consumer money and every indiscretion[.]'"

Complaint ¶ 8.

On April 27, 2011, Plaintiffs moved for summary judgment, arguing that defendant was liable as a matter of law because her statements were defamatory, published to third parties and were actionable per se. In an opinion issued on July 7, 2011, Judge Hernandez not only denied the motion, but found that "defendant's statements are expressions of opinion protected by the First Amendment." *Obsidian Finance Group, LLC v. Cox*, 2011 WL 2745849 (July 7, 2011) *2 (*Slip. op*. at 4).

After setting forth in full all ten blog postings submitted by plaintiffs, Judge Hernandez proceeded to examine their broader and specific context as well as the susceptibility to being proven true or false. He began his analysis by noting that each post contained the identical introductory information and a headline which "expressly discloses [the blog's] bias against bankruptcy courts, bankruptcy trustees, and what Cox considers the broken and corrupt bankruptcy court system." *Id*. at *6 (Slip op. at 12).[1]

The court concluded that while several of the accusations made by defendant "appear to assert facts or to imply the existence of undisclosed defamatory facts" if considered in isolation, when viewed in context readers would be less likely to view them as assertions of fact rather than expressions of opinion. The court pointed both to the broad context of an obviously critical blog and the specific context, namely, the "scattershot, hyperbolic accusations which are untethered to factual data regarding the 'Summit' bankruptcy and whatever role Padrick and Obsidian Finance actually played in the bankruptcy." *Id*. at *6 (Slip op. at 12).

Although Cox had not cross-moved for summary judgment, Judge Hernandez held that he intended *sua sponte* to enter an order granting summary judgment to defendant on the defamation claim unless the plaintiffs filed a memorandum in opposition with 15 days. *Id*. at 14-15. Plaintiffs timely submitted their opposition, along with additional blog posts not included in the original motion. Cox was offered an opportunity to file a reply but did not.

[1] The following information appeared at the top of each post: "The Bankruptcy Court System is Broken and the Real Estate Consumer is Paying the Price. No One Can Hold them Accountable but you. And so Far the Consumer Does not Even know how is really getting their money. Knowledge is Power Folks. Wake Up.. Email Your Bankruptcy Court Story to Crystal@CrystalCox.com—and Expose the Supposed Highest Fiduciary Responsibility of the U.S. Bankruptcy Court System." Below that was a headline that read "Bankruptcy Corruption—Trustee Corruption—Blog by Investigative Blogger Crystal L. Cox." *Id*. at *3 (Slip op. at 6).

In an opinion issued on August 23, 2011, the court adhered to its position that the blog postings submitted in connection with the original motion were constitutionally-protected expressions of opinion, as were all but one of the postings submitted with the plaintiffs' opposition. As to that, a lengthy posting on the web site "bankruptcycorruption.com" that appeared under the headline "Why Investigative Blogger Crystal L. Cox Says Kevin Padrick, Obsidian Finance LLC is a Liar," Judge Hernandez maintained that there were several fairly specific allegations that a reasonable reader could understand to imply a provable assertion of fact. 812 F. Supp.2d 1220, 1238 (D. Ore. 2011). Accordingly, while he granted summary judgment to Cox on all but one of her posts, he denied summary judgment and scheduled a trial on the remaining post.[2]

Pre-Trial Rulings, and a One-Day Trial

At a hearing on November 28, 2011, the court orally denied all Cox's First Amendment defenses as to the one remaining claim, holding that the plaintiffs were not public figures, Cox was "not media," and the subject matter of the blog posting at issue did not involve a matter of public concern, setting forth its rationale for trying the case as a strict liability tort[3] in a written opinion issued two days later. Obsidian Finance Group, LLC v. Cox, Dkt. # 95 (November 30, 2011).

The court rejected Cox's claim that she should be treated as a "media" defendant on the ground that she had failed to cite any cases in which an "investigative blogger" was held to be a media defendant or to provide any evidence of any education in journalism, connection with recognized news entities, adherence to journalistic standards, or other indicia of what the court considered illustrative of the media. *See* November 30 slip op. at 9.

Without any discussion, the court also held that neither plaintiff was an "all-purpose" public figure. *Id*. at 6. And it concluded that neither plaintiff was a limited-purpose public figure because any controversy that existed surrounding the Summit bankruptcy had predated their involvement. *Id*. at 8-9.

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[2] While the post also contained "several non-provable, figurative or subjective-type words which tend to negate the impression that defendant asserts provable statements of fact," the Cox court found that "this is a fairly long post [it occupies a full 3 pages of the Federal Supplement in the printed opinion] and overall, these words do not dominate the statements made there." 812 F. Supp.2d 1238. Although the post is somewhat abstruse, it asserted that "Kevin Padrick, Obsidian Finance Group, LLC" was hired, in connection with the Summit bankruptcy, to recommend the best method of realizing the value of the company's real estate investments, that he promised the Summit shareholders that he had friends who would fund what he termed a "short-term liquidity crisis" but that he failed to complete his contract with the shareholders and instead "illegally, unethically, corruptly" used his privileged information to get appointed to the position of bankruptcy trustee for Summit bankruptcy and make himself TONS of money." *Id*. at 1236. Cox also claimed plaintiffs committed tax fraud by failing to pay taxes on gains realized from sales of various properties under his trusteeship and avoided paying taxes on others by giving away the property. *Id*. at 1237 ("For an example, Kevin Padrick just gave away the Summit Shareholders' interest in Century Drive Mobile Home Park to another owner named Jim Hull.")

[3] The court also denied virtually all of the defendant's remaining defenses, holding that Oregon's retraction statute, its Anti-SLAPP law, and its shield law were all inapplicable and, further, that the posting was not protected by the absolute privilege for judicial proceedings. *See* November 30 slip op. 2-5.

Finally, the court reasoned that the subject matter of the posting was not an issue of public concern because it had not generated public concern, did not involve the evaluation of a public agency or official, and did not relate to products available to the public at large. *Id*. at 10-12.

In a one-day trial held on November 29, 2011, a jury awarded $1 million to Obsidian Finance and $1.5 million to Kevin Padrick.[4] Although the jury instructions included falsity as an element to be proven by the plaintiffs, they specifically provided that "[d]efendant's knowledge of whether the statements at issue were true or false, and defendant's intent or purpose in publishing those statements, are not elements of the claim and are not relevant to a determination of liability." *Obsidian Finance Group, LLC v. Cox*, Dkt. # 92 (Jury Instructions), 11.

On January 4, 2012, Cox filed a motion for a new trial, arguing that the jury instructions misstated the law and the verdict was excessive.

The Motion for a New Trial

Until her trial Cox had proceeded *pro se*. On her motion for a new trial, she was represented by the noted constitutional scholar Eugene Volokh, of the UCLA School of Law, who argued that the jury should have been instructed that a defendant cannot constitutionally be held liable without a finding of negligence and that presumed damages cannot constitutionally be awarded without a showing of "actual malice." A new trial was necessary because the court's failure to properly instruct the jury made it impossible to determine whether the jury had found Cox had acted with the requisite levels of fault and whether the $2.5 million verdict included presumed damages. Memorandum of Law, Dkt # 106, filed January 4, 2012, at 8 (hereinafter "Defendant's January 4 MOL").

In his brief for Defendant, Prof. Volokh argued that (1) Cox was entitled to the same constitutional protections afforded media defendants under *Gertz*, (2) the speech at issue was on a matter of public concern and (3) even if the speech was "private," the court could not constitutionally uphold a finding a liability without some level of fault.

On the first point, he cited decades of precedent supporting the argument that the protections afforded by the First Amendment apply equally regardless of whether the speaker is part of the institutional press. *Id*. at 9.[5]

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[4] *See Obsidian Finance Group, LLC v. Cox*, 2012 WL 1065484 (D. Ore. March 27, 2012) * 1 (Slip op. at 1). The court did not provide a breakdown of damage elements.

[5] *Id*. at 9 (*citing Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938) (freedom of the press "comprehends every sort of publication which affords a vehicle of information and opinion"); *New York Times v. Sullivan* (applying the same First Amendment protection to the newspaper defendant and to the individual defendants who placed an advertisement in the newspaper); *Garrison v. Louisiana*, 379 U.S. 64 (1964) (applying the rule of *New York Times v. Sullivan* to a speaker who was an elected district attorney and not a member of the institutional press); *Henry v. Collins*, 380 U.S. 356, 357 (1965) (applying the rule of *New York Times v. Sullivan* to an arrestee who issued a statement alleging that his arrest stemmed from "'a diabolical plot'"); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 782 n.18 (1978) (rejecting the "suggestion that communication by corporate members of the institutional press is entitled to greater constitutional protection than the same communication by [non-institutional-press businesses]"); *Cohen v. Cowles Media Co.*, 501 U.S. 663, 665–67, 669 (1991) (concluding that the press gets no special immunity from laws that apply to others, including laws—such as copyright law—that target

On the second, he cited *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986) and various lower court decisions for the proposition that allegations that a person or organization is connected to criminal activity constitute speech on a matter of public concern, and he argued that – for purposes of whether the publication at issue involved a matter of public concern – it is irrelevant whether there is already public concern or the public becomes interested as a result of a defendant's publication.[6]

And on the third, he cited dictum from a Ninth Circuit decision observing that, under *Gertz*, "[a] private person who is allegedly defamed concerning a matter that is not of public concern need only prove, in addition to the requirements set out by the local jurisdiction, that the defamation was due to the negligence of the defendant."[7]

Judge Hernandez denied the motion in an opinion issued March 27, 2012. Obsidian Finance Group, LLC v. Cox, Dkt. # 123 (March 27, 2012). The opinion was largely based on the reasoning in his pre-trial opinion in which he imposed strict liability on the ground that the plaintiffs were private figures, the defendant was nonmedia, and the matter was not one of public concern.

Issues on Appeal

Both parties appealed, with briefing ongoing as of the date of this writing.[8]

As framed by Prof. Volokh for Cox, the following issues were presented for review:

> (1) Whether, even if plaintiffs are treated as private figures, defendant is entitled to a new trial in which the jury is instructed—consistently with *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)—(a) that it could hold defendant liable for proven compensatory damages only if it found that defendant acted negligently, and (b) that it could hold defendant liable for presumed damages only if it found that defendant acted with "actual malice."
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> (2) Whether plaintiffs, a court-appointed bankruptcy trustee and the partnership through which he operates, are properly treated as special-purpose public

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communication); *Bartnicki v. Vopper*, 532 U.S. 514, 525 & n.8 (2001) (concluding, in deciding whether defendants could be held liable under statute banning the redistribution of illegally intercepted telephone conver-sations, that "we draw no distinction between the media respondents and [the non-institutional-media respondent]," and citing *New York Times v. Sullivan* and *First Nat'l Bank of Boston* as support for that conclusion).

[6] Defendant's January 4 MOL 14-16.

[7] *Id*. at 17 (*citing Newcombe v. Adolf Coors Co*., F.3d 686, 694 n.4 (9th Cir. 1998)).

[8] In addition to the Defendant-Appellant's brief, Scotusblog.com filed an amicus brief arguing that a blog that provides a useful public service and that should be entitled to receive the protections of First Amendment would not satisfy the criteria set out by Judge Hernandez for determining what constitutes the constitutionally-protected "media." And The Reporters Committee for Freedom of the Press also filed an amicus brief arguing that "media defendants" must be broadly interpreted and must include content providers who intend, when gathering information, to disseminate that information to the public and that what constitutes an issue of public concern must also be broadly interpreted.

> officials, so that the defendant is entitled to a new trial in which the jury is instructed—consistently with *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)—that it could hold defendant liable for presumed damages only if it found that defendant acted with "actual malice."
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> (3) Whether a new trial—or at least remittitur—is also required because the evidence presented to the jury did not support a conclusion that plaintiffs suffered $2.5 million in damages (whether proven or presumed) from the one post that this Court ruled could form the basis for plaintiffs' lawsuit.

Opening Brief of Defendant-Appellant and Cross-Appellee Crystal Cox, Dkt # 11, filed October 10, 2012 (hereinafter "Defendant's Opening Brief").

Plaintiffs cross-appealed Justice Hernandez's prior holding that all but one of defendant's posts were constitutionally protected opinion.

Nature of the Defendant: Is Cox "Media" and Does That Matter?

In the Opening Brief, Professor Volokh reiterated the argument that the constitutional protections set forth in decades of Supreme Court decisions apply to all persons who speak to the public, whether or not defined as "media."[9]

According to Volokh, *Citizens United* put the issue to rest, with the following definitive statement: "We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers." *Citizens United v. FEC*, 130 S. Ct. 876, 905 (2010) (internal quotation marks omitted). Moreover, as Prof. Volokh goes on to argue, the *Citizens United* majority specifically acknowledged the role of the Internet in blurring the distinctions between speakers. Defendant's Opening Brief, at 7 (*citing Citizens United*, 130 S. Ct. at 905–06 ("With the advent of the Internet and the decline of print and broadcast media, moreover, the line between the media and others who wish to comment on political and social issues becomes far more blurred.").[10]

The two amici devote considerable space to this question. In its brief, Scotusblog.com focuses on the importance of a broad definition of "media" in order to protect bloggers, and in turn the public interest, in the free dissemination of important information. As its brief illustrates, it is not only traditional media or journalists who produce important information "that provides a useful public service" – a service that "ought to receive the protections of the First Amendment" from "potential [defamation] liability."

On the flip side, Scotusblog points out that its own very important information dissemination would not qualify for protection as "media" activity, under several of the criteria identified by the Cox court that utilized factors more appropriate to established media and

[9] *See* note 5, *supra* and accompanying text.

[10] Indeed, even Judge Hernandez appeared to concede the point in his denial of a new trial. *See* 2012 WL 1065484 at *4 (acknowledging "six justices may have agreed in *Dun & Bradstreet* that there should be no distinction among [media and non-media] defendants in defamation cases").

professional journalists. Thus, according to the amicus brief, Scotusblog is written largely by staffers who are attorneys but who do not have formal training in journalism; the blog is not credentialed or affiliated with any recognized news entity; moreover, the blog has no formal policy regarding fact-checking nor does it have a policy of "maintaining notes of conversations, interviews or research."

In its amicus brief, in addition to addressing the issue of media definition, the Reporters Committee also argues the need for a broad definition of whether speech is in the public interest for purposes of the applicable fault standard in defamation actions, citing U.S. Supreme Court, Ninth Circuit and Oregon cases. The criteria, as distilled by the Reporters Committee brief, must be determined by the "content, form and context" of a given statement and should not be limited to only those statements addressing obvious issues of public concern but should be construed broadly to reach interests of subsets of the public, and must also be held to protect even "crude," arguably narrow, expression if, properly understood, the expression raises broader issues of concern to society.

Nature of the Speech: Were Cox's Posts on Matters of Public Concern?

In addition to the question of whether Cox is a "media defendant" entitled to the constitutional protections of *Gertz* (and the related question of whether *Gertz* protects nonmedia as well as media defendants), whether her speech involved a matter of public concern will be critical to the outcome of her appeal.[11]

That is, it is possible that the Ninth Circuit could determine that she is not entitled to the constitutional protections announced in *Gertz* because her speech did not involve matters of public concern, as did Judge Hernandez in the court below. Moreover, under *Dun & Bradstreet*, there would be no federal constitutional impediment to awarding plaintiffs presumed and punitive damages absent a showing of actual malice unless Cox's blogs involved a matter of public concern. (Of course this assumes that the Cox plaintiffs are not public figures or public officials.)

In this regard (i.e., determining the nature of the speech) it would seem that the institutional media enjoys a distinct advantage over "nonmedia" speakers, namely, that courts are more willing to presume that the speech published by the institutional media is speech on a matter of public concern.[12]

Cox argues that allegations that a person or organization is involved in criminal activity generally are considered speech on matters of public concern, providing as examples cases holding the following matters as being of public concern: allegations that the plaintiff had violated federal gun laws,[13] committed fraud in the art market[14] or in connection with a

[11] Cox also argues that plaintiff is a public official or a "special-purpose" public figure, but whether a trustee appointed by a bankruptcy court is a public plaintiff is beyond the focus of this article.

[12] *See, e.g., Gaeta v. New York News, Inc*., 62 N.Y.2d 340, 349 (N.Y. 1984) ("Determining what editorial content is of legitimate public interest and concern is a function for editors" and not for judges.)

[13] *Adventure Outdoors, Inc. v. Bloomberg*, 552 F.3d 1290, 1298 (11th Cir. 2008).

government program,[15] engaged in corruption in the jai alai industry,[16] or had links to organized crime.[17] Even accusations that a store owner refused to refund a customer for an allegedly defective product[18] or a mobile home park operator had charged an excessive rent or that a lawyer was an "ambulance chaser" interested only in "slam dunk cases"[19] were held to be on matters of public concern. Defendant's Opening Brief 15-16.

In his denial of the motion for a new trial, Judge Hernandez had sought to distinguish these cases as involving allegations of "fraud or corruption within an industry, or in the context of a national or international market," rather than merely involving the plaintiffs' alleged individual acts of criminality. *Obsidian Finance Group, LLC, v. Cox*, 2012 WL 1065484 (D. Ore. March 27, 2012) *5.

In response, Cox points out that not all the cases she had previously cited involved fraud on such a wide scale and that several of these cases (which the court had failed to address) involved allegations of criminality committed solely by individuals. Not only may addressing single instances of misconduct be important to the public but it may lead to exposing large-scale patterns of misconduct within an industry. Defendant's Opening Brief 18-20.

Often, there may be no preexisting controversy, and the speaker is merely attempting to promote the public interest. Although the absence of a public controversy may be relevant to plaintiff's status as a limited purpose public figure, it is not relevant to whether the speech involves a matter of public concern. In this regard, cases involving private figure and speech on matters of public concern often involve situations where there is insufficient controversy to make the plaintiff a limited purpose public figure but the allegations nonetheless involve matters about which the public could reasonably be concerned. *Id*. at 20.[20]

Is Defamation a Strict Liability Tort in the Private-Private Context?

Before addressing the ultimate question, namely, the applicable fault standard in private figures cases where the speech is purely on a matter of private concern, it is worth noting the extreme narrowness of this category of speech. *See, e.g., Dun & Bradstreet v. Greenmoss Bldrs*.,

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[14] *Boule v. Hutton*, 328 F.3d 84, 91 (2d Cir. 2003)

[15] *Weeks v. Bayer*, 246 F.3d 1231, 1233 (9th Cir. 2001).

[16] *Silvester v. American Broadcasting Companies, Inc.*, 839 F.2d 1491, 1493 (11th Cir. 1988).

[17] *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986).

[18] *Gardner v. Martino*, 563 F.3d 981, 989 (9th Cir. 2009)

[19] *Flamm v. Am. Ass'n of Univ. Women*, 201 F.3d 144, 147, 150 (2d Cir. 2000).

[20] Indeed, the New York Court of Appeals goes even further, including not only matters in which the public *might* be concerned but matters in which he public *ought to* be concerned. *See Chapadeau v. Utica Observer–Dispatch, Inc.*, 38 N.Y.2d 196, 199 (1975) (defining a statement as "within the sphere of legitimate public concern" when it is "reasonably related to matters warranting public exposition."). In New York, at least, it is clear that allegations an attorney had engaged in criminal or unethical activities would surely constitute speech on a matter of public concern.

472 U.S. 749, 759 (1985) (observing that "publications directed only to a limited, private audience are 'matters of purely private concern.'" Most often this is found in the employment context. *See, e.g.*, *Albert v. Loksen*, 239 F.3d 256 (2d Cir. 2001); *Weldy v. Piedmont Airlines, Inc.*, 985 F.2d 57 (2d Cir. 1993).

In the appellate briefing Prof. Volokh maintains that even if the speech is deemed a matter of purely private concern, *Gertz* would not permit a court to constitutionally impose liability without fault, a view, he argues, that is shared by the Ninth Circuit:

> The free speech concerns are not as great when a publication involves a private person and matters of private concern and therefore we do not require such a demanding standard to allow a private plaintiff to prevail. A private person who is allegedly defamed concerning a matter that is not of public concern need only prove, in addition to the requirements set out by the local jurisdiction, that the defamation was due to the negligence of the defendant. Gertz v. Robert Welch Inc., 418 U.S. 323, 347, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974).

Newcombe v. Adolf Coors Co., 157 F.3d 686, 694 n.4 (9th Cir. 1998).

Newcombe involved a beer advertisement allegedly bearing the likeness of the former Brooklyn Dodger star pitcher Don Newcombe, a recovering alcoholic who had devoted substantial time to using his fame to warn of the dangers of alcohol. Newcombe brought claims, *inter alia*, for commercial misappropriation, negligent publication, intentional infliction of emotional distress, and defamation. The Ninth Circuit affirmed the grant of summary judgment on the negligent publication, intentional infliction of emotional distress, and defamation claims, holding (with respect to the defamation claim) that the defamatory language was not libelous on its face[21] and plaintiff had failed to prove special damages, as required under the California defamation statute. 157 F.3d at 695.

In a footnote, the court addressed the constitutional barriers that Newcombe would have faced even if he had been able to meet the statutory requirements, namely, he would have been required to prove actual malice in the (likely) event he were found to be a public figure and to prove negligence even if he were to be found a private figure and the speech on a matter that is not of public concern. *Id*. at 694 n.4.

Prof. Volokh acknowledges that *Newcombe* is dictum as to whether *Gertz*, which involved speech on a matter of public concern, also requires proof of negligence when the speech is not of public concern but argues that a constitutional limitation on strict liability is nonetheless consistent with *Dun & Bradstreet* and broader First Amendment precedents. It is consistent with *Dun & Bradstreet*[22] because that case only addressed "the other half" of *Gertz* in holding that private figures need not prove actual malice to recover presumed or punitive damages in cases involving speech that is not of public concern. And it is consistent with First Amendment

[21] The defamation lay in the suggestion that he, a recovering alcoholic, endorsed alcohol. *Id*. at 694.

[22] It is more accurate to say that it is not inconsistent with *Dun & Bradstreet*.

holdings in a variety of contexts that prohibit the imposition of strict liability. Defendant's Opening Brief 23-24.[23]

Conclusion

What should be made of the Court's silence in *Dun & Bradstreet* on the liability prong in *Gertz*? Prof. Volokh argues that it indicates an unwillingness to treat defamation as a strict liability tort.[24]

On the one hand, it may be seen as evidence that the *Dun & Bradstreet* Court believed it unnecessary to do so because plaintiff there had satisfied the liability prong. That is, and notwithstanding the fact that the plurality opinion does not use the word "negligence," it is difficult to consider the Supreme Court's recitation of the facts established at trial without reaching a firm conclusion that defendant's negligence *had* been established in *Dun & Bradstreet* and that the Court decided the case on the basis of that understanding as to liability. Thus, as recited by the Supreme Court, the defendant's erroneous claim that plaintiff had filed for bankruptcy "had been caused when one of its employees, a 17-year-old high school student paid to review Vermont bankruptcy pleadings, had inadvertently attributed to respondent a bankruptcy petition filed by one of respondent's former employees." 472 U.S. at 752. Moreover, although the defendant's representative "testified that it was routine practice to check the accuracy of such reports with the businesses themselves, it did not try to verify the information about respondent before reporting it." *Id*.

Moreover, Justice Brennan, dissenting on the second prong of *Gertz*, clearly and expressly stated his view that on the facts of the case the defendant had been negligent:

> Greenmoss Builders should be permitted to recover for any actual damage it can show resulted from Dun & Bradstreet's negligently false credit report, but should be required to show actual malice to receive presumed or punitive damages.

Id. at 796 (Brennan, J., dissenting).

On the other hand, the Court might simply have wished to avoid deciding an issue before it was necessary to do so.[25] Yet Justice White made evident his belief that fault should not be

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[23] *See, e.g., Smith v. California*, 361 U.S. 147, 152 (1959) (criminal obscenity cases); *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 492–93 (1962) (civil obscenity statute); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (incitement); *New York v. Ferber*, 458 U.S. 747, 765 (1982) (child pornography distribution cases); *Virginia v. Black*, 538 U.S. 343, 359 (2003) (threat cases); *United States v. United States District Court*, 858 F.2d 534, 541 (9th Cir. 1988) (child pornography production cases); *Winter v. G.P. Putnam's Sons*, 938 F.2d 1033, 1035, 1037 (9th Cir. 1991) (physical injuries caused by incorrect information in a mushroom encyclopedia); *Lerman v. Flynt Distributing Co., Inc.*, 745 F.2d 123, 138 (2d Cir. 1984) (false light); *American-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 611 (6th Cir. 2005) (city ordinance making it a misdemeanor to participate in a march for which the proper permits have not been gotten).

[24] Of course, even removing the constitutional defenses and reverting to the common law would not eliminate the various common law privileges available to the defamation defendant.

[25] *See, e.g., Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 n. 6 (1990) (noting that in *Philadelphia Newspapers*, the Court "reserved judgment on cases involving nonmedia defendants and accordingly we do the same.").

required in the private-private context,[26] and both the plurality opinion and (more so) the concurrence of Chief Justice Burger[27] suggest a potential willingness – at least among the Justices on the Court at that time – to eliminate all constitutional barriers for purely private speech. And if not a thumb the Supreme Court may be said to have placed a finger on the scales with regard to the issue in *Hepps*, observing:

> When the speech is of exclusively private concern and the plaintiff is a private figure, as in *Dun & Bradstreet,* the constitutional requirements do not necessarily force any change in at least some of the features of the common-law landscape.

Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 775 (1986). But, still, this statement leaves open the possibility that as to at least "some features of the common-law landscape" even *Dun & Bradstreet* – other than the rule of presumed and punitive damages – the constitutional requirements may still have application.[28]

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[26] *Id*. at 773-74 (White, J., concurring) ("Although Justice Powell speaks only of the inapplicability of the Gertz rule with respect to presumed and punitive damages, it must be that the Gertz requirement of some kind of fault on the part of the defendant is also inapplicable in cases such as this.").

[27] *Id*. at 763-64 ("I dissented in Gertz because I believed that, insofar as the 'ordinary private citizen' was concerned, the Court's opinion 'abandon[ed] the traditional thread' that had been the theme of the law in this country up to that time") (Burger, C.J.) (internal citations omitted).

[28] The majority of lower courts that have considered the issue have concluded that the states can impose liability without fault in the private-private context. *See Snead v. Redland Aggregates Ltd.*, 998 F.2d 1325, 1334 (5th Cir. 1993) ("Although Justice Powell's opinion for a three-Justice plurality appears to adhere to the Gertz holding where issues of public concern are involved, his opinion contains strong hints that the plurality intended for the holding in Dun & Bradstreet to allow states to return to common law rules in private/private cases (*citing* Smolla, § 3.02[5]"); *Cox v. Hatch*, 761 P.2d 556, 559-60 (Utah 1988) ("*Dun & Bradstreet* made clear that the constitutional requirement of fault in a private plaintiff defamation case applies only if the subject matter of the defamatory falsehood pertains to a matter of 'public concern.' If the defamatory falsehood does not relate to a matter of "public concern," state law could constitutionally continue to apply the common law doctrine of strict liability in a defamation action."); *Dombey v. Phoenix Newspapers, Inc*., 150 Ariz. 476, 481 (1986) ("when a plaintiff is a private figure and the speech is of private concern, the states are free to retain common law principles") (dictum); *Ramirez v. Rogers*, 540 A.2d 475, 477 (Me. 1988) ("Because this case involves a non-media defendant, defaming a private plaintiff concerning a matter that is not of public concern, we hold that the trial justice properly applied the common law defamation rules when instructing the jury."); *Mutafis v. Erie Ins. Exchange*, 775 F.2d 593, 595 (4th Cir. 1985) ("[In *Dun& Bradstreet*] a majority of the Court ruled that the principles of New York Times and Gertz had no application where the speech concerned no public issue but was speech solely in the individual interest of the speaker and was on a matter of purely private concern."); *but see Huggins v. Moore*, 253 A.D.2d 297, 312-13 (1st Dept.) ("Since plaintiff is not a public person and the matters publicized were not of public concern, defendants are held to New York's negligence standard."), *rev'd on grounds that the matters were of public concern*, 94 N.Y.2d 296 (1999); *Krauss v. Globe Intern., Inc.*, 251 A.D.2d 191 (1998) (same); *Newcombe, supra*. And, of course, even if constitutional defenses are eliminated, there are numerous common law defenses still potentially applicable even in a purely private-private setting. So eliminating constitutional minimum standards in certain cases may still not in practice result in a strict liability regime. See note 25. Moreover, cases like *Huggins*, *Krause*,and *Newcombe*, would apply a negligence standard to non-public concern cases. None of these cases elaborate why the negligence standard applies, beyond a citation to Gertz. Moreover, the New York Court of Appeals in particular – if it found a suitable case – could (as in Immuno) be expected to find that the State Constitution requires negligence in the private-private context even if Gertz does not. New York has already applied a stricter standard than mere negligence, under Gertz, in its landmark case of Chapadeau v. Utica Observer-Dispatch, Inc., 38 N.Y.2d 196 (1975) (applying standard of "gross irresponsibility" in private figure/public concern cases) and it has consistently held that the New York State

That said, if public concern is required to trigger the minimum liability protections of *Gertz*, courts will at the very least be required "to take on the added responsibility for deciding, in every private-figure case, whether the subject of the communication at issue is newsworthy . . . a role for which courts are not particularly well equipped, and which the Supreme Court has, from time to time, explicitly eschewed." *Sack on Defamation*, § 6.6, at 6-28 (*citing Gertz, Miami Herald Publ'g v. Tornillo*, 418 U.S. 241 (1974); *Columbia Broadcasting System, Inc. v Democratic Nat'l Committee*, 412 U.S. 94 (1973)).

And it is the final irony of this analysis, that it was the reluctance to place courts in the business of determining what is and what is not a matter of public concern that was a central factor of the original rationale, in *Gertz*, for overruling *Rosenbloom* in the first place.

> The extension of the New York Times test proposed by the Rosenbloom plurality would abridge this legitimate state interest to a degree that we find unacceptable. *And it would occasion the additional difficulty of forcing state and federal judges to decide on an ad hoc basis which publications address issues of 'general or public interest' and which do not-to determine, in the words of Mr. Justice Marshall, 'what information is relevant to self-government.' We doubt the wisdom of committing this task to the conscience of judges.*

418 U.S. at 346 (internal citation omitted, emphasis added).

Constitution provides greater protection from claims of defamation than the First Amendment for statements of opinion – see Immuno AG v. Moor-Jankowski, 77 N.Y.2d 235 (1991).